CONDITIONAL AND FUTURE INTERESTS

AND

ILLEGAL CONDITIONS AND RESTRAINTS

IN ILLINOIS

BY

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DEDICATED TO

JOHN CHIPMAN GRAY

EMINENT ALIKE AS A MEMBER OF THE MASSACHUSETTS BAR

AND AS

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY

WITH WHOSE LEARNING AND DISCRIMINATION IN THE HANDLING OF FUNDAMENTAL PROBLEMS IN THE LAW OF FUTURE INTERESTS IT IS THE PURPOSE OF THIS VOLUME MORE INTIMATELY TO ACQUAINT THE MEMBERS OF THE BAR OF ILLINOIS.

"It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned."—*Mr. Justice Holmes in an address entitled "The Path of the Law,"* 10 *Harvard Law Review,* 457, 458.

PREFACE

This book was written to carry out the object mentioned in the dedication.

To accomplish this, it was necessary, first, to gain some command over those fundamental problems in the law of future interests, of which Professor Gray is so great a master; and secondly, to classify and arrange the Illinois cases with reference to these problems, and to check them up with the best solutions which have anywhere been offered.

The first step was taken with the aid of the 5th and part of the 6th volume of Gray's Cases on Property, the notes to those cases taken in Professor Gray's course at the Harvard Law School, Gray's Rule against Perpetuities, the same learned author's Restraints on Alienation, and several of his law Review Articles, and finally, most prized of all, a correspondence with Professor Gray extending over several months in 1904 and 1905, relating for the most part, to the application of the Rule against Perpetuities to gifts to classes. It is hoped that the notes to the text in this volume will indicate that other standard sources of information with regard to the law of future interests and its history, have not been neglected.

The second line of effort has followed this course: All the Illinois cases on future interests, collected by a careful index search of vols. 1 to 213 inclusive of Supreme Court Reports, and vols. 1 to 112 inclusive of Appellate Court Reports, were first abstracted. In doing this special care was taken to get at the exact points decided, to separate decision from *dicta,* and to note the reasons upon which both were founded. By means of these abstracts the cases were grouped according to the subject matter of the chapters and sub-sections of the 5th and part of the 6th volume of Gray's Cases on Property. Permission having been obtained to use the analysis adopted in that collection of cases, the Illinois decisions covering the sub-

ject matter of each chapter were re-examined from the original report, compared with the state of the law generally upon the points involved, and then given their place in the text which is now offered. Finally, memoranda were made on each case-abstract of the various points for which the case had been cited in the text, and the original report was subsequently examined and checked up with these memoranda on the case-abstract to make sure that each Illinois decision had been used to the fullest possible extent.

The effort to try each case by the general principles of the law as most carefully and accurately set forth in the best sources has been no small task. No pains have been spared to sustain every decision of our courts. The whole of Part 2, Chapter II. on the Destructibility of Contingent Remainders, which originally appeared as an article in the Law Quarterly Review for April, 1905, was the outcome of a persistent effort to comprehend the true significance of the decision in *Frazer v. Board of Supervisors,* 74 Ill. 282. Again and again decisions of our Supreme Court have seemed wrong and almost as often they have in the end appeared not only sound, but prompted by an admirably progressive temper. What at first appeared to be a serious difficulty in some cases has turned out to be no difficulty at all. Where it has been found necessary to differ from the view of the Court, that step has been taken only after expending the best thought and attention that could be brought to the problem. It is hoped that a painstaking and conscientious criticism of some cases with the reasoning upon which that criticism is based, fully set out, will meet with the approval of the members of the Court themselves. It is believed that by such disinterested activity on the part of the members of the bar, the Court itself may be aided from time to time in the precision and accuracy of its statements of the rules of law.

It is the sincere hope of the author that the work of Professors Langdell, Ames, Thayer and other members of the faculty of the Harvard Law School, who have contributed to its greatness, may, by books similar in scope to the one here offered, be brought into closer relations with our Illinois law.

May 1st, 1905. A. M. K.

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CONDITIONAL AND FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS.

TITLE I.
CONDITIONAL AND FUTURE INTERESTS.

CHAPTER I.
CONDITIONAL ESTATES.

PART 1.

RIGHT OF ENTRY FOR CONDITION BROKEN DISTINGUISHED FROM A POSSIBILITY OF REVERTER.

§ 1. **General outlines of the distinction:** "The distinction," says Professor Gray in his Rule against Perpetuities,[1] "between a right of entry for condition broken and a possibility of reverter is this: after the statute [of *quia emptores*], a feoffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest,[2]—a returning of the land to the lord

[1] § 31.

[2] The question therefore of the validity of such interests in Illinois is considered in connection with reversions. *Post*, §§ 124-126.

of whom it was held, because the tenant's estate had determined."

§ 2. **The interest of the dedicator upon a statutory dedication—What sort is it—On principle:** Upon a statutory dedication the fee simple estate in the land dedicated passes to the municipality.[3] It is admitted on all hands, however, that should the dedication be vacated there is some right in the original dedicator to recover back the lands dedicated.[4] Is this right a possibility of reverter or a right to enter for breach of a condition subsequent?

In the ordinary case there is no explicitly expressed intention of the dedicator[5] upon which to found a solution of this question. Nor do the terms of the statute throw any light upon the matter. If, therefore, the right arises by an expressed intent of the dedicator such intent must be expressed by implication from the act of dedication. If it arises by operation of the statute in regard to dedication it must be upon the construction of that statute as a whole—not because of any particular words in it. Which ever way you take it a court would seem to be pretty free to choose what sort of interest the dedicator shall be held to possess. Possibilities of reverter, however, as will hereafter be indicated,[6]

[3] Canal Trustees *v.* Havens, 11 Ill. 554; Hunter *v.* Middleton, 13 Ill. 50; St. John *v.* Quitzow, 72 Ill. 334, 336; Gebhardt *v.* Reeves, 75 Ill. 301, 304 (citing other cases); Matthiesson & H. Zinc Co. *v.* LaSalle, 117 Ill. 411, 414-417, 16 Ill. App. 69, (citing other Illinois cases).

Of course until the vacation does occur there is no right of possession in the dedicator or in any one else: Matthiesson & H. Zinc Co. *v.* LaSalle, 117 Ill. 411, 418.

[4] Hunter *v.* Middleton; 13 Ill. 50, 54 (*semble*); St. John *v.* Quitzow, 72 Ill. 334, 336; Gebhardt *v.* Reeves, 75 Ill. 301, 306; Helm *v.* Webster, 85 Ill. 116, 118 (*semble*); Village of Hyde Park *v.* Borden, 94 Ill. 26, 34; Matthiesson & H. Zinc Co. *v.* City of LaSalle, 117 Ill. 411, 418 (*semble*).

[5] In Helm *v.* Webster, 85 Ill. 116, the intent of the dedicator was fully expressed in the following language: "It is hereby provided and understood that, when said premises shall, after being opened as a street, cease to be used as such, or whenever such street as may be opened on said premises shall be abandoned or vacated by said city, the same shall revert to the present owners thereof, their heirs or assigns, the same as though this deed had never been made." This looks like a condition subsequent upon the breach of which the dedicator would have a right of entry.

[6] *Post*, §§ 124-126.

are of very doubtful validity since the statute of *quia emptores*. On the other hand there is no doubt that a right of entry for condition broken may be attached to a fee simple.[7] It would seem, therefore, more in accordance with the general symmetry of the law to regard the dedicator's interest as a right of entry for the breach of a condition subsequent.

§ 2a. **On authority:** No case in our Supreme Court has actually involved the question of the nature of the dedicator's interest. The expressions concerning it, so far as they go, have been conflicting,[8] and it may well be doubted whether our court was, in any case, really undertaking to pass upon the point, nor can the nature of the dedicator's interest be determined by inquiring whether, in case of vacation, an entry was made by him before bringing ejectment, since ejectment may be maintained without entry.[9] It is believed, however that the nature of the dedicator's interest must be involved where the question arises as to the alienability of his interest after the dedication has been vacated and before any entry or the equivalent of entry by him or his heirs. In such a state of facts, if the right of the dedicator were a possibility of reverter, then the fee would have expired by the terms of its original limitation and the dedicator, if he be living, or his heirs if he be dead, could convey without entry.[10] If, on the other hand, the right of the dedicator was to enter for condition broken, neither he nor his heirs could enter until the forfeiture had been perfected by entry or some equivalent act.[11]

It is worth observing somewhat in detail that the point was raised in just this way in *Ruch v. Rock Island*.[12] There it

[7] *Post*, § 14.

[8] In St. John *v.* Quitzow, 72 Ill. 334, 336, the Court says: "The new streets were dedicated upon condition the fee in the streets and alleys vacated should vest in appellant [the original dedicator]." On the other hand in Matthiesson & H. Zinc Co. *v.* City of LaSalle, 117 Ill. 411, 418, Scholfield J. says: "The adjacent lot owner [referring to the original dedicator] does not have a reversion, but a possibility of reverter only." In this latter case, however, the court was contrasting a reversion with a possibility of reverter and not a possibility of reverter with a right of entry for the breach of a condition subsequent.

[9] *Post*, § 30a.

[10] *Post*, §§ 124-126.

[11] *Post*, § 30a.

[12] 97 U. S. 693.

seems to have been assumed that the fee vested in the town by dedication for schools and churches. Subsequently to the conveyance by the town for other purposes the heirs of the original dedicator, without having entered or done any act sufficient to perfect a forfeiture for the breach of a condition subsequent (if any), conveyed to the plaintiffs who brought ejectment. A judgment for the defendants was affirmed. The court, speaking by Mr. Justice Swayne, pointed out that the heirs at law had conveyed before doing any act to forfeit the estate for breach of a condition subsequent and that this was quite conclusive against the plaintiff's recovery. The following language was used: "It was not denied by the plaintiff that the title had passed, and that the estate had vested by the dedication. If the conditions subsequent were broken,[13] that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger. Conceding the facts to have been as claimed by the plaintiff in error [the plaintiff in the ejectment], this was fatal to his right to recover, and the jury should have been so instructed."

§ 2b. How does it arise? We have considered what sort of interest the dedicator has. Does it arise by act of the parties or by statute, or merely by operation of law apart from the statute? It is believed that it must arise by virtue of the statute on dedication. If it does not, then if it be a possibility of reverter it arises by operation of law apart from the statute. But it must be very doubtful whether such an interest can properly so arise since *quia emptores*,[14] and, if it can, it should be objectionable on the ground of remoteness.[15] If it is a right of entry for condition broken, it may be valid apart from the question of remoteness, but it ought to

[13] There do not appear to have been any express condition subsequent. Whatever condition there was arose out of the fact of a dedication for schools and churches. See p. 695 of the report.

[14] *Post*, §§ 124-126.

[15] Gray's Rule against Perpetuities § 312; but see *post*, § 257.

be subject to that objection[16] unless created by the statute. In either case, where is the expressed interest of the dedicator that the fee shall continue only until the dedication is vacated, or that the dedicator shall have a right to re-enter when such vacation occurs? These considerations all indicate that the interest of the dedicator arises by force of the dedication statute alone.

§ 3. Rights of abutting owners upon vacation of a statutory dedication—In the absence of statute: It is apparent from the preceding sections that, in the absence of statute, the abutting owner has no right upon the vacation of a statutory dedication. The only possible ground upon which the abutting owner might have claimed anything was this: Where land abutting on a highway, the fee of which is in the owner of the abutting property, is conveyed, without expressly excluding the highway, the fee to the centre of the way is held, by the proper construction of the deed to be transferred.[17] In the same way, where the dedication passes the fee of the way with a right in the dedicator to retake possession in case of vacation, the deed of the dedicator covering the abutting property ought, unless it in terms exclude all interest in the way, to be construed as expressing an intent to transfer such right to one-half the street. On this reasoning the dedicator's right to retake the fee on vacation of the dedication will vest in the grantee. In *St. John v. Quitzow*[18] this view seems to have failed for no other reason than that the dedicator, when she conveyed to the abutting owners, expressly reserved in the deed the right to vacate the streets.

The difficulty with such a position is that it might be held, in the absence of statute, that the right of the original dedicator, whether it be a possibility of reverter or a right of entry for condition broken, cannot be transferred by deed.[19] Perhaps this difficulty was really in the mind of the court in *Gebhardt v. Reeves*.[20] There it was clearly intimated that where

[16] But see *post*, § 257.

[17] *Post*, § 7; Hamilton *v.* Chicago B. & Q. R. R. Co., 124 Ill. 235; Henderson *v.* Hatterman, 146 Ill. 555, 564.

[18] 72 Ill. 334, 336.

[19] *Post*, §§ 28a, 124.

[20] 75 Ill. 301, 306-307: "Until the municipality shall elect to abandon the use of the streets and alleys,

upon a statutory dedication, the fee had passed, the conveyance of the abutting property could not carry the right of the dedicator to any part of the land dedicated. It is worth observing, however, that in *Helm v. Webster*[21] one of the very cases in which the abutting owner was defending his possession in a street that had been vacated after a statutory dedication, the plaintiff was the grantee of the original dedicator in a deed executed before the vacation occurred. In affirming a judgment for the plaintiff the court must have sustained the transferability by deed of the right of the original dedicator to the plaintiff. Why, then, did not the same right pass by the deed of the pliantiff to the abutting owners who purchased lots from him?

§ 4. The acts of 1851,[22] 1865,[23] and 1874:[24] The act of 1851 was the first legislation in this state in favor of the abutting owner. It seems to have been restricted in its application to vacations by "Cities" only. It provided: "That when the corporate authorities of any city may deem it for the best interest of their respective cities, that any street or part of a street shall be changed, altered or vacated, said authorities shall have the power, upon the petition of the property holders owning property on such street or part of street to change, alter, or vacate the same, and to convey, by quit claim deed, all interest which said city may have had in the street or part of street so vacated, to the owner or owners of lots and lands next to and adjoining the same, upon the payment by such owner or owners of all assessments which may be made against their lots or lands, for and on

the former owner has no interest whatever in the land embraced within them,—absolutely nothing, within any definition of estate or property, that he could sell and convey. It had all passed to the corporation by the former grant, subject only to the possibility it might revert to him, if the contingency ever happened [that] the municipality should ever abandon the trust. Logically it follows, by the grant of the adjacent lot, the grantee takes no interest under his deed in the street or alley, other than he acquires in common with the public."

[21] 85 Ill. 116.

[22] Approved Feb. 15, 1851. L. 1851, p. 112; 1 A. & D. R. E. S. 1044. Repealed July 1, 1874, by R. S. 1874, p. 1018, § 156.

[23] Approved Feb. 16th, 1865. Laws 1865, p. 130; 1 A. & D. R. E. S. p. 1045. Repealed July 1, 1874, by R. S. 1874, p. 1033, § 550.

[24] R. S. 1874, chap. 145, p. 1092.

account of benefits to the same, arising from such change, alteration or vacation of any street or part of street as aforesaid."

The act of 1865 seems to have had reference only to cases where the vacation was by "act or acts of this state," and was therefore, in no way inconsistent with the act of 1851. It provided in part as follows: "That when any street, square, lane, alley, highway or part thereof, shall have been or may hereafter be vacated, under or by virtue of any act or acts of this state, the lot or tract immediately adjoining shall extend to the central line of any such street, square, lane, alley, highway, or part thereof, so vacated, unless otherwise specially provided in the act vacating the same: * * *"

The act of 1874 took effect upon the repeal of the two preceding acts. This statute was a consolidation of the two preceding acts in that it was made to apply to vacations by any municipality or the state. In other respects it followed with some additions, the act of 1865. It provided in part as follows (the italics showing the additions made to the act of 1865): "When any street ["square" omitted], alley, lane or highway, or any part thereof, has been or shall be vacated under or by virtue of any act of this state *or by order of the city council of any city or trustees of any village or town, or by the commissioners of highways, county board, or other authority authorized to vacate the same,* the lot or tract *of land* immediately adjoining *on either side* shall extend to the central line of such street ["square" omitted], alley, lane or highway, or part thereof so vacated, unless otherwise provided in the act, *ordinance or order* vacating the same, *unless in consequence of more of the land for such street, alley, lane or highway having been contributed from the land on one side thereof than the other, such division is inequitable, in which case the street, alley, lane or highway so vacated shall be divided according to the equities of the adjoining owners.*"

§ 5. **Effect and constitutionality of these acts—The wider and narrower meaning of these acts:** Taken in their wider meaning these statutes have reference to dedications by *any owner of land.* In its narrower meaning the act of 1851 must be interpreted as applying only when upon the vacation of a dedication, *an incorporated city becomes invested with a fee*

which it could hold as private property. Practically that narrows its operation to the case where the city dedicates its own private property. In such case the statute gives the city the power to convey to the abutting owners—a privilege, which, so far as the cases go, the municipality seems never to have exercised.[1] In their narrower meaning the acts of 1865 and 1874 would apply, whenever, upon the vacation of the dedication, the fee, or the right thereto, came to the hands either of the *state* or *any municipal corporation* or organization as distinguished from a private person or corporation.

§ 5a. These acts only operative in their narrower meaning, because in their wider meaning they would be unconstitutional and unjust: The only two cases upon the point seem to commit our Supreme Court to the narrower meaning of these statutes—not, however, upon the actual language of the acts, which will certainly bear the broader interpretation, but because the statutes, if they have the broader meaning, would be unconstitutional.

The first of these cases was *Gebhardt v. Reeves.*[2] There the dedication[3] and vacation were both under the act of 1851, and it seems to have been squarely held that the statute was not effective to prevent the original dedicator from maintaining ejectment upon his legal title in fee. Our Supreme Court declared shortly that, by the proper interpretation of the statute, "it simply authorizes the city to release whatever interest in the street it could lawfully convey." This is the primary ground for the decision, but observe that, in the mind of the court, the only reason for adopting this narrow construction of the statute was that any interpretation of the act which caused it to apply where the dedication was by an individual would have made it unconstitutional as depriving the original dedicator of his property without due

[1] Presumably the statute authorizes the city to convey to the abutting owners without the payment by them of any consideration; for, if they gave the city value, no statute would seem to have been necessary.

[2] 75 Ill. 301.

[3] It does not clearly appear from the report of the case when the dedication occurred, but the writer is informed by James Murray Esq., that from the tract books of the Chicago Title and Trust Co. it appears that the plat was acknowledged June 13th, 1856 and recorded about the same date.

process of law. The court says, without, it would seem, much elaboration upon so important a point: "The fee plaintiff had in the street and alley could not be divested and transferred to the adjacent lot owners by direct legislative action; nor could authority be given to any agency to do it for private purposes. An intention to take the property of one man and transfer to another, without compensation, ought not to be attributed to the legislature, where a different motive may be assigned for its action. A law that would have that effect, or that would authorize it to be done, would be palpably in violation of the constitution, as well as unjust."[4]

Helm v. Webster[5] seems to have applied the same doctrine to the act of 1874.[6] The dedication, in that case, was in 1855, and the vacation occurred by the ordinance of an incorporated city in 1876. At that time the act of 1851, under which the dedication was made, was no longer in force, so that the abutting owner could not claim under it. Whether the act of 1874 could be given a retroactive effect so as to control the vacation when the dedication had been made under the act of 1851, would depend upon whether or not the act of 1874 was, in substance, merely a re-enactment of the act of 1851. The court seems to have indicated that it was. They then went on to hold that any other than the narrower meaning of these statutes was impossible because in their wider meaning the acts would be unconstitutional. "The fee," the court says, "plaintiff had in the street and alley could not be divested and transferred to the adjacent owners by direct legislative action. An intention to take the property of one, and transfer it to another, without compensation, ought not to be attributed to the legislature, and a law that would have

[4] Upon this point Justices Sheldon and McAllister appear to have dissented.

[5] 85 Ill. 116.

[6] In the opinion of the court the Act of 1865 is particularly spoken of. Of all three acts, however, that is the one which could not possibly have been applied since it only operated where the vacation was by act of the state, and the vacation here was by ordinance of a city. The act of 1874, however, applied both where the vacation was by act of the state or by a city ordinance. In other respects it was modeled after the Act of 1865. Doubtless, therefore, the court, in mentioning the Act of 1865, was really referring to the act of 1874.

that effect, would be in violation of the constitution, as well as unjust."

§ 6. Are these acts in their wider meaning unconstitutional or unjust?—A difficulty about opening this question: There is a difficulty about opening this question in regard to the statutes which have already been passed. Our Supreme Court has not, as has been observed, held them void as unconstitutional, but has merely given them a narrow meaning, because, with the wider one, they would have been void. As they stand, then, these acts have an effect. Our Supreme Court might, therefore, say that, if the legislature re-enacted a new law to operate prospectively and in terms applying to a dedication by anybody, it would reconsider its constitutionality unprejudiced by its former rulings upon the ground that a decision as to the validity of an act of the legislature, made in a merely private controversy, should not preclude the reconsideration of the same question at a future time in a suit by other parties.[7] However, as to the statutes already enacted, their effect has been fixed by decisions twenty-five years old and, up to the present time, unimpeached. The reasoning upon which these cases went may be erroneous and may not be followed, but the actual decision has possibly become a rule of property which may have been relied upon and it might unsettle titles now to disturb it. The question, then, of the constitutionality and justice of these acts will be considered as if it referred to new legislation in form like the acts of 1851, 1865 and 1874 and clearly applying to a dedication made by anybody at all.

§ 7. Such acts are neither unjust to the dedicator nor contrary to public policy: It is to be observed that while the fact that a statute in one construction operates unjustly is

[7] In Allardt *v.* People, 197 Ill. 501, 509, the propriety of the decision in Burdick *v.* People, 149 Ill. 600, holding a certain act of the legislature valid, was questioned. The court said: "If the constitutionality of that act should again be presented by parties not before the court in the Burdick case, that decision will not preclude them, except in so far as it is founded upon sound reasoning and authority, and will then be re-affirmed or overruled, as shall appear right and proper." See also "The Doctrine of *Stare Decisis* as applied to Decisions of Constitutional Questions," by D. H. Chamberlain, 3 Harvard Law Rev. 125.

no ground for its being held unconstitutional, it is a reason for its being so construed as not to operate harshly. But do these acts in favor of the abutting owner in their wider meaning operate unjustly? Where is the injustice in saying to the dedicator: You need not dedicate at all. Even if you want to dedicate you need not do so under the statute so that the fee will pass to the municipality; but if you do you must part with all rights to this land so that when the dedication is vacated the fee will remain in the city with power to convey, or go to the abutting owners direct. This does not deprive the dedicator of any right that he has. It does not substantially deprive him of all right to dedicate by imposing an oppressive condition. Practically, it does not even discourage dedication, for if the dedicator ever considered the possibility that the fee would come back to him (which is extremely unlikely) he would simply have added something to the price of the lots if it did not do so. Such a statute merely places by act of the legislature a condition upon the dedicator's doing that which, in the absence of the general statute on dedication, he could not possibly do. From the point of view of the dedicator, what injustice or harshness is there in this?

Not only are these acts not unjust to the dedicator but, it is submitted, they are dictated by a sound public policy. The legislature has simply attempted to effect the same result which the courts reached in the case of common law dedication where the fee did not pass.

It has become a universally accepted rule of construction for conveyances that an instrument transferring the title to lands bordering upon a highway, the fee of which to the centre is in the transferor, will pass the fee to the centre of the way unless a very clear intention be indicated to leave the strips of land in the highway unconveyed. Our Supreme Court in one case has gone so far as to hold that even where there was no dedication at all the conveyance of lots in a subdivision by number will pass a title to the centre of strips of land indicated as intended streets.[1] In another case it has held that "although the measurement set forth in the deed brings the line only to the side of the highway, the title will still be

[1] Hamilton *v.* Chicago B. & Q. R. mont *v.* Miller 161 Ill. 210.
R. Co., 124 Ill. 235; Village of Ver-

carried to the centre of it, unless such words are used and such meets and bounds are set forth as show a contrary intention."[2] In support of this position the two Pennsylvania cases of *Paul v. Carver*,[3] and *Cox v. Freedley*,[4] are cited. In both the deeds in direct language bounded along "the northerly side of the" street. In the latter case the measurements of the lot were also given and if followed, would have fixed the boundary at the side of the way in question. Yet in both cases the deed carried to the centre of the way. Our Supreme Court may or may not go so far, but it has gone far enough clearly to affirm the general rule of law of construction that the deed will carry to the middle of the way unless there be some clear expression to the contrary.

Such a rule of law rests, as the courts have frankly declared, upon a public policy which seeks to prevent profitless litigation and future difficulties and inconvenience by avoiding the existence of outstanding titles to small strips of land in numberless and untraceable heirs. "No doubt the rule," said Mr. Justice Scott in *Gebhardt v. Reeves*,[5] "in its practical operations, subserves the public good by preventing the existence of strips of land of no great value formerly a part of the highway, but on the abandonment of which would induce profitless and vexatious litigation."[6]

The beneficent results, thus carefully worked out by the courts in the absence of legislation, were rudely broken into when it came to be held that a statutory dedication passed the fee to the municipality, leaving only a right of reverter or of entry on condition broken[7] in the dedicator. Since the dedicator had parted with the fee and since his interest, whatever it might be, was probably not transferable by deed[8] there was no way in which the remnant of title left in the dedicator could pass upon the conveyance of lots abutting

[2] Henderson *v.* Hatterman, 146 Ill. 555, 564. See also Gould *v.* Howe, 131 Ill. 490, where up on a common law dedication, the fee to the streets passed to the grantees of the original dedicator, even though the conveyance to them was made "reserving streets and alleys, according to the recorded plat."

[3] 26 Pa. 223, 3 Gray's Cases on Property 356.

[4] 33 Pa. 124, 3 Gray's Cases on Property 361.

[5] 75 Ill. 301.

[6] See also Paul *v.* Carver, 26 Pa., 223, 3 Gray's Cas. on Prop. 356.

[7] *Ante*, §§ 2-2b.

on the street. The general assembly, therefore, stepped in to correct this by such legislation as has been above set out.[9] The public policy which actuated it was exactly the same as that which had inspired the courts for a long time previous. The legislature was in fact endeavoring to prevent the interruption of the very salutary rule of the court with which its dedication acts had tended to interfere. In this view the holding that such legislation was unconstitutional and unjust becomes almost grotesque.

Some have thought that our Supreme Court, by requiring so technical and literal a compliance with the letter of the dedication statute that many dedications, especially many of those made before 1874,[10] must fail as statutory dedications, has substantially conceded that the result of *Gebhardt v. Reeves*[11] was unfortunate.

The effect of finding only a common law dedication certainly is that the fee of the streets remains in the original dedicator and passes by the conveyance of the lots to the abutting owners.[12] Thus, the desirable result is attained. It is true, also, that *Gebhardt v. Reeves* took the view that "substantial compliance with the provisions of the statute" was all that the law requires,—the case actually holding (1) that a plat not made and certified by the county surveyor according to the act of 1833 but by another surveyor, was valid,[13] and (2) that the absence of a corner stone did not

[8] §§ 28a, 124.

[9] *Ante*, § 4.

[10] The Act of 1833 (Laws, 1833, p. 599; 1 A. & D. R. E. S. p. 1039) seems to have governed dedications between 1833 and 1874, except when such dedications were by special act of the legislature. (See *post*, § 12, note as to Canal Trustees subdivisions). The act of 1833 was incorporated into R. S. 1845, ch. 25, div. 1, secs. 17 et seq. This was repealed by R. S. 1874, ch. 131, sec. 5, § 8.

[11] 75 Ill. 301.

[12] *Infra*, note.

[13] The Court also said on this point that it might be presumed, after the destruction of all written evidence of his official capacity, that the plat was made by the County surveyor in fact. There were, therefore, two grounds for the decision that the plat was made by the proper person. Each ground is part of the actual decision of the case (Wambaugh, Study of Cases § 26). The court in Village of Auburn *v.* Goodwin, 128 Ill. 57, 63 were, therefore, only justified in saying that the holding that one, other than the County surveyor, might make the plat, was unnecessary to the decision.

invalidate it where there were other monuments. It cannot be denied that later cases have consistently held that the same statute must be very literally complied with in order to make a statutory dedication. First, it was held that the acknowledgment of the dedicator by his attorney in fact was not a compliance with the act of 1833,[14] because that statute read that "every person or persons whose duty it may be to comply with the foregoing requisitions, shall, at or before the time of offering such plat or map for record, acknowledge the same," etc.[15] Then *Gebhardt v. Reeves* was in terms overruled so far as it held that the plat need not be made and certified by the county surveyor.[16] Still later we have a further line of cases to the effect that under this act of 1833 a plat acknowledged before a clerk of the circuit court or before a notary was insufficient[17] because the statute required acknowledgment before a justice of the supreme court, a justice of the circuit court or a justice of the peace.[18] It

[14] Gosselin *v.* City of Chicago 103 Ill. 623; Thomsen *v.* McCormick, 136 Ill. 135; Earll *v.* City of Chicago, 136 Ill. 277; Blair *v.* Carr, 162 Ill. 362; City of Alton *v.* Fishback, 181 Ill. 396; Thompson *v.* Maloney, 199 Ill. 276; Russell *v.* City of Lincoln, 200 Ill. 511.

Observe that this was changed by R. S. 1874, chap. 109, sec. 2; Hurd's R. S., (1903) chap. 109, sec. 2.

[15] Laws 1833, p. 599, sec. 4, (1 A. & D. R. E. S. p. 1039); R. S. 1845, ch. 25, div. 1, sec. 20, (A. & D. R. E. S. p. 1041). Repealed R. S. 1874, ch. 131, sec. 5, § 8.

[16] Village of Auburn *v.* Goodwin, 128 Ill. 57; Village of Augusta *v.* Tyner, 197 Ill. 242.

Observe, however, that now by the Act of 1874 (R. S. 1874, chap. 109, sec 1; Hurd's R. S. (1903) chap. 109 sec. 1) the holding of Gebhardt *v.* Reeves is law. The plat may be made by any "competent surveyor." In Lee *v.* Town of Mound Station, 118 Ill. 304, 313, it was held that a plat by a surveyor who was not the County surveyor was valid under the Act of 1874. There is a difficulty about the case, however, because the plat there in question was made in 1862.

Observe, also, that the other point of Gebhardt *v.* Reeves, that the plat was sufficient under the statute even if there was no corner stone, if there were other known and permanent monuments, has been made law by statute: R. S. 1874. Chap. 109, sec. 1; Hurd's R. S. (1903) chap. 109, sec. 1.

[17] Gould *v.* Howe, 131 Ill. 490; Village of Vermont *v.* Miller, 161 Ill. 210; Davenport Bridge Ry. Co. *v.* Johnson 188 Ill. 472; Rock Island & P. Ry. Co. *v.* Johnson, 204 Ill. 488.

[18] Laws 1833, p. 599, sec. 4, (1 A. & D. R. E. S. p. 1039); R. S. 1845 ch. 25, Div. 1, sec. 20, (1 A. & D. R. E. S. p. 1041).

has also been declared to be the law that there can be no statutory dedication without the acceptance of the municipality.[19] These rules have operated so often to defeat a statutory dedication in the cases coming up to the Supreme Court, that the point of the construction or validity of the acts which give the fee of the street to the abutting owner upon the vacation of a statutory plat made subsequent to such acts, has never once arisen since *Gebhardt v. Reeves.* Instead, the Supreme Court, again and again, finds that there is only a common law dedication so that the fee of the streets is in the abutting owners.[20]

All this may not be sufficient to charge the court with having consciously adopted a technical and literal construction of the dedication act of 1833 in order to avoid, as far as possible, the effect of *Gebhardt v. Reeves,* but it does make it clear that the object attempted to be accomplished by the acts in favor of the abutting owner are neither unjust to the dedicator nor contrary to public policy.

§ 8. **Their constitutionality:** It may well be wondered how a statute which is not unjust to an individual, which is founded on a sound public policy and against which there is no express constitutional prohibition can be invalid as without the power of a legislature in which is vested all legislative power except that expressly denied it. The argument in favor of the power of the legislature may, however, be put a little more formally in this way: The act in favor of the abutting owner constitutes one of the terms upon which statutory dedications may be made. One who voluntarily makes such a dedication, therefore, submits to give up his right to get back the land upon vacation of the dedication, and acquiesces in its passing, either directly as under the acts of 1865[21] and 1874[22] or indirectly by conveyance by the

[19] Hamilton *v.* Chicago, B. & Q. R. R. Co., 124 Ill. 235; Village of Vermont *v.* Miller, 161 Ill. 210.

[20] Village of Vermont *v.* Miller, 161 Ill. 210; Gould *v.* Howe, 131 Ill. 490; Davenport Bridge Ry. Co. *v.* Johnson, 188 Ill. 472, 204 Ill. 488; Earll *v.* City of Chicago, 136 Ill. 277; Thomsen *v.* McCormick, 136 Ill. 135; Thompson *v.* Maloney, 199 Ill. 276; Clark *v.* McCormick, 174 Ill. 164; Hamilton *v.* Chicago, B. & Q. R. R., 124 Ill. 235; Henderson *v.* Hatterman, 146 Ill. 555.

[21] *Ante,* § 4.

[22] *Ante,* § 4.

municipality as under the act of 1851,[23] to those who may be the abutting owners at the time of the vacation.

This argument seems to have been very clearly presented in *Gebhardt v. Reeves*[24] and the court flatly refused to recognize its force, saying: "The fee plaintiff had in the street and alley, could not be divested and transferred to the adjacent lot owners by direct legislative action; nor could authority be given to any agency to do it for private purposes." The court speaks of this legislation as if it amounted to taking the property of one man and transferring it to another, without compensation.

Such language was intelligible in *St. John v. Quitzow*[25] where the dedication had been made prior to 1851, but in *Gebhardt v. Reeves,* where the court recognize that the dedication was made after the law of 1851 went into force,[26] such language is unintelligible.[27] If applied in the slightest degree to other legislation it would require some curious results. Why, for instance, would it not make a statutory dedication invalid to pass a fee simple to the municipality? At common law the dedication gives the public only an easement over the land. Why, then, does not the statute deprive the dedicator of his property and transfer it to another without compensation? If the legislature may, to a limited extent, take the fee out of the dedicator upon a statutory dedication, why may it not take it out of him to the whole extent and, in that case, of what consequence is it to him what becomes of it? If the legislature has no power to give a certain legal effect to the dedication how has it any power to give a particular legal effect to what, under the statute *de donis,* would be an estate tail? If it can be said that the statute in favor

[23] *Ante*, § 4.

[24] 75 Ill. 301, 308: "The proposition relied on," the Court say, "is [that] this law, in force when the plat was made, in some way made a contract for plaintiff, by which he, in effect, disclaimed, in favor of his grantee, all interest in the street, in case it should thereafter be vacated, and agreed that whatever interest the city may have had therein should be conveyed to the adjoining owners."

[25] 72 Ill. 334.

[26] *Ante*, § 5a, note 3.

[27] Yet St. John *v.* Quitzow, 72 Ill. 334, is quoted both in Gebhardt *v.* Reeves, 75 Ill. 301, and Helm *v.* Webster, 85 Ill. 116, as quite decisive against the abutting owner.

of the abutting owners deprives the dedicator of his property without due process of law, because it deprives him of what, but for the statute, would return to him, may it not as plausibly be said that the turning of an estate tail into an estate for life in the donee in tail with a remainder in fee to the heirs of the body of the donee,[28] is equally depriving, without due process of law, the creator of the estate and the first taker of their property? In the absence of statute, the first taker would have an estate tail and the creator of the estate a reversion in fee. If the legislature has the power to impose such conditions upon grantors and devisors so that when they try to do one thing their act shall have an entirely different effect, surely there can be no objection to the legislature saying to an individual: You shall make a statutory dedication only upon the condition that the legal effect of your act shall be to pass the fee to the dedicated strip to the abutting owners upon the vacation of the dedication.[29]

An excellent argument can be made in favor of these acts upon the ground that the right of the dedicator exists only by the favor of the legislature.[30] Why, then, may not such legislative favor be at any time withdrawn, leaving the fee to vest absolutely in the municipality upon a statutory dedication, so that even upon their narrower meaning these acts would operate very greatly in favor of the abutting owner? Or it may be inquired: If the legislature can cause the dedicator, who otherwise would get nothing, to become invested with a right to the fee if the dedication is vacated, why may

[28] *Post*, §§ 114 *et seq.*

[29] Our Supreme Court has held also (*post*, § 24) that sec. 2 of an Act of 1865, afterwards appearing as sec. 9 of the Landlord and Tenant Act of 1873, providing for forfeiture upon a 10 day notice to quit, made any breach of covenant or agreement on the part of the lessee a ground of forfeiture, even though it was not expressly made a ground of forfeiture in the lease. No one ever suggested that this was unconstitutional as applied to leases entered into *after the act was passed.* But if these acts in favor of the abutting owner upon the vacation of a statutory plat are unconstitutional when applied to plats executed *after those acts were in force*, then sec. 9 of the Landlord and Tenant Act must equally be unconstitutional and void. In fact, one wonders what acts will not be void under such a holding as that in Gebhardt *v.* Reeves.

[30] *Ante*, § 2b.

not the legislature cause the abutting owners, who would otherwise get nothing, to become invested with title upon the same event? In short, if the legislature can, upon a statutory dedication, pass a fee subject to a condition subsequent in favor of the dedicator who otherwise would obtain nothing, why can it not shift the fee of the municipality to the abutting owners upon the happening of the same condition? So long as the person to whom the fee is shifted is not arbitrarily selected who can say that the act is not as constitutional in one case as in the other?

Finally, it may well be contended that since the only obstacle in the way of the right of the dedicator upon the conveyance by him of the abutting lots is that a possibility of reverter or a right of entry for condition broken is not transferable by deed,[31] these statutes in favor of the abutting owner may well be construed as permitting this right of the dedicator to pass under the same circumstances and in the same way that the fee of the dedicator passes where the dedication is at common law.[32]

§ 9. **Retroactive effect of these acts—When their narrower meaning is adopted:** If a municipality, before 1851 had dedicated, according to the statute, land which it held in its private capacity, its right to the fee upon vacation of the dedication would be a right held by it in its private capacity. How far, then, could the legislature, by retroactive legislation after 1851 deprive the municipality of that right and give it to the abutting owner?

§ 9a. **Upon their wider meaning:** In their broader meaning it is clear that none of these acts in favor of the abutting owner[33] can have any retroactive effect so as to control the vacation when the dedication was made prior to 1851. It may be worth while to point out that this was the real point made in *St. John v. Quitzow*.[34] The subsequent positive citation[35] of this case for the point that, where the dedication was made by a private individual *after* the act of 1851 went into effect,

[31] *Post*, §§ 28a 124, 126.

[32] This, it is believed, would be be an excellent theory upon which to frame new legislation upon this subject.

[33] *Ante*, § 4.

[34] 72 Ill. 334.

[35] Gebhardt *v.* Reeves, 75 Ill. 301, 308; Helm *v.* Webster, 85 Ill. 116, 118.

that act, if effective to aid the abutting owner, would be unconstitutional, is clearly erroneous.

It would seem, also, as if a vacation made by private act under the law of 1865 could have no retroactive effect over dedications made between 1851 and 1865, for the act of 1851 had no application where the vacation was by any other body than an incorporated city. Hence, as to a vacation under the act of 1865 by Private Act, the act of 1865 would be improperly retroactive if it should operate to divest the right of the dedicator to get back the fee of the street upon its vacation by any other body than an incorporated city. This fully explains the language of the court in *Village of Hyde Park v. Borden.*[36] There the dedication was made between 1852 and 1865. The vacation occurred by Private Act which went into effect on the same day as the act of 1865 regarding the rights of abutting owners. The court declared shortly: "If Michigan Terrace had been vacated, the land within its limits reverted to Charles Cleaver, the original owner, who dedicated the street."

If the abutting owner became such when the act of 1851 was in force and the vacation occurred after 1874, then these questions arise: Would the saving clause of the repealing act of 1874 operate to make the act of 1851 still controlling so that the city might quit claim to abutting owners? Or would that power be gone by the repeal, and, if so, would the act of 1874 have a retroactive effect upon the ground that it was substantially a re-enactment of the act of 1851? These difficulties might have been raised in *Helm v. Webster,*[37] for there the dedication was in 1855, the defendant became an abutting owner in 1872 and in 1876 the vacation occurred. So far as the court intimated any opinion at all, it inclined toward the view that the act of 1874[38] would be applied upon the ground that it was in substance like the act of 1851.

If the abutting owner claiming became such after the act of 1874, there is more difficulty. It is less possible to say

[36] 94 Ill. 26 at p. 34.

[37] 85 Ill. 116.

[38] The Court speaks only of the Act of 1865, but, as has been explained *ante*, § 5a, note 6, there are excellent grounds for believing that the reference was actually to the Act of 1874, which was modelled after the Act of 1865.

that the act of 1851 is in force for his benefit under the saving clause of the repealing act of 1874. Perhaps, however, it is not more difficult than before to say that the act of 1874 shall have a retroactive effect as to dedications occurring under the law of 1851, because it is merely a re-enactment of the law of 1851.

Observe that the act of 1865 had a practical operation for only four years because it applied only where the vacation was by act of the state. This practically confined its operation to the case of vacation by Private Act of the legislature. The constitution of 1870[39] deprived the legislature of power to make special laws for the vacation of "roads, town plats, streets, alleys, and public grounds." The difficulties, therefore, which might have arisen when the dedication occurred under the act of 1865 and the vacation after the act of 1874 do not come up.

§ 10. Application of these statutes in their narrower meaning to the case of vacations of streets in canal trustees' subdivisions—Introductory: Taken in their narrower meaning the effect of these statutes in favor of the abutting owner[40] would seem to be comparatively slight. There is, however, a particular chapter in the history of land titles in Illinois which may give this narrower meaning more importance than might at first be supposed. It is submitted that, where streets have been dedicated by canal commissioners and canal trustees of the Illinois and Michigan canal, we may have an appropriate case for the application of these statutes in favor of the abutting owner, so that, upon the vacation of such streets, the fee will pass to him.

§ 11. Power of canal commissioners and canal trustees to dedicate streets: By an act of Congress of March 2, 1827[41] the United States granted to the state of Illinois the alternate sections of the public lands on each side of the proposed route of the Illinois and Michigan canal, for five miles in width along its entire length. Under an act of Jan. 22, 1829,[42] passed to facilitate the construction of the canal, canal com-

[39] Article IV. § 22, R. S., 1874, p. 64.

[40] *Ante*, § 4.

[41] 4 Stats. at Large, 234; Hurd's R. S. (1903) p. 90.

[42] Laws 1829, p. 14, sec. 7; (1 A. & D. R. E. S. p. 859).

missioners were appointed. From that time on until the canal trustees were appointed under an act of 1843[43] the work of constructing the canal and administering canal lands was carried on by canal commissioners. During this time the title to the canal lands still remained in the state and title to such parts as were sold passed by the patent of the state[44] upon sale by the commissioners in accordance with the statutes. The acts of the commissioners seem to have been merely the acts of the state itself by its proper administrative officers. Under an act of 1843[45] a loan was negotiated to effect the completion of the canal and for the purpose of securing the bond holders it was provided that the canal itself and all the remaining canal lands should be conveyed to trustees, who were given full power to sell the lands to raise money to pay off the loan. The conveyance to the trustees was actually made in 1845.[46] Thereafter the canal and its lands were administered by the canal trustees as distinguished from the canal commissioners. This trust continued till 1871 when the trustees turned over the canal and all lands remaining in their hands to the state[47] and executed a release deed. From that time the canal and its property has been administered by canal commissioners under an act of March 7, 1872[48] which declares them to be acting "as officers of the state, and not as a distinct corporation."

In the period from 1829 to 1871 the sale of canal lands, first by the canal commissioners and then by the canal trustees, played an important part in the scheme of raising money to build the canal and to pay off loans floated in aid of its construction. In order to sell to the best advantage it was found advisable to subdivide many tracts of land and in some instances to lay out whole towns. The act of 1829[49] gave the commissioners power to lay off town lots. An amendatory

[43] Laws 1843, p. 54, (1 A. & D. R. E. S. 879).

[44] Sec. 7, Act of 1829, (Laws 1829, p. 14, sec. 7, 1 A. & D. R. E. S. 861); sec. 37, Act of 1836 (Laws 1836, p. 145, sec. 37, 1 A. & D. R. E. S. 867).

[45] Laws 1843, p. 54, (1 A. & D. R. E. S. 879).

[46] Laws 1845, p. 31, (1 A. & D. R. E. S. 844); 1 Moses, Illinois Historical and Statistical, 466.

[47] Laws 1871, p. 215.

[48] Laws 1871, p. 213.

[49] Laws 1829, p. 14, sec. 7, (1 A. & D. R. E. S. 859).

act of 1831[50] gave them power to subdivide tracts into lots. Under these two acts the original towns of Chicago[51] and Ottawa were laid out.[52] Sec. 34 of an act of 1835[53] and Sec. 32 of an act of 1836[54] were identical in directing the commissioners to "examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots, and they shall cause the canal lands, in or near Chicago, suitable therefor, to be laid off into town lots." Sec. 33 of the act of 1836[55] contains the further direction to the commissioners to proceed, on the 20th day of June next, to sell the lots in the town of Chicago and such part of the lots in the town of Ottawa, as also fractional section fifteen, adjoining the town of Chicago, "it being first laid off and subdivided into town lots, streets and alleys," as in their judgment will best promote the interests of the canal fund. By an act of 1837[56] the commissioners were given power "to cause surveys of such town sites as they may select to be laid out by such person or persons as they may think proper." By Sec. 8 of the act of 1843,[57] under which the canal trustees held, it was provided that the said board of trustees "so far as is not incompatible with this act shall possess all the powers and perform all the duties conferred upon the Board of Commissioners of the Illinois and Michigan canal," by the act of 1836 and the acts supplementary and amendatory thereof. Under this clause the powers conferred upon the canal commissioners to subdivide and lay out town lots were given to the canal trustees.[58]

That these powers to subdivide and lay out towns and town

[50] Laws 1831, p. 39, sec. 7 (1 A. & D. R. E. S. 862).

[51] The original Town of Chicago lay west of State street, bounded by Madison, Desplaines and Kinzie streets.

[52] History of Illinois, Davidson & Stuve, p. 476-7; Illinois Historical and Statistical, Moses, vol. 1, p. 464.

[53] Laws 1835, p. 223, (1 A. & D. R. E. S. 863).

[54] Laws 1836, p. 150; Chicago *v.* Rumsey, 87 Ill. 348, 352; Matthiessen & H. Zinc Co. *v.* LaSalle, 117 Ill. 411, 416.

[55] Laws 1836, p. 150, (1 A. & D. R. E. S. 865); Chicago *v.* Rumsey, 87 Ill. 348, 352.

[56] Laws 1837, p. 39, sec. 7, (1 A. & D. R. E. S. p. 868, sec. 7); Matthiessen & H. Zinc Co. *v.* LaSalle, 117 Ill. 411, 416.

[57] Laws 1843, p. 55, sec. 8.

[58] Trustees *v.* Brainard, 12 Ill. 487, 501-502.

lots necessarily included the power to dedicate streets, is hardly open to question.[59]

§ 12. Upon such dedication the fee passes, leaving a right to enter in the dedicator in case of vacation: It is clear that dedications made under the authority given in these canal acts operated to convey the fee of the street to the municipality.[60]

The right to re-enter upon the fee of a street upon the vacation of a dedication remained originally in the state as to all streets dedicated by commissioners. Whether such rights passed to the canal trustees who represented the bondholders under the act of 1843 need not now be answered, for even if they did the equity in them remained in the state and the legal title to them returned to the state upon the termination of the canal trustees' trust in 1871.[61] When the streets were dedicated by the canal trustees, the right to re-enter in case of a vacation was in the trustees, in the first instance, as a security for the holders of canal bonds. But here, also, the equity in the right to re-enter was in the state, and, when the trusts were completed and the trustees released to the state in 1871, the legal right to re-enter upon these vacated streets was in the state.

§ 13. Upon the vacation of a canal subdivision the fee in the street should go to the abutting owners: If, while the act of 1857[62] was in force, the vacation be made of streets dedicated by the canal trustees, then, if the dedication was made before 1851, the trustees must take the fee under *St. John v. Quitzow*.[63] If it was made after 1851 they take it under the rule of *Gebhardt v. Reeves*.[64] Suppose under these circumstances that the trusts of the canal trustees terminated without the trustees having disposed of the fee for the benefit of

[59] Matthiessen & H. Zinc Co. *v.* LaSalle, 117 Ill. 411; Chicago *v.* Rumsey, 87 Ill. 348.

[60] Matthiessen & H. Zinc Co. *v.* LaSalle, 117 Ill. 411; Chicago *v.* Rumsey, 87 Ill. 348; Davenport Bridge Ry. Co. *v.* Johnson, 188 Ill. 472, 480-481; Same *v.* Same, 204 Ill. 488, 490. Under the holding of the above cases a plat by the Canal Trustees was a valid statutory dedication though not acknowledged at all, since the Dedication Act of 1833 did not apply to it. (City of Chicago *v.* Rumsey, 87 Ill. 348, 353.)

[61] *Ante*, § 11.

[62] *Ante*, § 4.

[63] 72 Ill. 334; *ante*, § 9a.

[64] 75 Ill. 301; *ante*, § 5a.

the bondholders, could the abutting owners claim under the act of 1851? Could the abutting owners after the act of 1874,[65] claim under the words of that act—when any street "*has been* or *shall be* vacated"?

If the vacation was of streets dedicated by canal commissioners the case would not be altered if the right of the state were transferred to the canal trustees under the acts of 1843 and 1845.[66] If the rights of the state were not transferred to the trustees, then the abutting owners should be entitled under the act of 1851 upon the ground that the legislature could so provide for the disposition of the lands of the state if it saw fit to do so.

If the vacation be made under the act of 1865[67] the same considerations will control the result.

If the vacation be made since the act of 1874[68] it is submitted that there is no reason why that act in favor of the abutting owner should not apply. In such a case, whether the dedication was by the canal commissioners and the right to re-enter passed to the canal trustees, or whether the dedication be made by the canal trustees, the trusts of the canal trustees having terminated, the legal title to the right to re-enter would be in the state when the act of 1874 took effect. There is nothing unconstitutional or improper in the legislature so disposing of the interest of the state in favor of the abutting owner. If the act of 1874 is to have any effect at all it must at least vest the abutting owner with the fee of the vacated streets in canal subdivisions. In *Matthiessen & H. Zinc Co. v. LaSalle*[69] it is hinted that such a result is not impossible.

[65] *Ante*, § 4.
[66] *Ante*, § 11.
[67] *Ante*, § 4.
[68] *Ante*, § 4.
[69] 117 Ill. 411, 418.

Part 2.

Estates Which May Be Subject to a Condition Subsequent.

§ 14. **Fee Simple:** A fee simple estate may be made subject to forfeiture by the breach of a condition subsequent. This, it is believed, has been the law from the earliest times,[1] and this liberty has been fully sustained in this state by *Gray v. Chicago, M. & St. P. Ry.*[2] There were, in that case, two conveyances in fee simple executed running to the railroad subject to an express condition subsequent that the land conveyed should revert to the grantors upon the failure of the railroad to stop at a certain station all its accommodation trains to take and leave passengers. There was a breach of the condition and the grantor in one deed and the devisee of the grantor in the other brought ejectment. A verdict was directed for the defendant and judgment was rendered on this verdict. This our Supreme Court reversed. The only questions, discussed were the construction of the condition and its legality.[3]

§ 15. **Mortgages:**[4] It seems worth observing that a mortgage, so often considered as a conveyance wholly in a class by itself, is, in its elemental nakedness, merely the transfer of a fee simple, subject to a condition subsequent.[5] If the debt be paid accordingly to the terms of the condition the mortgagee's fee is subject to forfeiture. The mortgagor has a right of entry and if already in possession he has a legal title in fee simple at once. From this it followed that the mortgagee could

[1] Gray on Rule against Perpetuities, §§ 12, 30. How far it may be limited by the rule against perpetuities or public policy against forfeitures for alienation will be considered *post*, §§ 257, 277 *et seq.*

[2] 189 Ill., 400. See also in accord: Wakefield *v.* Van Tassell, 202 Ill. 41; Wilson *v.* Galt, 18 Ill. 431, 437.

[3] *Dedication:* The nature of the interest of the dedicator upon a statutory dedication has been fully considered *ante*, §§ 2-2b.

[4] It is not proposed here to indicate how far our Illinois Courts have modified the original view of the character of a mortgage, but only to call attention to some of the points in which the logical results of that original view have been retained, and to explain some departures in a way to cause the least disturbance to the law of future interests.

[5] Co. Lit. L. C. c. 5, sec. 332, note (1); Butler and Hargrave's notes, 1st American ed. from 19th London ed.

maintain ejectment and was, in the absence of any stipulation to the contrary, entitled to possession before condition broken. Such, indeed, was the doctrine of the English cases,[6] and in one of our early cases[7] there is a *dictum* that such is the rule in this state.

It is now, however, settled by the actual decision of our Supreme Court that the mortgagee cannot maintain ejectment until after condition broken.[8] This must rest upon the ground that equity, regarding the mortgagor as the real owner, would enjoin an action for possession by the mortgagee until the non-payment of the sum secured. The fact that there has been no such failure to pay becomes, therefore, an equitable defence which a court of law in a suit for possession recognizes and admits under the general issue pleaded.[9] The burden of proof, therefore, is upon the defendant—the mortgagor—to show that there has been no breach of the condition. This is the rule which our Supreme Court recognizes.[10] After default in the payment of the amount due equity will no longer enjoin a suit for ejectment, so that the basis of an equitable defence is lacking and the ejectment may proceed.[11]

[6] See the exposition of the English doctrine to be found in Barrett *v.* Hinckley, 24 Ill. 32, 41 *et seq.*, and Kransz *v.* Uedelhofen, 193 Ill. 477, at p. 484.

[7] Carroll *v.* Ballance, 26 Ill. 9, 17.

[8] Kransz *v.* Uedelhofen, 193 Ill. 477.

[9] It would seem to follow, also, that before default the mortgagor might maintain ejectment against the mortgagee, on the ground that, to the mortgagee's defence of legal title, the mortgagor would have an equitable reply, founded upon the fact that equity would enjoin the mortgagee from setting up the legal title before default.

[10] Finlon *v.* Clark, 118 Ill. 32.

[11] Delahay *v.* Clement, 3 Scam. 201, 203, (*semble*); Kruse *v.* Scripps, 11 Ill. 98; Vansant *v.* Allmon, 23 Ill. 30, (*semble*); Carroll *v.* Ballance, 26 Ill. 9; Fisher *v.* Milmine, 94 Ill. 328; Esker *v.* Hefferman, 159 Ill. 38; Ware *v.* Schintz, 190 Ill. 189.

In Kruse *v.* Scripps, *supra*, and Carroll *v.* Ballance, *supra*, it was held that no notice to quit was necessary before the mortgagee brought ejectment. This was put on the ground that the mortgagor had no estate at all. It is believed that this is strictly correct. The mortgagor's possession is protected by equity merely, and by the privilege which the mortgagor has to urge an equitable defence to the mortgagee's action of ejectment at law. The moment that bar is removed the right to possession of the mortgagee which has all along existed becomes fully effective. This must have been the

There is, then, no accuracy in speaking of the default of the mortgagor as if it operated to forfeit a legal fee simple in the mortgagor and invest the mortgagee with it.[12]

§ 15a. Terms for years: A term for years is the interest most commonly subject to conditions subsequent. The forfeiture of leases for nonpayment of rent or for the breach of covenants in the lease, which are made conditions by express stipulation, are so common as to require no citation of authorities regarding their validity in general.[13]

PART 3.

THE CONDITIONS THEMSELVES.

§ 16. Conditions arising by operation of law upon the conveyance of a fee simple—In general: Conditions of this sort are comparatively rare. The one attached to the conveyance of a fee simple passing to the municipality upon a statutory dedication has been fully dealt with above.[14]

§ 17. Mortgages—Difficulty in the rule that when the debt is barred the mortgagee has no right to possession: The law seems settled in this state that the moment the mortgage debt is barred by the statute of limitations no ejectment can be maintained by the mortgagee against the mortgagor or those who claim under him.[15] This seems to be the law quite regardless

view of the court because it not only said that the mortgagor had no tenancy, but in Carroll *v.* Ballance, *supra*, it declared that the mortgagee had a legal right to maintain ejectment before default.

Such a view is not inconsistent with the rule that the mortgagor's possession becomes adverse only upon default, since the cause of action by the mortgagee for possession cannot be said to arise, in the meaning of the Limitation Acts, so long as the mortgagor has a good defense.

After default it is clear that the mortgagor cannot maintain an ejectment against the mortgagee because the equitable reply (*supra* note 9) of the mortgagor is gone: Holt *v.* Rees, 44 Ill. 30; Kilgour *v.* Gockley, 83 Ill. 109; Oldham *v.* Pfleger, 84 Ill. 102.

[12] If this were the correct view, the mortgagee would have a shifting future interest by deed. Post, §§ 137 *et seq.* See also Forlouf *v.* Bowlin, 29 Ill. App. 471.

[13] See cases cited and dealt with. *Post*, §§ 21-26, 29, 31-59.

[14] *Ante*, §§ 1-13.

[15] Pollock *v.* Maison, 41 Ill. 516; Gibson *v.* Rees, 50 Ill. 383, 405 (*semble*); Emory *v.* Keighan, 88 Ill. 482; Schumann *v.* Sprague, 189

of any special statute of limitations governing mortgages such as sec. 11 of the act of 1872,[16] for the rule holds in a case where the right of entry by the mortgagee has not been barred by adverse possession, and where sec. 11 of the act of 1872 has no application,—as, for instance, where the mortgage is not governed by that act because executed before 1872,[17] or where the mortgage, though controlled by the act, is given to secure a debt not evidenced by a writing[18] so that it is barred in five years.[19]

This holding has disturbed the law of future interests because of the attempt to explain it upon some theory as to the nature of the mortgagee's legal interest, instead of on the principle of equitable defenees.

§ 18. View that the mortgagee has a base or determinable fee: The rule set out in the preceding paragraph having become well settled our supreme court began to call the title of a mortgagee in fee "in the nature of a base or determinable fee," saying that "the term of its existenee is measured by that of the mortgage debt."[20] If this means that the mortgagor has a possibility of reverter upon the termination of a fee simple it is open to some objection. Since the statute of *quia emptores* the possibility of the existenee of such an interest by act of the parties may well be doubted.[21] But even if the mortgagor has a possibility of reverter arising by operation of law,[22] such an interest would not, in

Ill. 425, (*semble*). In this last case the court seems to announce the doctrine of the text but the case could have been fully disposed of under sec. 11 of the Act of 1872 (*infra* note 16).

[16] Laws 1871-2, p. 558, sec. 11; R. S. 1874, ch. 83, sec. 11.

[17] Pollock *v.* Maison, 41 Ill. 516; Emory *v.* Keighan, 88 Ill. 482.

[18] Practically this would occur only when a deed absolute on its face was construed to be a mortgage securing a debt not evidenced by a writing, for in a mortgage securing an open account the mortgage itself is apt to recite the items of the open account and to contain a written promise to pay it which would be barred only by the ten-year statute. See Field *v.* Brokaw, 148 Ill. 654.

[19] Laws 1871-2, p. 559; R. S. 1874, ch. 83, sec. 15.

[20] Mr. Justice Mulkey in Barrett *v.* Hinckley, 124 Ill. 32, at p. 46, seems to have first used these expressions. They were repeated in Lightcap *v.* Bradley, 186 Ill. 510, 522, and adopted in Ware *v.* Schintz, 190 Ill. 189, 193.

[21] *Post*, § 126.

[22] Ware *v.* Schintz, 190 Ill., 189, 193.

general, be transferable by deed [23] as it is admitted the mortgagor's is. Under such a view it would be difficult to explain the holding that even after the debt is barred, yet, by a new promise or part payment, all the rights of the mortgagee spring into existence again and he may maintain ejectment.[24] For how, if the mortgagee's interest terminate by its own limitation, can it ever arise again? Such juggling in legal titles would seem to be indefensible.

§ 19. View that the mortgagee's interest after default is subject to a condition subsequent: It is believed, also, that it cannot be satisfactorily argued that there is in the mortgage a condition subsequent which gives the mortgagor a right of entry upon the extinguishment of the debt by the statute of limitations. There is, of course, no such condition in fact expressed, so it must arise, if at all, by operation of law. But, even so, the interest of the mortgagor would be one that is not usually transferable by deed.[25] This, as under the view of § 18, is a constant difficulty with working out the peculiarities of the estate of the mortgagee upon principles governing legal future interests generally.[26] There is another difficulty which, however, it is believed may be met. Statutes of limitations barring the owner's remedy against a stranger do not operate to transfer his title to the stranger, but the stranger is in of a new and original title by the statute. It might be thought, then, that a statute which declared that a mortgagor should be invested with a new and original legal title against the mortgagee after the mortgage debt was barred or after ten years of default in payment of the

[23] *Post*, § 126.

[24] This rule has been applied in the case of bills to foreclose, (Schifferstein *v.* Allison, 123 Ill. 662). No reason is perceived why the same result should not obtain in case the mortgagee brings ejectment.

[25] *Post*, §§ 28a, 124, 126.

[26] Observe an objection which the court itself has raised against this view: In Lightcap *v.* Bradley, 186 Ill. 510, 523, Mr. Justice Cartwright said: "The mortgagor's title is then [after the debt is barred by the statute of limitations] freed from the title of the mortgagee, and he is the owner of the premises, not by any new title, but by the title which he always had. Statutes of limitation do not transfer title from one to another, and a statute of limitations which would have the effect of transferring the legal title back from the mortgagee to the mortgagor would be unconstitutional."

debt, would be unconstitutional. Such an act applying only when the mortgagor remained in possession during the ten years would be valid enough as a short statute of limitations, for adverse holders, of a particular sort. So, if the act applied when the premises were vacant and unoccupied provided, at the end of the ten years, the mortgagor took possession, it might be sustained. Suppose, now, that the act applied even though the mortgagee was in possession all the time. It seems to be the intimation of Mr. Justice Cartwright that it would be unconstitutional, as taking the mortgagee's legal title without due process of law.[27] But is there not a perfectly rational ground for destroying the mortgagee's legal rights, held by him as a security, when the debt secured is lost? It is only another way of effectually barring all remedy for the collection of the debt. There is no arbitrary deprivation in such action.

§ 20. Barring of the debt is simply an equitable defence to the mortgagee's legal title: The writer suggests that the barring of the debt by the statute of limitations is simply an equitable defence to the mortgagee's legal title, and that this equitable defence may be urged in an action of ejectment. Equity may say that the debt is the real thing and that when this is extinguished in any way, either by payment after the day it is due, or by being barred by the statute of limitations, or in any other mode, equity would enjoin the action at law for possession. This would furnish the basis for the equitable defence. On the same reasoning equity would, upon a bill filed, decree a reconveyance.[1]

The difficulty with this explanation is that the extraordinary jurisdiction of equity is not usually to be invoked unless the complainant is willing to do equity, and doing equity in the case put would seem to require payment of the sum due. Our supreme court has, however, decreed otherwise,[2] and the subsequent act of the legislature[3] providing that "no person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage,

[27] *Supra*, note 26.

[1] In Murray *v.* Emery, 187 Ill. 408, the mortgagor's transferee filed a bill to remove the trust deed as a cloud. It was dismissed because the trust deed and debt were not barred by the statute of limitations.

[2] *Ante*, § 17.

[3] R. S. 1874, ch. 83, sec. 11.

unless within ten years after the right of action or right to make such sale accrues," if not actually covering the case of ejectment by the mortgagee, would, at least, seem to have supplemented and reinforced the rule already established by the decisions. Nevertheless, the recent case of *Fitch v. Miller*[4] indicates that we may still hope to overthrow the rule of the earlier cases[5] to the effect that the mortgagee cannot maintain ejectment after his debt is barred. Nor need we dispair of confining the operation of the statute to that of barring the right to foreclose or sell under a power, thus leaving the mortgagee to his legal title, which must prevail unless the mortgagor, without laches, seeks to redeem.

Fitch v. Miller actually holds that where a deed, absolute on its face, was, in equity, a mortgage by virtue of an instrument in writing, but not under seal, stating that it was the intention of the parties that the deed should be considered a mortgage, and when seventeen years had elapsed since default and no tender of the amount due had ever been made, no petition in equity for partition could be maintained by the heirs of the mortgagor. The reasoning is, that since the mortgagor can in such a case, have no remedy except in equity, he shall have none there, if he is guilty of laches and fails to do equity by tendering the amount of the loan. *Semble,* that ten years' default and failure to tender the amount due are always *prima facie* sufficient to bar the mortgagor's relief in equity. *Semble,* also, that mere failure to tender the amount of the loan, even though the debt be barred, will deprive the mortgagor of relief in equity. The court also intimates that the ten year limitation act does not prevent the mortgagor from standing on his legal title. This reasoning must, it is believed, apply equally well to the case of the ordinary mortgage with a defeasance clause. After default the mortgagee has the legal title and the right to possession. The mortgagor's rights are wholly in equity. Suppose, then, the mortgagor be in default for ten years, and then the mortgagee, relying upon his legal title, brings ejectment. If there is any defence it is a purely equitable one — a defence founded upon the fact that the mortgagor could have a bill for an injunction to restrain the mortgagee's ac-

[4] 200 Ill. 170.

[5] *Ante,* § 17.

tion at law. If equity would not interfere directly because of the mortgagor's laches and because of his failure to tender the amount due, then there should be no defence at law; and if, in partition without tender and with laches, the mortgagor could have no relief surely the same court of equity would not grant an injunction restraining the mortgagee's suit at law or the mortgagee's defence of legal title in an action of ejectment against him by the mortgagor. If that be so, why does not *Fitch v. Miller* go a long way toward overruling the earlier cases[6] which held that, when the mortgage debt is barred, the mortgagee cannot bring ejectment? Why does it not practically confine the operation of sec. 11 of the limitation act to foreclosure proceedings and sales under powers?

It is submitted, however, that, if the view that the mortgagee cannot maintain ejectment after the debt is barred be adopted, the theory that the mortgagor has an equitable defence explains the result with the least disturbance to well settled principles, for the mortgagor's equitable interest may always be transferred and there is no difficulty about his transferee being allowed to take advantage of the same equitable defences that he might have availed himself of. It also explains rationally the holding that when the statute of limitations against the debt has once been waived by a new promise or a part payment the mortgagee becomes entitled to all his old rights, for at once upon the waiver the equitable defence is gone and there is no impediment to an action founded upon the mortgagee's legal title.

§ 21. **In case of lease-holds—Implied condition that a tenant shall not repudiate the tenancy and claim to hold against the landlord:** It is clear that if a tenant not only disclaims to hold under his landlord but acknowledges another as such and pays rent to him, the former may, without any formality, elect to forfeit the tenancy and sue for possession in a forcible detainer suit against the tenant and the new landlord whom he has acknowledged.[1] It seems also that the giving up of possession by a tenant to a stranger who takes on assignment

[6] *Ante*, § 17.

[1] Ballance *v.* Fortier, 3 Gilm. 291; Fortier *v.* Ballance, 5 Gilm. 41; McCartney *v.* Hunt, 16 Ill. 76; Cox *v.* Cunningham, 77 Ill. 545; Doty *v.* Burdick, 83 Ill. 473; Wall *v.* Goodenough, 16 Ill. 415, (*semble*).

or sub-lease from the tenant, but claims to hold under a paramount title is a sufficient ground for the immediate forfeiture of the original lease. Upon such forfeiture the landlord may at once maintain forcible detainer against the stranger.[2] Even a mere oral disclaimer by the tenant coupled with the claim of title in himself is, in this state, a sufficient ground of forfeiture.[3] The attempt by a tenant to transfer more than he has operates merely as an assignment of his interest.[4] It does not seem that such a conveyance should by itself furnish a ground of forfeiture.[5]

§ 22. **By acts of 1865** [6] **and 1873** [7]**—Prior to 1865 no ground of forfeiture in the absence of express condition—Introductory:** Prior to the act of 1865 there was an important distinction between covenants and conditions in leases for years. For the breach of a covenant there was no ground of forfeiture. To present a ground of forfeiture it was necessary that the breach of the covenant should also be made by express language the breach of a condition subsequent. Unless, therefore, the non-payment of rent were made in terms a ground of forfeiture the landlord's only remedy was to sue for rent due and wait for the expiration of the tenancy.

Direct authority upon this point is not forthcoming. No opinion, however, has been found against it and, on principle, it is believed that it must be sound.

§ 22a. **On principle:** There was, it is true, an implied condition, upon which the feudal vassal held of his lord, that the vassal should perform the feudal services and that default in their performance was ground for forfeiture though no condition was ever expressed.[8] From a consideration, however,

[2] Hardin *v.* Forsythe, 99 Ill. 312; Thomasson *v.* Wilson, 146 Ill. 384.

[3] Fusselman *v.* Worthington, 14 Ill. 135; McGinnis *v.* Fernandes, 126 Ill. 228; Brown *v.* Keller, 32 Ill. 151; Herrell *v.* Sizeland, 81 Ill. 457; Wood *v.* Morton, 11 Ill. 547.

[4] Turner *v.* Hause, 199 Ill. 464.

[5] It has been said that any conveyance by a tenant at sufferance will forfeit the tenancy: Proctor *v.* Tows, 115 Ill. 138, 150. The owner, however, is always entitled to possession as against a tenant at sufferance.

[6] Laws 1865, p. 107, § 2. In force Feb. 16, 1865. Reenacted in 1873; Laws 1873, p. 119, § 9, see R. S. 1874, ch. 80, sec. 9.

[7] Laws 1873, p. 119, § 8. In force July 1st, 1873, see R. S. 1874, ch. 30, sec. 8.

[8] But prior to the time of Hen.

of the origin of leasehold interests in terms for years, it will appear that this feudal doctrine of implied conditions could have no application whatever to them. Terms for years started, as Sir Frederick Pollock has pointed out,[9] in the conception that "the relation between the landlord and the tenant is simply a personal contract." From a strictly feudal point of view there was "not an estate at all, only a personal claim against the freeholder to be allowed to occupy the land in accordance with the agreement."[10] But as early as the thirteenth century it came to be the law that if the tenant "was ejected in breach of his landlord's agreement, he could recover not merely compensation for being turned out, but the possession itself; and this not only against the original landlord but against a purchaser from him."[11] Thus, the leasehold became property, but it was distinct at almost every point from the interest of the feudal tenant. "Being in legal theory," writes Sir Frederick Pollock,[12] "the creature of contract, it has neither the dignities nor the burdens peculiar to freehold tenures. It is not the subject of feudal modes of conveyance, nor of the feudal rules of inheritance. No particular form of words is necessary for its creation; * * * . It could always be disposed of by will if the tenant died before the expiration of the term; and in case of such death the law deals with it in the same way as cattle or money and it goes to the executor, as part of the 'personal estate,' to be administered by the same rules as movable property. If undisposed of by will, the leasehold tenant's

III even this right was modified, so that the lord was only put into possession of the fee until the demand should be satisfied, and a forfeiture could be had only if the demand was not satisfied within a certain time. (Wright on Tenures, pp. 196-197.) Still later by the statute of 52 Hen. III, c. 22, the right of forfeiture by inferior lords was entirely taken away, leaving them only a right to distrain upon chattels. (Wright on Tenures, p. 200.) By the statutes of Gloucester (6 Ed. I, ch. 4), and Westminster (13 Ed. I, ch. 21) the right of forfeiture was somewhat restored. (Wright on Tenures, p. 201.)

What then is the law to-day where a life estate is created reserving rent, but no express condition of forfeiture? Is the nonpayment of rent a cause of forfeiture?

[9] The Land Laws, p. 137.

[10] Pollock on The Land Laws, p. 138.

[11] Pollock's Land Laws, p. 138.

[12] Land Laws, pp. 137-138.

interest belongs on his death to the same persons, and in the same proportions, as cash or railway shares which he has not disposed of.[13] There is no such thing as an heir of leaseholds. In one word, which for the lawyer includes all that has been said, a leasehold is not *real* but *personal* estate." The origin then and consequent development of the status of a leasehold interest preclude the application to it of any feudal rule raising an implied condition imposing a forfeiture for non-payment of rent, and make the insertion of such a condition in express terms necessary.

§ 23. **Not altered by any statute down to 1865:** This it is believed must have been the law of Illinois down to 1865.[14] The act of 1827[15] which now appears as sec. 4 of the Landlord and Tenant Act[16] merely gave the landlord the right to commence ejectment without any formal demand or re-entry where one-half year's rent was in arrear and unpaid, provided "the landlord or lessor to whom such rent is due has a right by law to re-enter for non-payment thereof." This statute, then, only operated if the landlord already had a right to re-enter by a clause of forfeiture in the lease.

§ 24. **Sec. 2 of the act of 1865[17] afterwards appearing as sec. 9 of the act of 1873:**[18] This statute was a wide departure from the common law. It proceeded to minimize the distinction between covenants and conditions in leases by making all covenants in leases conditions. More accurately speaking every breach of covenant in a lease is, since the act of 1865, a cause of forfeiture which may be taken advantage of by the statutory ten days' notice to quit. The language of the act as it now appears in R. S. 1874[19] is: "When default is made in any of the terms of a lease,[20] it shall not be necessary to give more than ten days' notice to quit or of the termination of such tenancy, and the same may be terminated on giving such

[13] Thornton *v.* Mehring, 117 Ill. 55.

[14] Chadwick *v.* Parker, 44 Ill. 326, 335-336, *Post*; § 24, note 21 (*semble*).

[15] R. S. 1827, p. 279, § 4; R. S. 1833, p. 675, § 4; R. S. 1839, p. 435, § 4; R. S. 1845, p. 334, § 4.

[16] R. S. 1874, ch. 80, § 4.

[17] Laws, 1865, p. 107; *ante*, § 22, note 6.

[18] Laws, 1873, p. 118, 119; R. S. 1874, chap. 80, sec. 9, p. 658. *Ante*, § 22, note 7.

[19] Chap. 80, sec. 9.

[20] May not the term "lease" include a lease for life?

notice to quit at any time after such default in any of the terms of such lease." What is meant by "default in any of the terms of such lease"? Does it mean breaches of express conditions, or does it include also breaches of covenants or promises—as for instance the usual one to pay rent? It would seem that the expression used was broad enough to cover all contracts, stipulations or covenants, even though no condition was expressed, thus in effect, turning all such contracts, stipulations and covenants into conditions by force of the statute. This construction is borne out by the fact that in the previous act of 1827 the legislature gave the landlord a summary remedy only if he had the "right by law to re-enter." There are some pointed *dicta*[21] and at least one clear decision of our supreme court[22] in favor of this view.

[21] Chadwick *v.* Parker, 44 Ill. 326, 335-336; Leary *v.* Pattison, 66 Ill. 203, 205; Woods *v.* Soucy, 166 Ill. 407, 420.

In Chadwick *v.* Parker, *supra*, Walker, C. J., said: "If his [the landlord's] lease contains a clause of reentry, he can, if he choose resort to his common law remedy, or failing in that, he may, after default, give notice [under the statute of 1865] * * * and on the failure of the tenant to pay such arears he may, after the expiratiou of the time, bring his suit without further notice. If the lease contains no such clause, then the landlord may, after default in payment, give a similar notice, and with like effect. This was no doubt what was intended by the legislature, as it brings within its provisions a large class of cases, not embraced in the common law; and affords a remedy in such cases, not previously possessed, of terminating a lease and regaining possession, where an insolvent tenant would not pay his rent, instead of leaving the landlord, as he was before, to his action for the recovery of his rent."

This above passage is quoted with approval in Woods *v.* Soucy, *supra*.

In Leary *v.* Pattison, *supra*, the Court speaks of Chadwick *v.* Parker as holding: "that the second section of the Act of 1865 was designed to dispense with the necessity of making a common law demand for rent on the very day it became due, *and to give a remedy when the lease contained no clause for a re-entry.*"

[22] Burt *v.* French, 70 Ill. 254. Here the lease was by parol and we may fairly assume that there was no express condition of forfeiture, yet it was held that a forfeiture for default in rent was properly perfected under the Act of 1865.

Observe also that in Dickinson *v.* Petrie, 38 Ill. App. 155, and Hayes *v.* Lawver, 83 Ill. 182, there was not so far as the report shows any condition of forfeiture.

In Drew *v.* Mosbarger, 104 Ill. App. 635, it was held in terms

§ 25. **Sec. 8 of the act of 1873:**[23] The innovation carried out in the act of 1865 was again applied in sec. 8 of the act of 1873. That provides: "The landlord[24] or his agent may, at any time after rent is due, demand payment thereof, and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than five days after the service thereof, the lease will be terminated. If the tenant shall not, within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended and sue for the possession under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand." It is, if possible, even more clear in this act than in the act of 1865 that the default in payment of rent is a cause of forfeiture even though the lease contains no express condition. Our supreme court seems to have so held.[25]

§ 26. **Whether these acts have any retroactive effect:**[26] If the acts of 1865 and 1873 are sufficient for the purpose of creating a forfeiture of leaseholds, even though the lease contains no express condition,[27] it is difficult to see how they can affect any leases made prior to the time these acts took effect, and in which there is no express clause of forfeiture. If the statutes were held to operate in such a case, they would most clearly change the already existing contract of the parties. They would in fact impair it directly and be unconstitutional.

§ 27. **By act of the parties—Is there any condition at all?**[28] This question arises in the case of conveyances expressed to be for certain purposes. Is there, in such a case, a right of re-entry if such purposes are not carried out? Thus, upon a conveyance to school trustees expressed to be for school pur-

that a lease might be forfeited by a ten-day notice to quit for a breach of covenant to cut burrs, even though there was no express condition of forfeiture.

[23] Laws, 1873, p. 118, 119; R. S. 1874, ch. 80, sec. 8, p. 658; Hurd's R. S. 1903, ch. 80, sec. 8, p. 477.

[24] Observe that the statute refers to landlords rather than to leases. Will it, then, govern in the case of a lease for life?

[25] Farnam *v.* Hohman, 90 Ill. 312. See also Bell *v.* Bruhm, 30 Ill. App. 300.

[26] See further on this matter, *post*, § 39.

[27] *Ante*, §§ 24, 25.

[28] The tendency seems to be against finding a condition in a doubtful case: Boone *v.* Clark, 129 Ill. 466.

poses, our supreme court seems to have admitted that if the school trustees sold the land or used it for other than school purposes the grantor might declare a forfeiture of the estate conveyed.[29] So where a lease of premises was made "to be occupied for a grocery store and for no other purpose whatever," it was held that the failure to so use the store was the breach of a condition subsequent.[30] On the other hand, where a deed was made to supervisors "for court house and other county buildings," no condition was created.[31] So, where the deed ran to commissioners in consideration of the location of the county seat having been made upon the granted premises, it was pretty clear that there was no condition.[32] So, too, when the conveyance was for church purposes and a proviso was added that if it were not used for such purposes the grantor was to be paid two hundred dollars, it is clear that there was no condition of forfeiture of the estate.[33]

A case which has come up several times is this: A grantee is to support the grantor for the remainder of his life[34] or pay him an annuity.[35] Is the support or the payment of an annuity merely a personal covenant or is its breach made a ground of forfeiture of the fee simple? It is of course possible by explicit terms, to make it the latter, but in none of the cases mentioned here was it done. In each case a bill was filed by the grantor to rescind the contract and for a re-

[29] School Trustees *v.* Braner, 71 Ill. 546; Eldridge *v.* Trustees of Schools, 111 Ill. 576.

[30] White *v.* Naerup, 57 Ill. App. 114, 118 1st Dist., Gary, J.).

[31] Board of Supervisors *v.* Patterson, 56 Ill. 111.

[32] Harris *v.* Shaw, 13 Ill. 456.

[33] Board of Education *v.* Trustees, etc., 63 Ill. 204. Eckhart *v* Irons, 128 Ill. 568, is to the same effect. The conveyance of lots was there made upon condition that a strip twenty feet wide at the front of each lot should be used only as a front yard and not built upon and in case of a breach of this stipulation the grantee was to pay a penalty of ten dollars per day. The Court intimated (p. 579) that this was not an estate upon condition, but only a contractual restriction upon the use of the premises conveyed. Observe that the Court lays stress upon the fact that there is no clause of reentry. That, however, is not necessary if the condition is clearly expressed.

[34] Frazier *v.* Miller, 16 Ill. 48; Oard *v.* Oard, 59 Ill. 46; Jones *v.* Neely, 72 Ill. 449; Stebbins *v.* Petty, 209 Ill. 291.

[35] Gallaher *v.* Herbert, 117 Ill. 160.

conveyance. In three cases where the contract was for personal support,[36] which the grantee failed to furnish under shameful circumstances, our supreme court said there were equitable grounds for sustaining the prayer of the bill. This holding does not, however, in any way proceed upon the ground that the estate is conditional. In a recent case,[37] where the grantee fully performed his contract so long as he lived, but where his heirs failed to do so, it was held that there was no ground in equity for the rescission prayed for; and the court expressly say that "the intervention of equity in such cases has been sanctioned in this state on the theory that the neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception." In another case where the contract was merely for the payment of a life annuity to the grantor[38] the court said there was no condition and no equitable grounds for rescission and a decree for the grantor was reversed.

§ 28. **When has the condition been broken:** The question of whether a condition has been broken has arisen regarding conditions of forfeiture on alienation.[39] Thus, in *Voris v. Renshaw*[40] the conveyance of the fee in 1850 was "upon this express condition, that the said grantee shall not convey the above property, except by lease for a term of years, to any person whomsoever prior to January 1st, 1861." It was held that this condition was not broken when the grantee gave a lease for 99 years and contracted to sell his reversion. A conveyance upon condition that the land be not used for other than school purposes is not broken according to the *dictum* of *Trustees of Schools v. Braner*[41] if the land be leased and the income applied to school purposes. A sale of the land by the school trustees would, according to the same case, be a breach of the condition. In leases this sort of condition takes the form of a provision against assignment or subletting. It

[36] *Supra*, note 34.

[37] Stebbins *v.* Petty, 209 Ill. 291. See also Pittenger *v.* Pittenger, 208 Ill. 582.

[38] Gallaher *v.* Herbert, 117 Ill. 160.

[39] As to the validity of such conditions see *Post*, § 281 *et seq.*

[40] 49 Ill. 425.

[41] 71 Ill. 546, 547.

has been held that a voluntary assignment for the benefit of creditors is the breach of such a condition.[42] But where one of two joint lessees occupying part of the premises takes in a partner the condition has been held not to be broken.[43]

In *Hawes v. Favor*[44] it was held that there was no breach of a condition in a lease not to destroy the dwelling house on the premises without the lessor's consent. In *King v. Edwards*[45] there was held to be no default in the payment of rent under the provisions of a coal lease. In *Dockrill v. Schenk*[46] it was held that there was no breach of the condition that the tenant pay all special assessments, since the landlord had given him no notice to pay them.[47]

PART 4.

WHO MAY TAKE ADVANTAGE OF THE BREACH OF A CONDITION SUBSEQUENT.

§ 28a. When attached to a fee simple: The general rule was that the right of entry for condition broken could only be taken advantage of by the grantor or his heirs.[1] So our supreme court has said,[2] and in *Presbyterian Church v. Venable*[3] they actually held that a possibility of reverter upon the dissolution of a corporation did not pass by a devise prior to the dissolution. Nevertheless, the court has squarely held

[42] Medinah Temple Co. *v.* Currey, 162 Ill. 441.

[43] Boyd *v.* Fraternity Hall Assn., 16 Ill. App. 574.

[44] 161 Ill. 440.

[45] 32 Ill. App. 558.

[46] 37 Ill. App. 44.

[47] See also Gilbert *v.* Holmes, 64 Ill. 548 and People *v.* Gilbert, 64 Ill. App. 203. In Tomlin *v.* Blunt, 31 Ill. App. 234, the condition seems to have been relied upon as embodying also a covenant. See also, I. C. R. R. Co. *v.* Wathen, 17 Ill. App. 582.

[1] Gray on Rule against Perpetuities, § 12. Even upon the Illinois authorities it is clear that neither a stranger nor the grantee can set up the breach of condition: Joliet Gas Light Co. *v.* Sutherland, 68 Ill. App. 230; Willoughby *v.* Lawrence, 116 Ill. 11.

[2] Board of Education *v.* Trustees etc., 63 Ill. 204, 205. Observe also the language of Sexton *v.* Chicago Storage Co., 129 Ill. 318, 332.

[3] Voris *v.* Renshaw, 49 Ill. 425, *ante*, § 28, might have been put on the ground that the grantee of the heirs of the original grantor, who, as was contended, had imposed a condition of forfeiture, was trying to take advantage of the forfeiture, if any.

(though nothing was made of the point in either case) that the right of entry was assignable by a general conveyance[4] of the land which was subject to the condition, and that a devisee[5] of the grantor could take advantage of the breach. The latter holding may possibly be supported on the ground that the language of our statute of wills in regard to what interest in land may be devised[6] is broad enough to include the right of entry for condition broken.[7]

§ 29. **To an estate for life or years:** Prior to the statute of Hen. VIII[8] the rule as to who might take advantage of the breach of a condition subsequent was the same in case of a tenancy for life or years as in the case of a fee simple,—only the feoffor, or lessor and his heirs could take advantage of the right of entry for condition broken.[9] By the statute of Hen. VIII, however, this was altered and the assignee of the reversioner was entitled to enforce a forfeiture.[10] This statute may fairly be regarded as part of the common law of this state.[11] In addition we have a further act of 1873[12] which is sufficient to accomplish the same result.[13]

A concurrent lease is "one granted for a term which is to commence *before* the expiration or other determination of a previous lease of the same premises to another person. If

[4] Helm *v.* Webster, 85 Ill. 116, *ante*, § 5a.

[5] Gray *v.* Chicago, M. & St. P. Ry., 189 Ill. 400. In Boone *v.* Clark, 129 Ill. 466, 498, the Court said: "A breach of a condition subsequent can be taken advantage of only by the grantor, his heirs or *devisees*."

[6] *Post*, § 73.

[7] As to the scope of the language of the act defining what may pass by a quit claim deed in the statutory form or under sec. 1 of the Act on Conveyances see *post*, §§ 76-79.

[8] 32 Hen. VIII, c. 34; Co. Lit. 215a; 5 Gray's Cases on Property, 3; 2 Starr & Curtis, Ill. Stats. (1896), p. 2515.

[9] *Ante*, § 28a.

[10] *Infra*, note 11.

[11] In Fisher *v.* Deering, 60 Ill. 114, 115; Barnes *v.* Northern Trust Co., 169 Ill. 112, 116; Scheidt *v.* Belz, 4 Ill. App. 431, 435, the right of the assignee of the reversion to sue for and recover rent reserved in the lease under the statute of Hen. VIII was sustained.

As to how far upon the assignment of a remainder or reversion attornment by the tenant in possession is necessary in Illinois see *Post*, §§ 71, 122.

[12] Laws 1873, p. 120, § 14; R. S. 1874, ch. 80, sec. 14.

[13] Thomasson *v.* Wilson, 146 Ill. 384, 389-390; Fisher *v.* Smith, 48 Ill. 184; Springer *v.* Chicago Real Estate Loan Co., 202 Ill. 17, 26 (*semble*).

under seal it operates as an assignment of part of the reversion during the continuance of such previous lease."[14] It is clear that the holder of the concurrent lease has a right to collect rent to be paid during the then residue of the term granted by the first lease and the continuance of the concurrent lease.[15] In *Drew v. Mosbarger*[16] the appellate court for the 3rd district went a little farther and held that the holder of the concurrent lease could declare a forfeiture of the lease in possession because of the failure of the tenant in possession to perform a stipulation of his lease.

PART 5.

EFFECT OF THE BREACH OF A CONDITION SUBSEQUENT.

§ 30. Estate voidable, not void: The breach of a condition subsequent does not operate at once to avoid the grantee's estate, but only enables him, in whose favor the condition is imposed, to avoid the estate if he so elects.[17] In short, no matter how strongly the words of the conveyance may declare that it shall be void upon breach of the condition, it is only voidable. This was one of the instances where the common law undertook to temper the harshness of forfeiture.[18]

[14] Woodfall, Landl. and Tenant, 16th ed. (1898), p. 222.

[15] Woodfall, Landlord and Tenant, 16th ed. (1898), p. 222.

[16] 104 Ill. App. 635.

[17] Thus, the assignees of leaseholds who take contrary to the conditions of the lease cannot contend that by that breach of condition the lease is *ipso facto* void and that they are excused from paying rent under it: Webster *v.* Nichols, 104 Ill. 160, 171; Sexton *v.* Chicago Storage Co., 129 Ill. 318, 332; Springer *v.* Chicago Real Estate Loan & Trust Co., 202 Ill. 17 (*semble*); Chicago Attachment Co. *v.* Davis Sewing Machine Co., 33 Ill. App. 362. In such a case the lease is void only at the option of the lessor. See also: Willoughby *v.* Lawrence, 116 Ill. 11; Joliet Gas & Light Co. *v.* Sutherland, 68 Ill. App. 230; Raybourn *v.* Ramsdell, 78 Ill. 622; Board of Education *v.* Trustees, etc., 63 Ill. 204; Chadwick *v.* Parker, 44 Ill. 326, 334.

[18] *Post*, § 62.

Part 6.

Mode of Perfecting a Forfeiture.

§ 30a. Of freehold estates: It has always been said that to perfect a forfeiture in case of freehold estates an entry was necessary.[19] At the present day, however, this hardly means that there is no right to recover possession in a proper action by the grantor unless he has made an entry. He may, it seems, upon breach of the condition, at once sue for possession. That is in fact what was done in *Gray v. Chicago, M. & St. P. Ry Co.*[20] In *Lyman v. Suburban R. R. Co.*[21] our supreme court appears to have approved this in holding that a suit in equity to restrain the enjoyment of an alleged easement over the plaintiff's land might be maintained upon the supposition that the alleged easement had been terminated by the breach of a condition subsequent though no entry had been made.[22]

§ 31. Of estates less than freehold—The common law mode of forfeiture: Where the cause of forfeiture was default in the payment of rent the common law mode of forfeiture seems to have required "a demand of the precise amount of rent due, neither more nor less; that it be made upon precisely the day when due and payable by the terms of the lease or if a further day was specified within which it might be paid to save the forfeiture, then upon the last day of that time. It was required to be made at a convenient hour before sunset, upon the land, at the most conspicuous place; as, if it were a dwelling house, at the front door, unless some other place was named in the lease, when it was necessary to make it at that place. It was required that a demand should be made in fact,[23] should be pleaded and proved, to be availing.

[19] Gray on Rule against Perpetuities, § 12; Board of Education *v.* Trustees, etc., 63 Ill. 204, 205; Mott *v.* Danville Seminary, 129 Ill. 403, 415, 416.

[20] 189 Ill. 400.

[21] 190 Ill. 320, 329.

[22] In Mott *v.* Danville Seminary, 129 Ill. 403, 415, the Court intimates that "reentry or *some other act equivalent to a reentry*" is necessary to entitle one to forfeit a freehold estate.

[23] In Chapman *v.* Kirby, 49 Ill. 211, 215, the Court adds: "Although no person be present."

The tenant, however, had the entire day within which to make payment." [24]

Where the forfeiture was not for default in the payment of rent, the mere breach of the condition would, under Coke's statement,[25] *ipso facto* end the lessee's estate. The common law, however, in making the term voidable only at the option of the landlord,[26] seems to have required at least such act or expression on the part of the lessor as amounted to the exercise of an option to take advantage of a forfeiture.[27] The cases in Illinois make it clear that the mere bringing of a suit of forcible detainer is a sufficient declaration of forfeiture and, if the cause of forfeiture exist, the suit may be maintained.[28] There may, however, be a question as to how far a re-entry, or some act equivalent thereto[29] is necessary where the lease expressly provides for forfeiture by re-entry.

§ 32. Effect of Illinois statutes upon the common law modes of forfeiture—In case of default in payment of rent—Act of 1827: The common law mode of forfeiture for default in the payment of rent[30] was very crude. It was hard on both landlord and tenant. It gave the tenant no time if the

[24] This is taken from the opinion of the court in Chadwick *v.* Parker, 44 Ill. 326, 330-331. See also Chapman *v.* Kirby, 49 Ill. 211, 215; Woods *v.* Soucy, 166 Ill. 407, 418; Howland *v.* White, 48 Ill. App. 236, 241.

In the absence of proceedings for forfeiture authorized by statutes it would seem necessary to make a demand in the above manner in Illinois: Dodge *v.* Wright, 48 Ill. 382; Cheney *v.* Bonnell, 58 Ill. 268; Chapman *v.* Wright, 20 Ill. 120; Henderson *v.* Carbondale Coal Co., 140 U. S. 25, 33.

[25] Co. Lit. 214b (5 Gray's Cas. on Property, 2); Pennant's Case, 3 Co. 64a (5 Gray's Cases on Property, 18).

[26] *Ante*, § 30.

[27] Watson *v.* Fletcher, 49 Ill. 498; Cheney *v.* Bonnell, 58 Ill. 268.

[28] Fortier *v.* Ballance, 5 Gilm. 41, 3 Gilm. 291; Wall *v.* Goodenough, 16 Ill. 415; Fusselman *v.* Worthington, 14 Ill. 135; McCartney *v.* Hunt, 16 Ill. 76 (*semble*). See *Post*, § 37.

In all of the above cases the ground of forfeiture was the disclaimer of the tenant (*Ante*, § 21). No difference, however, is perceived between such a cause of forfeiture and the breach of an express condition in the lease.

Observe that the demand for possession made before bringing the action of forcible detainer in Fortier *v.* Ballance, *supra*, was such as was required by the forcible detainer statute generally. (R. S. 1845, ch. 43, sec. 1.)

[29] See *ante*, § 30a.

[30] *Ante*, § 31.

landlord made the proper demand and if the landlord did not make the proper demand on the day the rent fell due, he could not declare a forfeiture at all for that particular failure to pay rent. The decree of a court of equity upon the bill of the tenant, which gave the tenant a short day within which to pay the amount due and interest was more rational, and legislation has developed along this line.

The first act of this sort in Illinois is to be found in the Revised Statutes of 1827.[31] It has remained among our statutes until the present time, appearing in the revisions of 1845[32] and 1874[33] as sec. 4 of the Landlord and Tenant act. It was copied from an act of Geo. II.[34] The language of the Illinois statute is as follows: "In all cases between landlord and tenant, where one-half year's rent shall be in arrear and unpaid, and the landlord or lessor to whom such rent is due has right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, commence an action of ejectment for the recovery of the demised premises. And in case judgment be given for the plaintiff in such action of ejectment, and the writ of possession be executed thereon, before the rent in arrear and costs of suit be paid, then the lease of such lands shall cease and be determined, unless such lessee shall, by writ of error, reverse the said judgment, or shall by bill, filed in chancery, within six months after the rendition of such judgment, obtain relief from the same: Provided, that any such tenant may, at any time before final judgment on said ejectment, pay or tender to the landlord or lessor of the premises the amount of rent in arrear, and costs of suit, and the proceedings on such ejectment shall thereupon be discontinued."

§ 33. Sec. 2 of the Act of 1865,[35] appearing also as sec. 9 of the Act of 1873:[36] Sec. 2 of the Act of 1865 contained a

[31] R. S. 1827, p. 279, § 4; R. S. 1833, p. 675, § 4; Gale's Statutes (1839), p. 435, § 4.

[32] R. S. 1845, p. 334, § 4.

[33] R. S. 1874, p. 658, § 4.

[34] 11 Geo. II, c. 19. See Chadwick *v.* Parker, 44 Ill. 326, 332.

[35] Laws 1865, p. 107; *ante*, §§ 22, 24.

[36] Laws 1873, p. 118, 119; R. S. 1874, ch. 80, sec. 9; *ante*, §§ 22, 24.

general provision for forfeiture by a ten day notice to quit whenever "default is made in any of the terms of a lease." This remained in force as a section of the Act of 1865 till 1873 when it was incorporated into the act of that year as sec. 9 and now appears in R. S. 1874 as sec. 9 of chapter 80 on Landlord and Tenant.

Observe that this section does not in terms declare that if the tenant pays or tenders the rent within the ten days there will be no forfeiture of the lease. Our supreme court has, however, clearly intimated that such is its legal effect.[37]

§ 34. Sec. 4 of the Act of 1865.[38] Sec. 4 of the Act of 1865 remained in force only from 1865 to 1874. It was omitted from the revised landlord and tenant act of 1873 and was expressly repealed in 1874.[39] It has not since reappeared. It contained this provision: "And where the covenant of a lease has been violated by the nonpayment of rent when due, it shall be sufficient for the landlord, his agent or attorney, to make demand for payment of rent due on any day prior to the commencement of his action of forcible detainer."

This clause simply declares that "it shall be sufficient" for the landlord to make demand for rent due on any day prior to the commencement of the suit. This is the language of an act which tempers the rigor of some other rule. Our supreme court has said[40] of it that its purpose was to simplify the common law mode of declaring a forfeiture which required a demand for rent on the day it is due.[41] Certainly, the only positive effect that can be drawn from the literal language of the act is to make a common law demand for rent due, on any

[37] Chadwick *v.* Parker, 44 Ill. 326, 334 *semble;* Fisher *v.* Smith, 48 Ill. 184, 187, *semble;* Chapman *v.* Kirby, 49 Ill. 211; Cone *v.* Woodward, 65 Ill. 477, 478, *semble;* Leary *v.* Pattison, 66 Ill. 203, 205-206, *semble;* Woodward *v.* Cone, 73 Ill. 241, 243, *semble.*

As to how far the mode of forfeiture here prescribed is complete in itself so that no separate or other demand for rent need be made than that contained in the notice to quit and so that it is not affected by sec. 8 of the Act of 1873, see *post,* § 34.

[38] Laws 1865, p. 108, sec. 4.

[39] R. S. 1874, p. 1032, sec. 536.

[40] Cone *v.* Woodward, 65 Ill. 477. 478. See also, Burt *v.* French, 70 Ill. 254, 255; Woods *v.* Soucy, 166 Ill. 407, 418.

[41] *Ante,* § 31.

day before suit brought, sufficient for the purposes of declaring a forfeiture. It would seem to follow, therefore, so far as this section is concerned[42] that the act leaves intact the power to effect a forfeiture by a common law demand for rent on the day it is due so that a tender of rent by the tenant on the next day will prevent the consequences of a forfeiture only by resort to a court of equity; for why in the absence of any express provision abolishing it, should the more difficult mode of forfeiture, from which the act was passed to relieve only the landlord be held to be done away with?

This question also arises: Does sec. 4 leave the landlord free to declare a forfeiture by the service of a ten day notice to quit under sec. 2[43] without any separate demand for rent?

This, it is submitted, ought to be answered in the affirmative on the ground that the force of sec. 4 is simply to give the landlord power to forfeit the term by a common law demand for rent on a day after the rent was due; that it does not add any new requirement of a demand for rent; and that, therefore, sec. 2 remains as a mode of forfeiture complete in itself. Sec. 2 reinforces this view by declaring that "no other notice or demand of possession or termination of such tenancy [referring to the form of notice prescribed which contains no express demand for rent] shall be necessary."[44]

It is clear that, if any sort of special demand for rent were required under sec. 4 it should have been a common law demand, simply so far modified that it might be made on a day subsequent to the day the rent became due. We find, therefore, in cases arising under the act of 1865, the argument continually being made that there was no demand for rent on the day it was due and no proof that it was demanded on any other day, except in so far as the ten day notice to quit was a demand. Yet our supreme court as often kept saying that no such demand was necessary and held that mere notice to quit under the statute was sufficient.

[42] For the effect of sec. 2 of the Act of 1865 and sec. 9 of the Act of 1873 on the common law mode of forfeiture, see *post*, § 36.

[43] *Ante*, §§ 22, 24, 33.

[44] Observe also that since, upon the ten day notice to quit, the tenant can avoid the forfeiture by paying the rent due within ten days (*ante*, § 33), there is in fact a very substantial demand for rent though it is not according to the common law requirements.

Thus, in *Chadwick v. Parker*[45] the ten day notice to quit under sec. 2 was the only one given, and the point was actually urged that no other demand for rent had ever been made. Yet the forfeiture by the ten day notice to quit was upheld. The court, by Walker, C. J., said: "We do not under our statute see that it was the duty of the landlord to call upon the tenant for the money at the premises unless he intended to declare a forfeiture under the common law."[46]

The subsequent case of *Cone v. Woodward*[47] is hard to account for. There the court without in the least noticing *Chadwick v. Parker* seems to have reached an entirely opposite result. It held that a suit of forcible detainer against a tenant should be dismissed because the complaint did not state that a demand for rent had been made. The court quote sec. 4 of the act of 1865 and say: "To create the forfeiture under the statute, there must be a default in paying the rent, a demand for the same, and ten days' notice to quit, and a failure to pay the rent before the expiration of the ten days' notice. . . . In this case the plaint fails to state that a demand for rent was made, and in the absence of such an allegation there was no right to recover." Presumably, therefore, the complaint alleged the ten day notice to quit and the failure of the tenant to pay in that time. There would seem, then, to be a difficulty in reconciling the case with *Chadwick v. Parker* upon the ground that a ten day notice to quit is sufficient as including a demand for rent. Nevertheless, it does not seem probable that our supreme court intended to, or did hold a rule different from that of *Chadwick v. Parker*. Mr. Justice Walker gave the opinion of the court in *Chadwick v. Parker* and *Woodward v. Cone*, and again in *Burt v. French*.[1] In the first and last of these three cases the view was clearly taken that no demand for rent is necessary when there has been a ten-day notice under the statute.

In the comparatively recent case of *Woods v. Soucy*,[2] by way of *dictum* merely, the majority of the court intimated

[45] 44 Ill. 326.

[46] Leary *v.* Pattison, 66 Ill. 203; Burt *v.* French, 70 Ill. 254; Williams *v.* Vanderbilt, 145 Ill. 238, 247, *accord*.

[47] 65 Ill. 477. See also Woodward *v.* Cone, 73 Ill. 241, 243.

[1] 70 Ill. 254 (decided one year after Woodward *v.* Cone).

[2] 166 Ill. 407.

and seemed to concede, that, under sec. 4 of the act of 1865, such a demand was necessary in addition to any ten day notice to quit under sec. 2. Speaking of the effect of sec. 4 the court says: "When the landlord sought to forfeit a lease for nonpayment of rent he must still make a demand therefor, though not in conformity with the strict requirements of the common law. . . ." In support of this the court cites both *Chadwick v. Parker* and *Woodward v. Cone*, and then unaccountably says, speaking of sec. 9 of the act of 1873: "It is clear the meaning of the words 'no other notice shall be necessary' for the termination of a tenancy as used in sec. 9 is to exclude the idea that there must be a demand of payment and notice of termination of the tenancy, as in section 8." Now as sec. 9 of the act of 1873 is identical, including the words quoted, with sec. 2 of the act of 1865, and, as sec. 8 of the act of 1873 requires a demand for rent much as sec. 4 of the act of 1865 did, one wonders why the court intimated that a demand for rent in addition to the ten day notice to quit was necessary under the act of 1865.

§ 35. **Sec. 8 of the Act of 1873:** The text of this section has been given above.[1] It appears in our statute book for the first time in 1873. It operated only in case of default in the payment of rent and in that case it was fully effective.[2] Observe, also, that it does not take away the right to declare a forfeiture for nonpayment of rent by a ten day notice to quit[3] under sec. 9 of the act of 1873; nor is the right to effect a forfeiture under sec. 8 of the act of 1873 in any way modified by the presence of sec. 9.[4]

§ 36. **How far has a forfeiture by a common law demand for rent been abolished by the Acts of 1827, 1865, and 1873:** If the act of 1827[5] deprived the landlord of power to effect a forfeiture by a common law demand for rent on the day it

[1] *Ante*, § 25.

[2] Farnam *v.* Hohman, 90 Ill. 312; Espen *v.* Hinchliffe, 131 Ill. 468; Johannes *v.* Kielgast, 27 Ill. App. 576; Bell *v.* Bruhn, 30 Ill. App. 300; Howland *v.* White, 48 Ill. App. 236; Lemp Brg. Co. *v.* Lonergan, 72 Ill. App., 223.

[3] Woods *v.* Soucy, 166 Ill. 407; Dickinson *v.* Petrie, 38 Ill. App. 155.

[4] Lemp Brg. Co. *v.* Lonergan, 72 Ill. App. 223.

[5] *Ante*, § 32.

was due, it did so only in the narrow line of cases where the act of 1827 applied.[6] On the other hand if sec. 2 of the act of 1865,[7] afterwards appearing as sec. 9 of the act of 1873, operated to forbid a forfeiture by the common law demand for rent, then, since that section applied in all cases of default in the payment of rent, the whole common law mode of forfeiture must have been abolished.

The language of sec. 2 does not, in terms, forbid a forfeiture by a common law demand. It may be argued, however, that, as a forfeiture by that mode bore hardly upon both the landlord and the tenant sec. 2 was passed for the relief of both, and that, to permit it to give the landlord a more convenient mode of forfeiture without at the same time depriving him of the power of forfeiting according to the common law mode, would be to construe the act as exclusively for the benefit of the landlord.

Between 1865 and 1873 there was a difficulty with this reasoning because of the presence on the statute book of sec. 4 of the act of 1865 which assumed the possibility of a forfeiture by means of the common law demand for rent and simply modified its requirements for the benefit of the landlord alone, leaving a common law demand to be made if the landlord chose to use it.[1] In 1873, however, sec. 4 of the act of 1865 was dropped from our statute book and since then there would seem to be no reason why we cannot regard the common law mode of forfeiture upon default in the payment of rent as abolished.

§ 37. For cause other than default in the payment of rent—Sec. 2 of the Act of 1865,[2] appearing afterwards as sec. 9 of the Act of 1873:[3] This section only, of all the three above mentioned acts of 1827,[4] 1865,[5] and 1873,[6] applied to forfeitures for causes other than the nonpayment of rent. Must you, then, upon the breach of a condition other than default

[6] The cases under the similar English statute seem never to have decided whether the common law mode of forfeiture is forbidden: Woodfall, Landlord & Tenant, pp. 337-341, 16th ed. (1898).

[7] *Ante*, §§ 24, 33.

[1] *Ante*, § 34.

[2] Laws 1865, p. 107; *ante*, §§ 22, 24, 33.

[3] Laws 1873, p. 118, 119; R. S. 1874, ch. 80, sec. 9; *ante*, §§ 22, 24, 33.

[4] *Ante*, § 32.

[5] *Ante*, § 24.

[6] *Ante*, § 25.

in the payment of rent, give the ten day notice to quit under this section to the exclusion of the common law method of simply exercising an option by any clear act, as, for instance, bringing suit for possession? In two cases at least such a ten day notice was given and the court seems to approve the necessity of that procedure by discussing the question of whether the notice was properly given or not.[7] In another the lessor simply served a written notice referring to the ground of forfeiture and declaring that he had elected to terminate the lease and demanded possession of the premises.[8] It does not appear that either of these formalities were held to be necessary. They were steps taken out of abundant caution merely. In a line of cases where the ground of forfeiture was the disclaimer of the tenant there was apparently no act on the part of the landlord except the bringing of the action for possession.[9] In one of these[10] the supreme court said no notice to quit was necessary.[11] In *Medinah Temple Co. v. Currey*[12] the landlord's only act was to petition the county court in which the tenant's voluntary assignment proceedings were pending, to enforce a forfeiture for default in assigning without permission. In an appellate court case[13] the landlord seems to have done no other act than that of entering upon the possession of the tenant and putting him out. Yet the forfeiture was complete by this evident exercise of his option by the lessor.

It does not seem altogether clear, therefore, that sec. 2 of the act of 1865 and sec. 9 of the act of 1873 absolutely require a ten day notice to quit in cases where the forfeiture is for causes other than nonpayment of rent.

[7] Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210; Thomasson *v.* Wilson, 146 Ill. 384. See also Dockrill *v.* Schenk, 37 Ill. App., 44.

[8] Kew *v.* Trainor, 150 Ill. 150.

[9] Cox *v.* Cunningham, 77 Ill. 545; Doty *v.* Burdick, 83 Ill. 473; Hardin *v.* Forsythe, 99 Ill. 312; McGinnis *v.* Fernandes, 126 Ill., 228; *ante*, § 31, note 28.

[10] McGinnis *v.* Fernandes, 126 Ill. 228. But compare with this, Cheney *v.* Bonnell, 58 Ill. 268.

[11] It may, of course, be said that the forfeiture in these cases was not for default in "the terms of a lease" to which alone sec. 2 of the Act of 1865 and sec. 9 of the Act of 1873 refer. It is true that the default is not in an *express condition* of the lease, but is it not within the broader phrase "any terms" of the lease?

[12] 162 Ill. 441.

[13] White *v.* Naerup, 57 Ill. App. 114.

§ 38. How demand may be made or notice served: This was provided for in section 3 of the act of 1865[14] and the method there indicated applied of course, only to forfeitures declared under sec. 2 of that act.[15] The landlord and tenant act of 1873[16] contained not only sec. 2 of the act of 1865 (inserted as sec. 9) but also a new section (8). It incorporated likewise, as secs. 10 and 11, sec. 3 of the act of 1865 respecting the service of notices. In this form secs. 10 and 11 clearly applied to forfeiture by a ten day notice under the preceding sec. 9. They applied also to forfeitures under sec. 8. Section 10 is as follows: "Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant,[17] or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises;[18] and in case no one is in the actual possession of said premises then by posting[19] the same on the premises."[20]

§ 39. Retroactive effect of the Acts of 1827,[21] 1865,[22] and 1873:[23] In *Chapman v. Kirby*[24] our supreme court expressly declined to give an opinion upon whether the act of 1865 could govern leases entered into before the passage of that law. In *Woods v. Soucy*[25] it held that so far at least as sec. 2 of the act of 1865 provided merely a mode of effecting a forfeiture for nonpayment of rent, it might operate in regard to a lease entered into before 1865. The lease involved in that case contained a clause of forfeiture for default in the payment of rent, so that the act of 1865 was not given any

[14] Laws of 1865, p. 107, § 3.

[15] Ball *v.* Peck, 43 Ill. 482.

[16] Laws 1873, p. 118, 119; R. S. 1874, ch. 80, p. 658.

[17] Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25 (10 day notice by mail not proved).

[18] Farnam *v.* Hohman, 90 Ill. 312; Bell *v.* Bruhn, 30 Ill. App. 300.

[19] Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210.

[20] Sec. 11 reads: "When any such demand is made or notice served by an officer authorized to serve process, his return shall be *prima facie* evidence of the facts therein stated, and if such demand is made or notice served by any person not an officer, the return may be sworn to by the person serving the same, and shall then be *prima facie* evidence of the facts therein stated."

[21] *Ante*, § 32.

[22] *Ante*, § 24.

[23] *Ante*, § 25.

[24] 49 Ill. 211, 216.

[25] 166 Ill. 407, 416-417.

retroactive operation which would result in the creation of a cause of forfeiture which was not expressly provided for by the act of the parties. Nor could the act of 1865 be given any such retroactive operation without impairing the obligation of the contract of lease.[26] If however, the act be construed to have a retroactive effect as far as the mode of creating a forfeiture is concerned it is difficult to see why it must not equally be construed to have a retroactive effect so far as the creation of a new cause of forfeiture goes. But, if so construed, it is void as far as the latter effect is concerned and, since both applications of the act are inseparable,[27] the whole must be bad. The way to have met this difficulty would have been to hold either that the act had no retroactive effect of any kind, or else that it had no effect at all unless there was an express condition of forfeiture in the lease. In *Woods v. Soucy* our supreme court refused to take the former step and, in cases which we have already examined, it has refused to take the latter.[28]

§ 40. **Mode of perfecting a forfeiture as altered by the agreement of the parties—Provisions for the benefit of the landlord:** The landlord's principal difficulties are as follows:

(1) Suppose he has a responsible tenant who wants to quit: If he declares a forfeiture that is exactly what the tenant desires. On the other hand, if the landlord accepts possession of the premises from the tenant the claim will be made that the lease has been terminated by a surrender.[29] The first of these difficulties has been overcome by a provision for entry by the landlord without forfeiture.[30] The second might

[26] *Ante*, § 26.

[27] Cooley, Constit. Lim., 1st ed., pp. 178-179; People *v.* Cooper, 83 Ill. 585, 595; Hinze *v.* People, 92 Ill. 406, 424; People *v.* Martin, 178 Ill. 611, 625; People *v.* Knopf, 183 Ill. 410, 422; Noel *v.* People, 187 Ill. 587, 597; Donnersberger *v.* Prendergast, 128 Ill. 229, 234; People *v.* Hazelwood, 116 Ill. 319 326; Strong *v.* Dignan, 207 Ill. 385, 394.

[28] *Ante*, §§ 24, 25.

[29] West Side Auction Co. *v.* Conn. Mut. Life Ins. Co., 186 Ill. 156; Marshall *v.* Grosse Clothing Co., 184 Ill. 421; Humiston, Keeling & Co. *v.* Wheeler, 175 Ill. 514.

[30] Grommes *v.* St. Paul Trust Co., 147 Ill. 634; Heims Brg. Co. *v.* Flannery, 137 Ill. 309; cf. Johannes *v.* Kielgast, 27 Ill. App. 576.

conceivably be obviated by a clause that any surrender shall be in writing signed by the party to be charged.[31]

(2) When an irresponsible tenant pays no rent and undertakes to keep possession he is met by clauses providing for forfeiture without entry, without demand for rent and without notice to quit.[32]

§ 40a. Provision for the protection of the tenant: No reason is perceived why the common law and statutory modes of forfeiture may not be done away with by mutual agreement for the benefit of the tenant as well as of the landlord. Thus, it may be provided (and this is especially appropriate in long leases), that a forfeiture shall occur only upon a longer notice than that provided by the statute; and this, it is submitted, will exclude any forfeiture upon a five or ten day notice.[33]

PART 7.

REMEDY IN CASE OF FORFEITURE DULY PERFECTED.

§ 41. By ejectment or forcible detainer suit: An action of ejectment would seem to be an appropriate remedy in all cases of forfeiture duly perfected. Where a fee simple has been forfeited perhaps it is the only remedy by action, since the forcible entry and detainer statute provides a summary remedy for possession in case of forfeiture only "when any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise."[34]

§ 41a. Actual entry upon the land—Action of forcible entry and detainer for possession by the one put out—Introductory: A forfeiture having been duly perfected, how far may the

[31] Perhaps this would not help matters much for it might fairly be contended that the parties could waive such a clause by mutual agreement, and that the acts relied upon as a surrender by mutual assent could be used also to show such a waiver.

[32] Espen *v.* Hinchliffe, 121 Ill. 468; Williams *v.* Vanderbilt, 145 Ill. 238, 245; Belinski *v.* Brand, 76 Ill. App. 404; Mueller *v.* Kuhn, 46 Ill. App. 496. See, however, Woodward *v.* Cone, 73 Ill. 241, where the language of the lease was not sufficient to constitute a waiver.

[33] Crandall *v.* Sorg, 99 Ill. App. 22.

[34] R. S. 1874, ch. 57, sec. 1, § 4.

grantor or landlord physically enter and take possession? To answer this question let us suppose that he does actually enter and take possession. Will he have any defence to the several actions which the one put out may bring against him? Suppose an action of forcible entry is brought. Is it any defence that at the time the defendant entered, a forfeiture had been perfected and he had a right to possession?

§ 42. Where the entry is forcible—Before 1872: The answer to the question of the preceding paragraph must depend upon the construction to be given our forcible entry and detainer statutes.

Up to 1872 the form of the act so far as it touches the present problem followed the first section of the act of 1827.[35] It was this: "If any person shall make any entry into any lands, tenements or other possessions, except in cases where entry is given by law, or shall make any such entry by force, . . . such person shall be adjudged guilty of a forcible entry and detainer . . ." It was further provided that if the defendant be found guilty, judgment should be given "for the plaintiff to have restitution of the premises."

By the literal language of this act, a forcible entry by one having the immediate right to possession gave to the one put out the statutory remedy for repossession, yet this was an absurd result, for when accomplished it simply produced further litigation, viz., an action of forcible entry and detainer or ejectment against the person who had just been restored by judicial process to an unlawful possession.[1] It has even been said that the effect of such a construction of the act was to produce in some degree the evil sought to be avoided, by encouraging the scramble for a possession which, however defective the title upon which it was founded might be, could only be attacked by an action involving the validity of the plaintiff's title.[2] Pehaps such a result was impossible under

[35] R. S. 1827, p. 230; R. S. 1833, p. 311; R. S. 1839, p. 313; R. S. 1845, ch. 43, p. 256; Gross' Stats. of Ill., vol. 1, ch. 43, p. 299; superseded by Forcible Entry and Detainer Act of 1872 (Gross' Stats. of Ill., vol. 2, ch. 43, p. 187). Repealed in terms by R. S. 1874, ch. 57, sec. 21.

[1] Right of a Landlord to Regain Possession by Force, 4 Am. Law Rev. 429, 447; dissenting opinion of Mills, J., in Chiles *v.* Stephens, 3 A. K. Marshall (Ky.), 340, 350.

[2] Right of a Landlord to Regain Possession by Force, 4 Am. Law Rev. 429, 447.

the English statutes on forcible entry and detainer, for those acts had a distinct criminal character and operation by which the one having the right to possession might be punished for a forcible entry, even though he were not restored to possession.[3] Furthermore, restitution under the English acts was never awarded "except to a freeholder under the stat. 8 Hen. VI., or to a tenant for years under the stat. 21, Jac. I.,"[4] and where, under these statutes, a writ of restitution was sought, "it was requisite for the title of the plaintiff to be truly set out, and mere possession made a *prima facie* title, only if not traversed."[5] The Illinois forcible entry and detainer act of 1827, however, was not in character or operation a criminal statute; nor did it limit the right of restitution in any way so as to exclude the case where the plaintiff had no right to possession. Perhaps, then, there was no alternative but to follow the language of the act and restore to a wrongful possession the one forcibly put out by him who had the immediate right to possession. At all events that is what our supreme court did.[6]

§ 43. **Since 1872**: In 1872 our forcible entry and detainer statute was fundamentally changed,[7] being altered to conform pretty closely to the provision of the Massachusetts act of 1836.[8] then in force in that state as chap. 137 of the Genl.

[3] Turner *v.* Meymott, 1 Bing. 158 (*semble*); Taunton *v.* Costar, 7 T. R. 43 (*semble*); Taylor *v.* Cole, 3 T. R. 292 (*semble*).

[4] Right of a Landlord to Regain Possession by Force, 4 Am. Law Rev. 429, 446. See also, F. N. B., 248 H. *Cf.* 1 Hawkins Pleas of the Crown, p. 508, sec. 47, (chap. 28 of Forcible Entries and Detainers).

[5] Rex *v.* Wilson, 8 T. R. 357, 360; 2 Chit. Crim. Law, 1136. See also Right of a Landlord to Regain Possession by Force, 4 Am. Law. Rev. 429, 446.

It seems clear the one forcibly put out had no *qui tam* action for damages under the English statutes if the defendant showed a right to possession in himself: Right of a Landlord to Regain Possession by Force, 4 Am. Law Rev. 429, 437; 1 Hawkins Pleas of the Crown, p. 495, sec. 3.

[6] Baker *v.* Hays, 28 Ill., 387; Shoudy *v.* School Directors, 32 Ill. 290; Smith *v.* Hoag, 45 Ill. 250; Huftalin *v.* Misner, 70 Ill. 205. See also Chiles *v.* Stephens, 3 A. K. Marshall, (Ky), 340; Right of a Landlord to Regain Possession by Force, 4 Am. Law Rev. 429, 446, citing Krevet *v.* Meyer, 24 Mo. 107 and King *v.* St. Louis Gas Light Co., 34 Mo. 34.

[7] Gross' Ill. Stats. Vol. 2 (1871-1872) Ch. 43, p. 187; R. S. 1874 Ch. 57, p. 535.

[8] R. S. (Mass. 1836) Ch. 104.

Stats. of 1860.[9] Sec. 1 of the Illinois act follows word for word sec. 1 of the Massachusetts act.[10] It reads: "No person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force but in a peaceable manner." Sec. 2 of the Illinois act is modeled upon sec. 2 of the Massachusetts statute as it appears in R. S. (Mass. 1836) ch. 104, and in Genl. Stats. (Mass. 1860), ch. 137.[11] This is the section which actually gives the remedy for restitution or possession in certain cases. The Illinois statute provides in part as follows: "§ 2. The person entitled to the possession of lands or tenements, may be restored thereto in the manner hereinafter provided: First—When a forcible entry is made thereon. Second—When a peaceable entry is made and the possession is unlawfully withheld." Like the Massachusetts acts[12] the Illinois statute provides in sec. 5 that the complaint shall be made by the party "entitled to possession." Like the Massachusetts acts[13] the Illinois statute, in sections 13, 14 and 16, provides that the plaintiff shall have an execution for possession "if it shall appear that the plaintiff is entitled to possession," and "if the plaintiff is non-suited or fails to prove his right to possession, the defendant shall have judgment."

In the recent Massachusetts case of *Page v. Dwight*[14] it was held that since 1836, with the exception of one year from 1851 to 1852, it had been the law under the Massachusetts forcible entry and detainer statutes that one forcibly put out by another, who had the immediate right to possession, could not bring forcible entry and detainer. The court conceded that under the early laws of Massachusetts "every forcible entry by a private individual was unlawful, and might sub-

[9] See also Pub. Stats. (Mass. 1882) Ch. 175; Rev. Laws (Mass. 1902) Ch. 181.

[10] R. S. (Mass. 1836) Ch. 104, sec. 1; Genl. Stats. (Mass. 1860) Ch. 137, sec. 1; Pub. Stats. (Mass. 1882) Ch. 126, sec. 15; Rev. Laws. (Mass. 1902) Ch. 136, sec. 15.

[11] See also Pub. Stats. (Mass. 1882) Ch. 176, sec. 1, and Rev. Laws (Mass. 1902) Ch. 181, sec. 1.

[12] R. S. (Mass. 1836) Ch. 104, sec. 4; Genl. Stats. (Mass. 1860) Ch. 137, sec. 5; Pub. Stats. (Mass. 1882) Ch. 175, sec. 2; Rev. Laws (Mass. 1902) Ch. 181, sec. 2.

[13] R. S. (Mass. 1836) Ch. 104, secs. 6 and 7; Genl. Stats. (Mass. 1860) Ch. 137, secs. 7 and 8; Pub. Stats. (Mass. 1882) Ch. 175, sec. 5; Rev. Stat. (Mass. 1902) sec. 5.

[14] 170 Mass. 29.

ject him to punishment, and that in addition, in most cases, the person forcibly put out of possession might be put back by legal proceedings without regard to the question of the true title or right of possession." This was, however, changed by R. S. (Mass. 1836), ch. 104, which provided that only "the person entitled to possession" might be restored to it. "This language," the court says, "seems to leave without remedy under the statute the case where one not legally entitled to possession is forcibly put out by the true owner, or by one entitled to possession; for in such case the party forcibly put out is not a 'person entitled to the premises,' and by the terms of the statute such persons only are to be restored." Benjamin R. Curtis and others, commissioners to revise and reform proceedings in courts of justice, recognized this effect of R. S. ch. 104 and recommended a change back to the rule of the earlier statutes. This was accomplished by an act of 1851 which was, however, repealed after a year, and R. S. ch. 104 again became the law of Massachusetts. It was embodied in Massachusetts Genl. Stat. (1860), ch. 137, and it was from this, in all probability, that our Illinois forcible entry and detainer act of 1872 was modeled.[1] The holding in *Page v. Dwight* was rested by the Massachusetts court upon those very features of the Massachusetts statute which were copied into the Illinois act of 1872, viz. that it is provided in terms that "the person entitled to the premises may recover possession thereof," that if it appears "that the plaintiff is entitled to the possession of the premises, he shall have judgment and execution for the possession and for his costs"; that "such person may take . . . a writ," that is to say, "the person entitled to the premises," as stated in the section preceding; and that it is provided that if the plaintiff becomes non-suited "or fails to prove his right to the possession" the defendant shall have judgment.[2]

[1] The writer asked the learned author of the Revised Statutes of 1874 about the source of the Illinois Forcible Entry and Detainer Act of 1872 and received this in reply: "While I consulted the Mass. Statutes on many subjects I do not think I did in reference to Forcible Entry and Detainer. I think by consulting statutes of 1845 and amendments, you will find I stuck pretty closely to them."

[2] The Massachusetts court it is true was aided in reaching its conclusion by a feature of the Massachusetts statutes not embodied in

Considering, then, the language of the Illinois forcible entry and detainer act of 1872 as contrasted with that of 1827, and the fact that our act of 1872 was modeled after the Massachusetts act of 1836, which was thought by eminent counsel in 1851 to furnish no remedy to one forcibly put out by him who had the immediate right to possession—an opinion since declared to be entirely correct—a clear opportunity was given our supreme court to hold that, under the Illinois forcible entry and detainer act of 1872, one forcibly put out had no action for restitution against him who had the right to possession. There was a further reason, not present in Massachusetts, for our courts so construing the act of 1872. It had become well established here that the forcible entry and detainer statutes had given the one forcibly put out by him who had the immediate right to possession, an action of trespass.[1] As to this result no distinction was to be drawn between the acts of 1827 and 1872.[2] By this holding, therefore, the one forcibly deprived of a wrongful possession was given a remedy—but not the futile one of putting him back into a wrongful possession of which he might at once be deprived by legal proceedings. Without, however, in the least adverting to these considerations, our supreme court continued to hold, under the act of 1872, as it had under the act of 1827, that the immediate right to possession was no defence in a suit of forcible entry and detainer where the plaintiff had been forcibly put out.[3] In one case [4] only does the court contrast the language of the act of 1872 with that of 1827. The conclusion at which it arrives after so doing is thus stated: "It will be observed that the two statutes are substantially alike and hence any

the Illinois Act of 1872; *i. e.*, the provision that if it appeared that title was involved the suit might be summarily removed to the Superior Court. But it is observable that the opinion of the court in Page *v.* Dwight does not at all rest upon this provision, but finds the other clauses already referred to which were embodied in the Illinois Act amply sufficient as a basis for its decision. *cf.* "Right of a Landlord to Regain Possession by Force," 4 Am. Law. Rev. 429, 447-449.

[1] *Post*, § 50.

[2] *Post*, § 50.

[3] Allen *v.* Tobias, 77 Ill. 169; Doty *v.* Burdick, 83 Ill. 473; Hubner *v.* Feige, 90 Ill. 209; Stillman *v.* Palis, 134 Ill. 532; Phelps *v.* Randolph, 147 Ill. 335; Knight *v.* Knight, 3 Ill. App. 206; Pederson *v.* Cline, 27 Ill. App. 249.

[4] Phelps *v.* Randolph, 147 Ill. 335, 339.

decision of the court rendered under the statute of 1845 [same as act of 1827] is applicable under the present statute."[5]

§ 44. **Where the entry is peaceable:** If, however, the entry by one entitled to possession were peaceable there was not the slightest ground for saying that the person dispossessed could maintain a forcible entry and detainer suit to be restored to possession. He who entered had done no act described in sec. 1 of the act of 1827.[6] He had done nothing prohibited by the 1st section of the act of 1872.[7] He had done nothing for which any action is given by sec. 2 of the act of 1872. It seems clear to the writer, therefore, that the appellate court for the 3rd district in *City of Bloomington v. Brophy*[8] was entirely sound in holding the right of possession of the city to a strip of land, upon which it had peaceably entered, a complete defence to an action of forcible entry and detainer by the person dispossessed.

It would seem to follow from this that the defendant in a forcible entry and detainer suit who has entered in a peaceable manner, may always show title in himself in order to maintain his right to possession. It is inconceivable that one should be told by a court that he had a good defence in the right to possession where the entry was peaceable, and yet in the next breath be informed that he could not show his right to possession by proving his title. The appellate court therefore, in *City of Bloomington v. Brophy*[9] acted with commendable discrimination when it held that the defendant in the forcible entry and detainer suit who had entered peaceably might prove its title in fee.[10]

[5] Then the court goes on to cite the cases decided under the Act of 1827 holding the immediate right to possession no defence in forcible entry and detainer by one forcibly put out. (*Ante*, § 42).

[6] *Ante*, § 42.

[7] *Ante*, § 43.

[8] 32 Ill. App. 400. The case of Phelps *v.* Randolph, 147 Ill. 335 is not *contra*, for there, as will be pointed out directly (*Post*, § 45), the whole question really turned upon whether the entry was in fact peaceable or forcible.

[9] 32 Ill. App. 400.

[10] The general statement often met with in the decisions of this state, that title is never involved in a suit of Forcible Entry and Detainer, is unsatisfactory as a proposition of law. It is an incomplete statement of actual results. (City of Bloomington *v.* Brophy, 32 Ill. App. 400). It is unfortunate so far as it is correct because it does

§ 45. **What entry is peaceable and what forcible:** Since the immediate right to possession is a defence to him who enters peaceably and no defence to one who enters forcibly, the question becomes important—when is an entry peaceable and when forcible?

This question was fully dealt with and apparently settled for the time being by our supreme court in *Fort Dearborn Lodge v. Klein.*[11] There force within the meaning of the statute was held to be "actual force as contradistinguished from that force which is implied from an unlawful entry merely," and an end was made of the idea that had grown up around a *dictum* of *Reeder v. Purdy*,[12] that the forcible entry forbidden was any entry against the will of the occupant. Thus the law stands unless we can say, upon an examination of the more recent case of *Phelps v. Randolph*,[13] that there has been some return to the *dictum* of *Reeder v. Purdy.*

Phelps v. Randolph was a peculiar case. The plaintiff who had been put out by the one having the immediate right to possession, sued in forcible entry and detainer to be restored to his wrongful possession. This he might do if the entry of the rightful owner had been forcible.[14] The plaintiff clearly had the right of it on the facts, for the entry was with actual physical force and violence. On the other hand the defendant would seem to have had the best of it upon the record, because the court below had instructed the jury that "the taking of such property by opening a gate and removing cattle or other stock therefrom, against the will of the

not suggest any legal principle upon which it may rest. The proper distinction is, it is submitted this: When title becomes relevant under the statute it may be involved. When it is irrelevant under the statute it is not involved. Now in almost all cases the question of title is by the terms of the statute entirely immaterial. Thus, when the entry is forcible, even by one entitled to possession, the right to possession and consequently title as showing the right to possession is entirely irrelevant under our decisions (*ante*, §§ 42, 43). On the other hand when the entry is peaceable by one who has the immediate right to possession, the right to possession becomes a good defence and in showing the right to possession the title may become involved. (City of Bloomington *v.* Brophy, 32 Ill. App. 400).

[11] 115 Ill. 177; *Post*, § 53.

[12] 41 Ill. 279; *Post*, § 51.

[13] 147 Ill. 335.

[14] *Ante*, §§ 42, 43.

one occupying such property, is a forcible entry under the law." This was open to the criticism that it did not fairly tell the jury that "forcible" meant actual physical force according to the doctrine of the *Klein* case, but left them to infer that an entry merely against the will of the occupant was forcible. The judgment for the plaintiff was, however, sustained and the court certainly appear to support the idea that any entry against the will of the occupant is forcible. All the authorities cited to sustain such a position are, however, curiously vulnerable. The court quotes from *Atkinson v. Lester*[15] and *Croff v. Ballinger*,[16] where the person in peaceable possession had been dispossessed by one having no right to possession.[17] In such a case the entry, no matter how peaceable, is the foundation of an action of forcible entry and detainer under the very terms of the statute. The court cites *Smith v. Hoag*[18] where the entry was clearly with actual force. Finally, they refer to that *dictum* of *Reeder v. Purdy*,[19] which long prevailed to demoralize the law where the one dispossessed brought trespass, but which was entirely disposed of in *Fort Dearborn Lodge v. Klein*.[20] *Phelps v. Randolph* is, it is believed, properly explained as a case where the facts in the record overbore the fault in the instructions; —where the court could say that upon the undisputed facts the trial court should have peremptorily instructed that the entry was forcible, so that the fault in the instruction did not do the defendant any harm. Viewed in this way the definition of a forcible entry contained in the *Klein* case is not in any way modified or interfered with. This, it is submitted, is as it should be.

§ 46. **How far may the one put out sue in trespass q. c. f., assault and battery, and d. b. a.—Three possible views:** To counts in trespass for assault and battery and *de bonis asportatis* the substance of the defence will be the same: that the defendant had the immediate right to possession of the premises and after requesting the plaintiff to leave he entered and

[15] 1 Scam. 407.
[16] 18 Ill. 200.
[17] Doty & Burdick, 83 Ill. 478; Hammond *v.* Doty, 184 Ill. 246 to same effect.
[18] 45 Ill. 250.
[19] *Post*, § 52.
[20] *Post*, § 53.

put him and his goods out, using no more force than was necessary.[1] In the case of trespass *quare clausum fregit,* the plea is technically one of *liberum tenementum,* and consists merely in the allegation that the *locus in quo* was the freehold of the defendant,[2] it being left to the plaintiff to set up in his replication any further facts which show a right to possession in him consistent with the defendant's having the freehold.[3] The basis, then, of the plea of *liberum tenementum* is the immediate right to possession of the defendant.[4]

Concerning the validity of these defences, there are three views:

(1) It has been held that these defences are all valid, no matter what sort of an action of trespass it brought, or how much force is used, provided only no more than necessary is employed. This rests upon the assumption that by the common law the defence was valid and that no statute had ever taken it away; that the forcible entry and detainer statute only punished forcible entries as crimes—viz., as offences against the public and did not alter the common law as between individuals.[5]

(2) On the other hand some cases go to an opposite extreme, holding the defences bad in all cases where the entry is

[1] For the form of the plea see 2 Chitty on Pleading (ed. of 1809), p. 529; also Newton *v.* Harland, 1 M. & G. 644, 1 Scott N. R. 474, 1 Ames' Cases on Torts, 136.

[2] 2 Chitty on Pleading (1st ed. 1809) pp. 551-554.

[3] "The plea [of *liberum tenementum*] has sometimes been criticised for being anomalous and illogical in this, that the defendant, though a freeholder, might nevertheless be guilty of a trespass,—as where a landlord wrongfully enters upon his tenant. But in such case that is proper matter to be set up in a replication,—the very thing which was done in this case." Mulkey C. J. in Fort Dearborn Lodge *v.* Klein, 115 Ill. 177 at p. 187. For the form of the replication see 2 Chitty on Pleading (1st. ed. 1809) p. 648.

[4] "As a plea of confession and avoidance it [a plea of *liberum tenementum*] has been construed to admit 'such a possession in the plaintiff as would enable him to maintain the action against a wrongdoer, and to assert a freehold in the defendant with a right to immediate possession as against the plaintiff' (Ryan *v.* Clark, 14 Q. B. 71). And this we think is the legal effect of the plea." Mulkey C. J. in Fort Dearborn Lodge *v.* Klein, 115 Ill. 177 at p. 187.

[5] Low *v.* Elwell, 121 Mass. 309; 1 Ames Cases on Torts, 2nd ed., p. 146,—and see cases there cited on

made with actual force.[6] These seem at bottom to go upon a judicial conception of what sound policy demands. They are designed to discourage violence and the taking of the enforcement of law into private hands. It is made possible because the common law relied upon in the first class of cases *supra* did not early become crystallized in decisions to the extent of the view there announced.

(3) The English courts have reached results consistent with both the above views. The earlier English cases settled it as law that in trespass *q. c. f.* the plea of *liberum tenementum* was valid even where the entry was forcible,[7] and such has always continued to be the law in England.[8] It was not, however, until the middle of the 19th century that the question arose as to the validity of the defences mentioned in the case of trespass for assault and battery. In spite of much opposition the newer public policy prevailed and the defence was held insufficient in *Newton v. Harland.*[9] Such has not only remained the law in England, but in the more recent case of *Beddall v. Maitland,*[10] the defence to a count of trespass *d. b. a.* was denied.

§ 47. **The Illinois cases—First indications:** The first tendency exhibited in the Illinois cases was to follow the result of the English cases that in trespass, *q. c. f.* the plea of *liberum tenementum* was a good defence.[11]

page 149, note 9. In Low *v.* Elwell, the action was trespass for assault and the defence was valid. *A fortiori* it would have been valid in trespass *quare clausum fregit.*

[6] Duston *v.* Cowdry, 23 Vt. 631; see cases cited 1 Ames' Cases on Torts (2nd ed.), p. 152, note 2. In Dustin *v.* Cowdrey, *supra,* the defence was denied in an action of trespass *q. c. f.* and *d. b. a. A fortiori* it would have been denied in trespass for assault and battery.

[7] 4 Am. Law Rev. 431-437.

[8] Beddall *v.* Maitland (1881), 17 Ch. Div. 174, 1 Ames' Cases on Torts (2nd ed.), 143; Beattie *v.* Mair (1882), L. R. 10 Irish 208, 1 Ames' Cases on Torts (2nd ed.), 151.

[9] 1 M. and G. 644, 1 Ames' Cases on Torts (2nd ed.), 136.

[10] 17 Ch. Div. 174, 1 Ames' Cases on Torts, 143.

[11] Hoots *v.* Graham, 23 Ill. 81. In Dean *v.* Comstock, 32 Ill. 173, 179, the Court seems to fully sustain this plea, adding, however, the qualification that the entry by the defendant must be made "in a peaceable manner." See *Post,* §§ 48, 49, *et seq.*

At the time of these two cases the Forcible Entry and Detainer statute of 1827 (*ante,* § 42) was in force.

§ 48. **Reeder v. Purdy**[12]**—Its real scope:** In this case the plaintiff joined counts in trespass for assault and battery upon his wife, *d. b. a.* and *q. c. f.* The plaintiff and his wife sued also declaring upon two counts in assault upon the wife. In both suits the general issue was filed and by agreement all defences might be made under it. The plaintiff had entered under a parol contract for the purchase of the land and the defendant claimed to be the owner with an immediate right to possession. The court instructed[13] that "The fact that the defendant Reeder was the owner, and entitled to the possession of the premises occupied by the plaintiff is no justification for the assault and battery upon the plaintiff's wife, if any such is proven, and no justification of his attempts to take possession of the premises occupied by the plaintiff by force, and no justification for the removal of the plaintiff's property therefrom by force, if any such force is proven; provided that the plaintiff and his family were in the quiet possession of the said premises at the time of such assault and force." There was a verdict and judgment for the plaintiffs, and upon appeal this was affirmed. The propriety of the above quoted instruction was directly called in question, fully considered by the supreme court and approved. It might have been objected that this instruction did not make clear that it was to be applied only in case the entry was made with actual physical force. But this might well have been met by saying that it was not material error because the trial court was warranted from the evidence in assuming that actual force had been used.[14] Indeed the su-

[12] 41 Ill. 279. Note that this case is cited almost indifferently as Reader *v.* Purdy and as Reeder *v.* Purdy. The reason seems to be that the former is the title in Denslow's edition of 41 Ill., and the latter is the spelling used in Freeman's edition of the same report.

[13] These instructions are set out only in 41 Ill. 279, 280 (Denslow's Reports).

[14] The following is a description of the means employed to get Purdy out, given in Denslow's report of the case: "Reader, Baker and Barker, in the absence of Purdy from home, got admission into the house, and then proceeded to put Mrs. Purdy and the furniture out of the house by force. Mrs. Purdy, who is described as a weak little woman, weighing ninety-six pounds, fought for her possession with great energy. She locked one of the doors and gave the key to her daughter, from whom it was taken, then went at the assailants with hot water, a

preme court seems to make this assumption as a matter of course. The approval of this instruction then, taken together with the fact that the jury could not have found otherwise than that actual force had been used, establishes this rule only: in trespass *quare clausum fregit,* assault and battery, or *de bonis asportatis* the right of possession is no justification where the entry was forcible.[15]

§ 49. Subsequent cases—Fort Dearborn Lodge v. Klein:[16] The scope of *Reeder v. Purdy* as above indicated has been repeatedly affirmed and followed. It mattered not whether the suit was trespass with the three counts[17] as in *Reeder v. Purdy,* or with a count *de bonis asportatis* joined with one or the other of the two out of the three counts,[18] or in trespass *quare clausum fregit* alone.[19] In every instance the result was the same. Any justification based upon the immediate right to possession was out of the question where the entry was with actual force. Thus, *Reeder v. Purdy* came very properly to stand for the proposition that the common law right of a person entitled to possession to forcibly enter upon the land, using as much force as might be necessary, had been done away with in this state.[20]

stick of wood and a bayonet belonging to her husband, who had been a soldier in the army, and, insomuch that one of the assailants was obliged to hold her by the wrists, to enable the other two to get out the furniture. Finally, after all the furniture had been got out of the house, except that in her bed room, she succeeded in nailing a board across the door and barring her assailants out. By this time the city marshal and others had arrived, and the attempt to dispossess her, which had occupied from nine to twelve o'clock in the morning, was abandoned."

[15] Observe, in passing, that if the defendant has himself been wrongfully dispossessed by the plaintiff, and the defendant has *forcibly* retaken possession, the defendant's right to possession seems to be a valid defence: Chapman *v.* Cawrey, 50 Ill. 512; Illinois & St. L. R. R. Co. *v.* Cobb, 82 Ill. 183, 94 Ill. 55.

[16] 115 Ill. 177.

[17] Haskins *v.* Haskins, 67 Ill. 446.

[18] Wilder *v.* House, 48 Ill. 279 (assault and *d. b. a.*); Farwell *v.* Warren, 51 Ill. 467 (*q. c. f.* and *d. b. a.*); Comstock *v.* Brosseau, 65 Ill. 39 (*q. c. f.* and *d. b. a.*).

[19] Page *v.* De Puy, 40 Ill. 506, decided at the same term (Apl. 1866) as Reeder *v.* Purdy, and following rather than preceding that case. (See 40 Ill. 509-510); Illinois & St. L. R. R. Co. *v.* Cobb, 68 Ill. 53.

[20] Dearlove *v.* Herrington, 70 Ill. 251, 253.

Fort Dearborn Lodge v. Klein and the cases following it[21] have only made this more clear. In none of them is it suggested for a moment that any entry by actual force can be justified. In the *Klein* case the court especially distinguishes that case from *Reeder v. Purdy* and *Page v. DePuy* in the following manner: "In the present case the plea expressly avers that the entry was peaceable, and moreover the proofs show that such was the fact. There was such force in the *Page* and *Reeder* cases as to clearly bring them within the forcible entry and detainer laws, even as construed in England."

The *Klein* case and more recently *Ryan v. Sun Sing*[22] have justified so far as the action of trespass *quare clausum fregit* is concerned,[23] the writer's view of the true scope of *Reeder v. Purdy*. They hold that if the entry is peaceable the immediate right to possession is a complete defence.[24] The plea of *liberum tenementum* is, however, bad on demurrer unless it contain an addition not found in Chitty,—that the defendant entered "not with force, but peaceably."[25]

§ 50. The ground of the rule laid down in Reeder v. Purdy: "The statute of forcible entry and detainer [of 1827][26]" said Mr. Justice Lawrence in that case "not in terms, but by necessary construction forbids a forcible entry, even by the owner, upon the actual possession of another.[27] Such entry is, therefore, unlawful. If unlawful it is a trespass, and an action for the trespass must necessarily lie." The first section of the

[21] Lee *v.* Mound Station, 118 Ill. 304; Ryan *v.* Sun Sing, 164 Ill. 259; Rose *v.* Ruyle. 46 Ill. App. 17.

[22] 164 Ill. 259.

[23] What the holding will be where the entry is peaceable but the action is for assault and battery or *de bonis asportatis* still remains an open question in our Supreme Court (*post*, § 54).

[24] See also Dean *v.* Comstock, 32 Ill. 173, 179 (*semble*); Brown *v.* Smith, 83 Ill. 291 (*semble*); Piper *v.* Connelly, 108 Ill. 646; Lee *v.* Mound Station, 118 Ill. 304; Rose *v.* Ruyle, 46 Ill. App. 17.

[25] Such was the form of the plea in Fort Dearborn Lodge *v.* Klein, 115 Ill. 177; also in Ryan *v.* Sun Sing, 164 Ill. 259. In Rose *v.* Ruyle 46 Ill. App. 17 (3d dist.) the Court (by Pleasants, J.) follows the Reeder and Klein cases with great discrimination, laying it down distinctly that a good plea of *liberum tenementum* must contain the additional allegation that the entry was peaceable.

[26] *Ante*, § 42.

[27] See also Ambrose *v.* Root, 11 Ill. 497, 500, *accord.*

forcible entry and detainer statute of 1872,[28] however, left nothing to implication, but, in terms provided, "that no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force but in a peaceable manner."

The English statutes against forcible entry and detainer were criminal acts. They punished and prohibited offences against the public. It early became the settled law in England that these statutes, though that of 5 Rich. II, ch. 7, contained a prohibition in the same language as sec. 1 of our act of 1872, did not do away with the defence of *liberum tenementum* in an action of trespass *q. c. f.* even when the defendant had entered with such force as the statute made a criminal offence.[29] This was sustained on the ground that the creation by statute of a public offence punished by the state did not alter the rights of individuals toward each other. Now, the Illinois acts, though modeled to some extent upon the English acts, are not criminal statutes. They neither define, prohibit or punish an act against the public as did the English acts. They contain in addition to the civil remedy for restitution, simply a general prohibition and, if that is to be given full effect as a prohibition, it must operate to prevent any justification for entries by the one entitled to possession where such entries are by force.

The English cases, having started in to say that the criminal forcible entry and detainer statutes had nothing to do with the rights of individuals toward each other, should have continued so to hold, and to regard the right of entry using no more force than is necessary as a justification, not only in trespass *q. c. f.* but in assault and battery and *d. b. a.* as at common law.[1] The inconsistency of the English cases is that they did not do this, but, in *Newton v. Harland*[2] held that, in trespass for assault and battery the defence of right to possession was not good. Our Supreme Court, with more consistency, it is believed, has continued down to the present

[28] *Ante*, § 43.

[29] *Ante*, § 46.

[1] This is the position which the Massachusetts Court has taken. *Ante*, § 46.

[2] 1 M. & G., 644, 1 Scott N. R. 474, 1 Ames Case on Torts, p. 136.

time, to consider the forcible entry and detainer statute of 1827 and 1872 as containing a sweeping prohibition on all forcible entries, even when made by the person having the right to possession. It has constantly held, therefore, that such an entry constituted an unjustifiable trespass *q. c. f.* and that there was no defence to counts for assault and battery and trespass *d. b. a.*

§ 51. Distinction between forcible and peaceable entry: The actual decisions of our supreme court and the grounds upon which they rest clearly make the distinction between a forcible entry and a peaceable entry all important. When, then, is an entry forcible and when peaceable? The answer to this question depends wholly upon the construction to be given the terms "forcible," and "peaceable" in our forcible entry and detainer statutes. It is believed that these were so far modeled after the English acts that our construction of these terms should follow that given to the same words in the English statutes.[1] This is certainly the view taken by our supreme court in *Fort Dearborn Lodge v. Klein*.[2] "The word forcible, as used in the statute[s]" says Mr. Justice Mulkey in his admirable opinion in that case, referring to the statute of Rich. 2 and some other English forcible entry and detainer acts, "was held to mean actual force as contradistinguished from that force which is implied from an unlawful entry merely. By actual force was meant such as breaking open doors, or other like violent acts. So where an entry was affected by means of threats or intimidation of any kind, such as being attended by an unusual number of persons or by making a display of dangerous weapons, it would be deemed a forcible entry within the meaning of these statutes."[3]

§ 52. The vice of Reeder v. Purdy.[4] The vice, if any, of *Reeder v. Purdy* was the impression which it left that a forcible

[1] *Post*, § 147, note 45.

[2] 115 Ill. 177, 185-187. *Ante*, § 45.

[3] Observe the following cases where the entry was forcible under this view: Reeder *v.* Purdy, 41 Ill. 279; Wilder *v.* House, 48 Ill. 279; Farwell *v.* Warren, 51 Ill. 467; Haskins *v.* Haskins, 67 Ill. 446; Illinois & St. L. R. R. Co. *v.* Cobb, 68 Ill. 53; Westcott *v.* Arbuckle, 12 Ill. App. 577.

In the following cases the entry was peaceable: Fort Dearborn Lodge *v.* Klein, 115 Ill. 177; Ryan *v.* Sun Sing, 164 Ill. 259; Comstock *v.* Brosseau, 65 Ill. 39.

[4] 41 Ill. 279, *Ante*, § 48.

entry, such as made a right to possession no defence in trespass, meant any entry against the will of the person in possession. This would practically make every entry forcible and deny any justification for the entry of one entitled to the possession.

Some color for this view was to be found in *Reeder v. Purdy*. Mr. Justice Lawrence, in that case, after quoting from Blackstone to the effect that "an eighth offence against the public peace is that of forcible entry and detainer, which is committed by violently taking or keeping possession of lands, and tenements with menaces, force and arms, and without the authority of law, * * *" goes on to say, "In this state it has been constantly held that any entry is forcible, within the meaning of this law, that is made against the will of the occupant." In another portion of his opinion after admitting that one entitled to possession may enter "if he can do so without a forcible disturbance of the possession of another," continues, "but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant."

Observe that since the entry in *Reeder v. Purdy* was indisputably with actual force and the instructions were sustained upon that assumption,[5] these remarks of Mr. Justice Lawrence were entirely unnecessary to the decision. They might, then, well have been passed by as carrying farther than was intended. Instead, they were evidently seized upon and exploited for the purpose of making all entries illegal, for an entry, however peaceable, might always be against the will of the occupant. So long as *Reeder v. Purdy* was cited as the leading case upon the subject, it was not uncommon to find judges at *nisi prius*[6] giving instructions that not even one who had an immediate right to possession could make an entry without legal process against the will of the one in possession. Even the supreme court[7] itself appears to have approached very close to such a rule.

[5] *Ante*, § 48.

[6] Brooke *v.* O'Boyle, 27 Ill. App. 384; Mueller *v.* Kuhn, 46 Ill. App. 496; Fort Dearborn Lodge *v.* Klein, 115 Ill. 177 (observe attitude of the trial court).

[7] Dearlove *v.* Herrington, 70 Ill. 251, 253; Comstock *v.* Brosseau, 65 Ill. 39; Westcott *v.* Arbuckle, 12 Ill. App. 577, 580. In Dearlove *v.* Herrington, *supra*, the Court cited Reeder *v.* Purdy as holding that "if the owner in fee be wrongfully kept out of possession, he is not

Mr. Justice Lawrence did not cite any cases for his proposition that an entry by one entitled to possession is forcible within the meaning of the forcible entry and detainer statute if it be made "against the will of the occupant." He did, however, speak of its having been constantly so held in this state. The learned judge, doubtless had in mind two well known previous adjudications[8] that where one, who has no right to do so, enters upon the one in peaceable possession, the one so entered upon can bring an action of forcible entry and detainer under the statute. In these cases it was urged that the plaintiff could not sue because the entry was not forcible. The obvious reply to this was that by the statute, under which those cases were decided,[9] an action for possession was given if the defendant made "any entry into any lands, tenements or other possessions, except in cases where entry is given by law, or shall make any such entry by force. * * *" If the entry were wrongful it did not have to be with actual force to enable the one disposesssed to bring his action. In *Atkinson v. Lester*[10] this was stated pretty directly. In *Croff v. Ballinger*[11] however, the court spoke to the point more at length, using expressions more picturesque than accurate. It was said that "If one enters into the possession of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible in legal contemplation. The word force in our statute, means no more than the term *vi et armis* does at common law, that is, with either actual or implied force." It is submitted that these remarks properly had reference only to the case where the plaintiff, in the action of forcible entry and detainer, had been put out by one who had no right to the possession.

permitted to enter against the will of the occupant, except for the purpose of demanding rent, or to make necessary repairs."

[8] Atkinson *v.* Lester, 1 Scam. 407; Croff *v.* Ballinger, 18 Ill. 200. Many cases decided since Reeder *v.* Purdy follow the doctrine of these two cases: Smith *v.* Hoag, 45 Ill. 250; Doty *v.* Burdick, 83 Ill. 473; Phelps *v.* Randolph, 147 Ill. 335; Hammond *v.* Doty, 184 Ill. 246; Pratt *v.* Stone, 10 Ill. App. 633; Pederson *v.* Cline, 27 Ill. App. 249; Parrott *v.* Hodgson, 46 Ill. App. 230; Coverdale *v.* Curry, 48 Ill. App. 213; Roberts *v.* McEwen, 81 Ill. App. 413.

[9] In both cases it was the Forcible Entry and Detainer Act of 1827: R. S. 1827, p. 228; R. S. 1833, p. 311; R. S. 1839, p. 313; R. S. 1845, p. 256.

[10] 1 Scam. 407.

[11] 18 Ill. 200.

It is believed that the vice of *Reeder v. Purdy* consisted in suggesting by way of *obiter dictum* that the same language applied where the plaintiff in trespass had been put out by one having the immediate right to possession.

§ 53. **The virtue of Fort Dearborn Lodge v. Klein:** The real virtue of *Fort Dearborn Lodge v. Klein* was that it put an end to the idea which apparently began with *Reeder v. Purdy* that the forcible entry forbidden to one entitled to the possession was any entry which was against the will of the occupant. Mr. Justice Mulkey, in giving the opinion of the court in that case, said:[12] "With respect to the prohibitory feature contained in the first section it is, in legal effect, the same as that contained in 5 R. 2 chap. 8 above cited. A person not having a right to enter is forbidden to do so. One having such right may enter provided he do so without force, and in a peaceable manner. The word 'force' as here used, means actual force, as contradistinguished from implied force. Any entry requires force, in the literal sense of the term, but that, of course could not have been meant, for it would involve an absurdity. Nor does it mean that force which the law implies where a peaceable entry is made by one having no right to enter, for the act absolutely prohibits a person of that kind from making an entry at all. The conclusion, therefore, is irresistible that the force which the statute inhibits is actual force."

§ 54. **Some further questions:** It would seem that acts which would constitute a *prima facie* case of trespass to chattels may be perfectly consistent with a peaceable entry. The right to possession ought therefore, in such a case to be a good defence. In the same way acts which would constitute a *prima facie* case of assault and battery might, if the damages were merely nominal, be perfectly consistent with a peaceable entry. In such case, also, the right to possession should be a valid defence.

A more difficult question is the determination of when a peaceable entry becomes complete, so that any further acts toward the person and chattels of the former occupant may be justified as the legitimate defence of a lawful possession, rather than acts done in the course of gaining possession in an unlawful manner. In *Page v. De Puy*[1] Mr. Chief Justice Walker

[12] 115 Ill. 177, 191.

[1] 40 Ill. 506, 510.

says the one entitled to possession has "no right to make a forcible entry, or, having lawfully entered, to inflict injury upon the person or property of the occupant." This seems to point to the rule which the English cases have adopted[2] that "if an entry be made peacebly, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of Richard II."

§ 55. View of the appellate court in the first district—Before the Klein case:[3] The first cases[4] decided by the appellate court of the first district involving the validity of the defence of immediate right to possession in an action of trespass came up in 1883, two years before the *Klein* case. It seems, however, to have followed the true rule as announced by the supreme court in the *Klein* case,—that, in trespass, with counts for assault and battery, *de bonis asportatis,* and *quare clausum fregit,* where the entry was with actual force, the right of possession by the defendant was no defence.[5]

§ 56. Since the Klein case[6]**—In trespass q. c. f.—Judge Gary's view:** Since the Klein case the appellate court of the first district seems to have gone back to the settled rule of the English cases,[7]—that in trespass *quare clausum fregit,* even where the entry of the defendant has been made with actual force, the plea of *liberum tenementum* is a complete defence.[8]

In five[9] of the nine cases[10] containing actual decisions or *dicta* to this effect the opinion of the court was given by Judge

[2] Edwick *v.* Hawkes, 18 Ch. Div. 199, 210-212.

[3] 115 Ill. 177, *Ante,* §§ 49, 53.

[4] Westcott *v.* Arbuckle, 12 Ill. App. 577.

[5] *Ante,* §§ 48, 49, 50.

[6] 115 Ill. 177; *ante,* §§ 49, 53.

[7] *Ante,* § 46.

[8] The only qualification to this, suggested merely and never acted upon, is that there must be no breach of the peace accompanying the entry: Brooke *v.* O'Boyle, 27 Ill. App. 384, 386.

A breach of the peace obviously includes more than actual force.

[9] Brooke *v.* O'Boyle, 27 Ill. App. 384; Harding *v.* Sandy, 43 Ill. App. 442; Frazier *v.* Caruthers, 44 Ill. App. 61; Ostatag *v.* Taylor, 44 Ill. App. 469; White *v.* Naerup, 57 Ill. App. 114.

[10] The cases *supra,* note 9, and also Chicago & W. I. R. R. Co. *v.* Slee, 33 Ill. App. 416 (Moran, J.); Eichengreen *v.* Appel, 44 Ill. App. 19 (Waterman, J.); Mead *v.* Pollock, 99 Ill. App. 151 (Waterman, J.); Mueller *v.* Kuhn, 46 Ill. App. 496 (Shepard, J.).

Gary. It will be convenient to examine these cases together since the repetition of his views on several different occasions upon the same subject will go far toward precluding error as to what he meant. In three[11] of the five cases where Judge Gary gave the opinion of the court the form of action seems to have been trespass *quare clausum fregit* alone.[12] The trial judge seems fairly to have instructed the jury that even though the plaintiff might have wrongfully withheld the possession of land from the defendant, the latter would not be justified in entering and taking possession with actual force.[13] In all of these cases such an instruction was held improper. In *White v. Naerup*[14] the action was trespass *quare clausum fregit*. The appellate court held that an instruction should have been given which in substance declared that if the plaintiff (the tenant) did acts which amounted to a breach of a covenant of the lease "then the defendant [the landlord] had the right to enter said store and take possession thereof." It is noticeable here

[11] Brooke *v.* O'Boyle, 27 Ill. App. 384; Harding *v.* Sandy, 43 Ill. App. 442; Ostatag *v.* Taylor, 44 Ill. App. 469.

[12] In Brooke *v.* O'Boyle, *supra*, note 1, the case came up from a justice of the peace, so there were no written pleadings but from the evidence trespass *q. c. f.* was all that could have been complained of.

[13] In Brooke *v.* O'Boyle, 27 Ill. App. 384, the Court instructed: "Although possession of land may be acquired wrongfully by the plaintiff this will not justify even the owner of property in entering and *taking possession forcibly* against the will of the person in possession."

In Harding *v.* Sandy, 43 Ill. App. 442, the Court instructed: "That a person in the actual peaceable possession of premises, is presumed to be there rightfully and no one, not even the owner of the property, has a right to go upon the premises and *forcibly eject* the person so in possession of the premises or any part of them, or remove his property therefrom against his will, unless the person so entering has some legal process from a court of competent jurisdiction, authorizing him to do so, or consent of the one in possession."

In Ostatag *v.* Taylor, 44 Ill. App. 469, the Court instructed: "The law does not prevent a man, although he is entitled to possession of certain premises, to take the law into his own hands and *employ force and use violence* to regain possession even though such possession is wrongfully withheld. The law has provided the action of forcible entry and detainer and the action of ejectment for this purpose and no one has the right to *forcibly eject* another in the peaceable possession of premises without legal process."

[14] 57 Ill. App. 114.

that there is no qualification that the defendant must enter peaceably and without force.

In all the cases above referred to the temper of the court quite manifestly leans to the view that one having a right to possession may enter even with actual force, provided there be no breach of the peace. In *Brooke v. O'Boyle*[15] Judge Gary says: "The heresy introduced into the law of this state in 1886[16] based upon *Dustan v. Cowdry*, 23 Vt. 635, has after much pruning been got rid of in *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. The owner may take from a wrongful holder his own if he can do so without a breach of the peace." In *Harding v. Sandy*[17] the same learned judge said: "The profession is slow to unlearn what in *Brooke v. O'Boyle*, 27 Ill. App. 384, we called 'the heresy introduced into the law of the state in 1866.' The case there cited, *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, holds that the owner may take from a wrongful holder his own if he can do so without a breach of the peace. * * * The contrary doctrine for some time held in this state was first adopted by the supreme court in *Reeder v. Purdy*, 41 Ill. 279 * * *."[18] In *Frazier v. Caruthers*,[19] Judge Gary says: "Whenever there is an abuse of the right of entry by excessive force (and for that purpose all force is excessive[20]) restoration of the possession may be obtained by an action of forcible entry, but trespass *qu. cl.* will not lie. * * *. The same argument that induced the decision to the contrary in *Reeder v. Purdy*, 41 Ill. 279, has more than once been held specious in England." A little further on he continues: "The true rule is laid down in *Hoots v. Graham*, 23 Ill. 81,[21] where it is said 'no case has been referred to, and it is believed none exists which holds

[15] 27 Ill. App. 384, 386.

[16] This is obviously a misprint for 1866, the year Reeder *v.* Purdy was decided. The Court itself makes the correction in Harding *v.* Sandy, 43 Ill. App. 442.

[17] 43 Ill. App. 442.

[18] The Court here goes on to say that Reeder *v.* Purdy was based upon Duston *v.* Cowdry, 23 Vt. 631, and that the latter was in turn based upon Newton *v.* Harland, 1 M. & Gr. 644, 1 Scott, N. R. 474, which "has been long since overruled in England." This last would seem incorrect. See *ante*, § 46.

[19] 44 Ill. App. 61, 67.

[20] This may well be doubted, see *ante*, §§ 51-53.

[21] This is repeated in Ostatag *v.* Taylor, 44 Ill. App. 469, 470.

that a trespasser or a person in possession as a wrong doer can recover against the owner of the fee, with right of possession. Such a rule would be an end to the enjoyment of property and its protection by judicial determination. It would be to hold that the actual possession however acquired, was paramount title.' The experience of the last twenty-five years in this city [Chicago] justifies the statement that also under it blackmail is lawful gain." In *White v. Naerup*[22] he said: "This court has gone back to the common law, as held in *Hoots v. Graham,* 23 Ill. 81, that a trespasser or a person in possession as a wrong doer cannot recover against the owner of the fee with right of possession."

§ 57. **Sustained by other judges:** The four cases, where the opinions of the court were given by other judges, seem to back up the clear cut views of Judge Gary.[23] In *Chicago & W. I. R. R. Co. v. Slee,*[24] Judge Moran seems to have laid it down as law that in trespass *qu. cl. fr.* the right to possession alone is a good defence, making no qualification that the entry must be peaceable. In *Eichengreen v. Appel,*[25] Judge Waterman said: "Proceeding with reasonable notice, in a reasonable manner and with no unnecessary rigor, as appellant did, appellee has no cause of action because appellant merely took what belonged to him and which appellee held without right."[26] In *Mueller v. Kuhn*[27] Judge Shepard said: "The principal vice in each of the instructions consists in the assumption of the first and the expression of the sixth that a landlord may not re-enter and retake possession of his premises withheld by a tenant in possession after the determination of a lease, except by process of law. It would put an end to the enjoyment of property to hold that trespass *quare clausum fregit* could be maintained against the owner, with right of possession, who merely takes possession of what is his own."

§ 58. **Contrary to the rule of the supreme court:** If the writer is correct in finding the doctrine of our supreme court to be that the right to possession is only a defence in trespass *qu. cl. fr.* when the entry of the defendant is peaceable as

[22] 57 Ill. App. 114, 118.
[23] *Ante,* § 56.
[24] 33 Ill. App. 416.
[25] 44 Ill. App. 19, 20.
[26] See also the remarks of the same learned judge in Mead *v.* Pollock, 99 Ill. App. 151, 154.
[27] 46 Ill. App. 496.

distinguished from an entry with actual force and violence,[28] it is plain that the appellate court of the first district has tempered justice with mercy for the landlord or landowner. It apparently allows the one entitled to possession to use as much force as may be necessary up to the point of committing a breach of the peace. It would apparently regard the plea of *liberum tenementum* in the form given by Chitty[29] as a good defence. To this extent the rule of the appellate court in the first district is materially different from that of our supreme court.

§ 59. In trespass for assault and battery and de bonis asportatis: How the appellate court of the first district would hold when the action is for assault and battery or *de bonis asportatis* instead of *quare clausum fregit* cannot be known by any direct decision. There seems to be not much doubt but that Judge Gary would hold the defence of right to possession good,—the plaintiff being left to recover if at all, under a replication alleging excessive force or perhaps a breach of the peace. In *Ostatag v. Taylor*[30] the learned judge says: "No trespass is committed in taking possession of one's own; we add, if an assault is committed in so doing, it may or not, be justifiable." On the other hand Judge Shepard in *Mueller v. Kuhn*[31] suggests the distinction recognized by the English cases that it is only in trespass *qu. cl. fr.* that the defence of right to possession is valid even when the entry is forcible. In that case the declaration contained counts in trespass for assault *de bonis asportatis,* and *quare clausum fregit.* The instructions were general and calculated to give the jury to understand that no entry could be made by one entitled to possession except by process of law. These instructions were held bad only because they led the jury to believe that, for the mere entry into the land, there was no defence and the judgment for the plaintiff was reversed because the jury might have given damages for the mere entry upon the land. The natural inference is that the court was by no means prepared to say that in trespass for assault and *de bonis asportatis* the defence of right to possession was valid under any circumstances, much less when the entry was forcible.

[28] *Ante,* §§ 45, 51-53.
[29] *Ante,* § 49.
[30] 44 Ill. App. 469, 470.
[31] 46 Ill. App. 496.

§ 60. **Defence of leave and license:** Our supreme court, having adhered to the view that sec. 1 of the forcible entry and detainer statutes of 1827 and 1872 prohibited all entry with actual force by him who had the right to possession, so that the one so entering was without defence in trespass *qu. cl. fr., d. b. a.,* or for assault and battery,[1] it remains to be inquired how far a plea of leave and license may be a good defence to an entry with actual force.[2]

If the forcible entry by one having the immediate right of possession be prohibited by statute, and if such statutory prohibition be based upon the injury to the public which arises from such entries, rather than upon the conferring of any benefit to the one wrongfully holding possession, on what ground can a plea of leave and license to a forcible entry be supported?[3] It was very pertinently suggested by Judge Gary in *Frazier v. Carruthers,*[4] that if the forcible entry and detainer statute probihits the entry then no plea of leave and license was good, because the parties should not by their agreement be allowed to permit that to be done which by a statute *pro bono publico* is prohibited. Yet nothing now seems clearer under the authorities in this state[5] than that such a defence is valid, and that, too, quite regardless of whether the plaintiff counts

[1] *Ante,* §§ 48-50.

[2] It is not believed that any proper distinction can be made between a license to enter with as much force as may be necessary and a license to expel and put out the occupant and his goods, using as much force as may be necessary.

As we have seen, (*Ante,* § 54), the forcible entry or the peaceable entry and putting out of the occupant by force are within the prohibition of the Forcible Entry and Detainer statutes. Compare, however, Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214.

[3] Note that where, as in Massachusetts, they deny the forcible entry and detainer statutes any effect except to give a civil remedy for restitution, (*ante,* § 46) a plea of leave and license is unnecessary. *A fortiori* it is sufficient.

[4] 44 Ill. App. 61, 67. See also Marks *v.* Gartside, 16 Ill. App. 177, 179, where the plea in trespass set up leave and license to the landlord, who was defendant, to enter and repair. The Court suggested that under the Reeder *v.* Purdy (*ante,* §§ 48-50) doctrine such a plea was no defence to the entry by the defendant and could only go in mitigation of damages.

[5] Ambrose *v.* Root, 11 Ill. 497; Page *v.* De Puy, 40 Ill. 506; Fabri *v.* Bryan, 80 Ill. 182; Mueller *v.* Kuhn, 46 Ill. App. 496; Schaeffer *v.* Silverstein, 46 Ill. App. 608; and Wetzel *v.* Meranger, 85 Ill. App. 457, may be cases of the same sort.

in trespass for assault and battery,[6] *de bonis asportatis*[7] or *quare clausum fregit*.[8]

The logical difficulty with this result is recognized in a curious way in *French v. Willer*.[9] There the question was whether a power of attorney to confess judgment in a forcible entry and detainer suit was valid or not. The majority of the court argued that only the legislature could authorize such a proceeding, since it would be contrary to the mode of suit prescribed by the forcible entry and detainer statute. To this the three minority judges replied that if leave and license was a good defence to the forcible entry prohibited by the forcible entry and detainer statute there was no reason why the parties might not, by their agreement, so far alter the mode of suit prescribed by the statute as to make lawful the confession of judgment in an action of forcible entry and detainer. It may well be assumed that the retort of the majority of the court was that so far as the plea of leave and license was a defence to an offense against the public prohibited by the forcible entry and detainer statute its admission was illogical and anomalous and it should not be made the basis for a further anomaly.

Perhaps the best ground for the rule that the plea of leave and license is good in trespass for a forcible entry is to be found in the illogical punishment which our forcible entry and detainer statute furnishes. Logically the entry should be made a crime and prosecuted as such, and the punishment by fine or imprisonment be exacted by the state. The one dispossessed should be restored to possession unless the one entering were entitled to it. This was the theory upon which the English statutes operated. *Newton v. Harland*[1] broke the symmetry of these results and it is not inconceivable that the illogical step taken in that case might, in order to correct to some extent the first error, have led to the further illogical position that a plea of leave and license in trespass for assault and battery or *d. b. a.* is valid.[2] So long, however, as

[6] Ambrose *v.* Root, 11 Ill. 497.

[7] Fabri *v.* Bryan, 80 Ill. 182; Mueller *v.* Kuhn, 46 Ill. App. 496.

[8] Page *v.* De Puy, 40 Ill. 506; Fabri *v.* Bryan, 80 Ill. 182; Mueller *v.* Kuhn, 46 Ill. App. 608.

[9] 126 Ill. 611.

[1] 1 Scott, N. R. 474, 1 M. & G. 644; *ante*, § 46.

[2] Cf. Kavanagh *v.* Gudge, 7 M. & G. 314. There is, however, a *dictum* in Edwick *v* Hawkes, 18

our forcible entry and detainer statutes punished the offence against the public by permitting the person entered upon to pocket the fine awarded in the shape of actual and punitive damages in an action of tort against the person forcibly entering—a remedy in form purely civil—it was not unnatural that the usual principles applicable to such suits should prevail. In short, if the forcible entry and detainer statutes, apart from restoring possession, did no more than give the one put out forcibly by him who had the right to possession, a civil remedy, why should not the plea of leave and license be good?

§ 61. How far equity will enforce a forfeiture: Where a forfeiture has been perfected the remedy at law for possession is adequate, and a bill in equity praying for a decree that the premises might be forfeited by reason of a breach of condition would seem to be improper[1] If, however, the interest is forfeited and the one having the legal title has such possession, and the acts of him whose interest has been forfeited are such, that equity could grant relief, apart from any question of forfeiture, then the bill may lie. Thus, where the defendant had an easement over the plaintiff's land which was subject to forfeiture for breach of a condition subsequent, our supreme court declared the mere filing of a bill sufficient completion of forfeiture and then allowed the bill on the ground that it was filed to restrain repeated and continuous trespasses upon the complainant's land.[2] Again, since the grantee or lessee, whose interest has been legally forfeited for breach of condition has a right in equity under some circumstances—especially when the forfeiture is for nonpayment of rent or money—to redeem from such forfeiture,[3] no reason is perceived why, after a legal forfeiture, he may not file a bill to foreclose the right to redeem, just as a mortgagee files a

Ch. Div. 199, 208, to the effect that a leave and license given by a tenant to his landlord to enter and "upon so entering to use all necessary force in putting out the plaintiff and his family" would be "void as being in effect a license to commit a crime" under the statute of Richard II.

[1] Douglas *v.* Union Mutual Life Ins. Co., 127 Ill. 101, 116 (*semble*); Toledo, St. L. & N. O. R. R. Co. *v.* St. Louis & O. R. R. Co., 208 Ill. 623.

[2] Lyman *v.* Suburban R. R. Co., 190 Ill. 320.

[3] *Post*, § 66.

bill to foreclose the mortgagor's equity to redeem or the vendor sues to end the vendee's equity to purchase. It would seem as if the bill of the appellee in *Crandall v. Sorg*[4] might have been sustained on this ground since he had declared his forfeiture and was in possession. The appellate court, however, directed the bill to be dismissed, because equity would not enforce a forfeiture.

PART 8.

RELIEF AGAINST FORFEITURE.

§ 62. At law—Several modes of relief: The common law tempered the rigors of forfeiture in several ways;—by declaring the estate merely voidable and not void when the breach occurred,[5]—by requiring some further act on the part of the grantor or lessor to complete the forfeiture, as an entry in the case of the forfeiture of a freehold estate,[6] or an election in the case of the forfeiture of a term for years,[7]—and, in the case of a forfeiture for the nonpayment of rent, a very particular sort of a demand for rent.[8]

§ 63. License:[9] By the rule in *Dumpor's* case a consent, once having been obtained to assign contrary to the provisions of the covenant against assignment, any further assignment might be made without consent, and that, too, whether the first consent was to assign "to any person or persons whatsoever,"[10] or to a single specified person.[11] From the language of our supreme court in *Kew v. Trainor*[12] there must be a doubt whether it would recognize *Dumpor's* case at all as law.[13] It is even probable that, if it did recognize it, the rule would be confined strictly to the facts of *Dumpor's* case where the consent was to assign "to any person or persons whatsoever," and not applied to the common case of the con-

[4] 99 Ill. App. 22.

[5] *Ante*, § 30.

[6] *Ante*, § 30a.

[7] *Ante*, § 31.

[8] *Ante*, § 31. Observe also that the tendency was to construe provisions as covenants rather than conditions: Gallaher *v.* Herbert, 117 Ill. 160.

[9] Post, § 64, note 16.

[10] Dumpor's Case (1603), 4 Co. 119b, 5 Gray's Cases on Prop. 23.

[11] Brummell *v.* Macpherson (1807), 14 Ves. 173, 5 Gray's Cases on Prop. 26.

[12] 150 Ill. 150, 157.

[13] But see Voris *v.* Renshaw, 49 Ill. 425.

sent to an assignment to a particular person. At all events, it is perfectly clear that when the lessor consents to an assignment with an express proviso "that no further assignment of said lease or subletting of the premises, or any part thereof, shall be made without my written consent first had thereto," no further assignment can be made without such written consent.[14] If that be so, why would not a clause inserted in the lease itself to the effect that one consent to an assignment should not waive the required consent for any future assignment, be sufficient to abrogate the rule in *Dumpor's* case?

§ 64. **Waiver:**[15] Of course there is no question about the validity of any express release of the right to declare or complete a forfeiture.[16] The common law, however, in its endeavor to soften the hardships of forfeiture went farther than this and declared that "any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee, is a waiver of such forfeiture."[17] Thus if the landlord assents to certain acts which, in effect, recognize the existence of the tenancy, that is a waiver though the landlord never actually thought about any waiver at all. Thus, the receipt of rent due for a period subsequent to the happening of the breach of condition amounts to a waiver of the cause of forfeiture in the absence of any express reservation of the right to declare a forfeiture in spite of the receipt of rent.[18] In the same way other acts,

[14] Kew *v.* Trainor, 150 Ill. 150; Springer *v.* Chicago Real Estate Loan Co., 202 Ill. 17 (*semble*).

[15] See Chicago *v.* Chicago & W. I. R. R. Co., 105 Ill. 73.

[16] The common case of this is where the landlord gives a license or consent to the tenant to do such acts as would amount to a breach of the terms and conditions of such lease were it not for such consent: Moses *v.* Loomis, 156 Ill. 392 (consent by parol).

[17] Webster *v.* Nichols, 104 Ill. 160, 172. See also Channel *v* Merrifield, 106 Ill. App. 243, where the tenant's right to terminate the lease by 30 days' notice after failure of the lessor to furnish power was waived by tenant's remaining in possession after the expiration of the 30 days. In the Supreme Court this was reversed (206 Ill. 278) on the ground that the lessor had the 30 days in which to begin again to keep his covenant and avoid the forfeiture so that the lessee did not have to move until a reasonable time after the 30 days expired.

[18] Watson *v.* Fletcher, 49 Ill. 498; Webster *v.* Nichols, 104 Ill. 160, 172; Stromberg *v.* Western Tel. Cons. Co., 86 Ill. App. 270.

which recognize the existence of a tenancy, amount to a waiver. Thus, a notice to quit for nonpayment of rent is a recognition of the tenancy up to that time and waives a cause of forfeiture arising from subletting.[19] So, it was recently intimated,[20] that the conveyance by the landlord of the reversion subject to the lease was a waiver of any cause of forfeiture which had then accrued.

The question has not yet arisen in this state whether, in the interest of preventing forfeitures, it shall be held that the acts of the landlord, which recognize the existence of a tenancy, amount to a waiver of forfeiture by operation of law, so that an express reservation by the landlord that the receipt of rent or other act shall not, in a particular case, amount to a waiver of any existing cause of forfeiture, will be ineffective to prevent the waiver. When this question arises it is likely to be argued from *Kew v. Trainor*[21] that the rule that the consent to one assignment by the tenant waives the requirement of any consent for any future assignment was a waiver by operation of law, and that if the landlord by express proviso may prevent the operation of this rule of law, why may he not, in the same way, prevent the operation of a rule of law which declares that the acceptance of rent for a period subsequent to the occurrence of the cause of forfeiture is a waiver

Gradle *v.* Warner, 140 Ill. 123, seems to be practically a case of waiver by acceptance of rent. The rent was tendered in the shape of a certificate of deposit for more than the rent itself, and the landlord did not settle the question of rent then because the change was not to be had.

Meath *v.* Watson, 76 Ill. App. 516, seems curiously reactionary. It is hardly to be supported as it is reported. There the tenant sublet in violation of the lease on July 30th. On August 1st "the original tenant paid by check $100 rent for August in advance, as by the terms of the lease, and then informed the agent of appellee of the subletting." The Court said there was no merit in the contention that this receipt of rent amounted to a waiver of the cause of forfeiture. If, as seems to have been the case, the information of the subletting was given at the same time as the giving of the check, this would be wrong. The case may have been decided correctly upon another cause of forfeiture which was not waived.

[19] Frazier *v.* Caruthers, 44 Ill. App. 61; Dockrill *v.* Schenk, 37 Ill. App. 44.

[20] McConnell *v.* Pierce, 210 Ill. 627.

[21] 150 Ill. 150; *ante*, § 63.

of such cause? It is conceived that this argument, while logically sound, overlooks the fact that the rule of *Dumpor's* case is barely tolerated, if it is tolerated at all, in this state, and that the desperate inclination to get away from it led to the decision in *Kew v. Trainor.* On the other hand the general rule that waivers of forfeiture occur by operation of law in certain cases,—especially by the receipt of rent,—is the direct outcome of a sound public policy which seeks to prevent forfeitures. Our supreme court may, therefore, well say, when the time comes, that a landlord cannot be permitted to receive rent and at the same time keep available a cause of forfeiture.[22]

§ 65. **Estoppel**: *Hawes v. Favor,*[23] was entirely disposed of on the ground that no conditions were broken by the tenant. At the end of its opinion, however, the court says that even if there had been a breach the landlord had waived his right of forfeiture because he stood by while large sums of money were being expended by the tenant in the improvements and alterations which formed the basis of the alleged cause of forfeiture. It may well be questioned whether this *dictum* is sound. Can there be a waiver from mere inaction when there is no legal duty to act? Are we to infer that the landlord, when he knows that the tenant is spending money in doing certain things which may amount to a cause of forfeiture, must warn the tenant that his acts are amounting to a cause of forfeiture? That would be a serious enough proposition. The *dictum* of the court seems, however, to go even farther. It appears from the opinion of the court that it must have been very difficult to tell whether the acts of the tenant in rebuilding amounted to a breach of the condition or not. The landlord, it seems, did not, during the time that the changes were being made, file a bill for an injunction because it was very doubtful if the acts of the tenant amounted to a breach of covenant. The inquiries of the landlord as to what was being done, and out of which the court raised the waiver or estoppel to declare a forfeiture, seem to have been made in order to find out whether there was a breach of the covenant or not, and apparently he did not make up his mind that

[22] Davenport *v.* The Queen, 3 Prop. 40; Croft *v.* Lumley, 6 H. L. App. Cas. 115, 5 Gray's Cas. on C. 672.

[23] 161 Ill. 440.

there was a cause of forfeiture until the tenant's alterations were completed. The position of the court would, then, seem to go to the length of requiring the landlord, whenever he perceived any act of the tenant, which cost the tenant money, and which might result in a breach of condition, to give notice to the tenant that, if his acts did result in a breach of condition, he, the landlord, would forfeit the lease.

§ 66. **In equity**: There seems not to have been much resort in this state to equity by tenants to obtain relief against forfeitures already declared,[24] even for nonpayment of rent.[25] In *Palmer v. Ford*[26] the tenant filed a bill for an accounting and relief, after forfeiture for nonpayment of rent had been declared and notice served. The lessee offered to pay whatever should be found to be due him and prayed that the lessor be restrained from prosecuting suits for possession against his sub-tenants, that an account be taken and that he be restored to possession of the premises under the lease. The chief question discussed by the supreme court was whether there was any equity in the bill. It would seem as if the bill might have been sustained as an effort by the tenant to redeem from a forfeiture for nonpayment of rent, provided the time for such redemption had not gone by. But the court distinctly said that if the forfeiture was well declared then the bill ought to have been dismissed. The suit was, however, sustained upon the ground that the forfeiture actually declared had been waived by the lessor and that the plaintiff was entitled to relief because of the accounting prayed for.

[24] In Wilmington Star Mining Co. *v.* Allen, 95 Ill. 288, no question of this sort seems to have been raised. But see Cusack *v.* The Gunning System, 109 Ill. App. 588.

[25] In Gradle *v.* Warner, 140 Ill. 123, the Court found a waiver of a cause of forfeiture for non-payment of rent, instead of suggesting that relief might be had from forfeiture under the circumstances.

[26] 70 Ill. 369.

CHAPTER II.

REVERSIONS AND REMAINDERS.

§ 67. **Introductory—Classification of future interests:** Arranged according to the intent of the settlor, there are three sorts of future interests in real and personal property: *first*, those which take effect only by way of succession; *second*, those which take effect only by way of interruption;[1] and, *third*, those which may take effect in one way or the other according as the event upon which they are limited happens before, or at the time of, or after the termination of the preceding interest. The first of these three sorts of future interests comes into possession at the conventional termination of a preceding estate less than a fee simple,—as where the limitations are to A for life, then to B in fee. It takes effect by way of succession because it stands ready to come into possession, if at all, whenever and however the preceding estate determines. Those of the second group, on the other hand, operate by way of interruption of an estate already created. Thus, if land be limited to A in fee, but if A die without issue him surviving then to B in fee, B's interest, if it take effect, does so by way of interruption of A's. It cuts short the preceding interest and is known as a shifting future interest or conditional limitation. If land be conveyed to A for life and one year after A's death to B in fee, B's interest will interrupt or cut short the interest in fee of the reversioner after A's life estate. B's interest is here known as a springing future interest. Suppose now that land be limited to A for life and then to such children of A as, either before or after his decease, shall attain the age of twenty-one years. Here we have a case, where, if the expressed intent of the settlor be carried out, the future interest may take effect by way of succession or by way of interruption acording as all of A's children shall have attained twenty-one before A's life estate terminates, or all attain that age afterwards. If some children attain that age before the termination of A's life estate and

[1] The writer is indebted for these words "succession" and "interruption" in this connection, to Mr. Edward Jenks' article, "Future Interests in Land," XX Law Quart. Rev. 280.

some afterwards and all take, then the future interest will take effect partly by way of succession and partly by way of interruption. This, then, is an example of the third group of future interests.

§ 68. **Reversions and remainders defined with reference to this classification:** Reversions and remainders are future interests which must take effect, if at all, by way of succession after a particular estate, *i. e.*, which must take effect, if at all, whenever and however the preceding estate determines.[1] Both terms are restricted, in their proper application, to interests in real estate. Historically, they are common law or feudal future interests as distinguished from springing and shifting legal future interests by way of interruption which were only valid under the statutes of uses and wills of Hen. VIII.[2] Reversions and remainders differ in the mode of their creation.[3] The former arise by operation of law, being what is left in the settlor after the creation of an estate less than a fee simple. A remainder, on the other hand, is created by act of the parties.

It should also be observed that, strictly speaking, a future interest, though expressly limited to take effect by way of succession after a term for years, is not a remainder.[4] For this

[1] Observe that in Eldred *v.* Meek, 183 Ill. 26, 36, our supreme court quotes with approval from Gray's Rule against Perpetuities that a future interest, to be a vested remainder, must be "ready to take effect whenever and however the particular estate determines." See, also, the language used in Harvard College *v.* Balch, 171 Ill. 275, 280 and Marvin *v.* Ledwith, 111 Ill. 144, 150, which is appropriate to describe estates taking effect in succession.

[2] *Post*, §§ 83, 146.

[3] Challis' Law of Real Prop. 2d. ed. p. 68.

[4] Challis' Law of Real Prop. 2d. ed. pp. 70, 89. This learned writer seems, also, to say (p. 70) that a future interest by way of succession after a term for years cannot properly be called a reversion.

Observe that where an interest is limited to take effect by way of succession after a term for years and is subject to no condition precedent to its taking effect other than the termination of the term, it is regarded as the creation of a present interest subject to the chattel interest of the term. Illinois Land & Loan Co. *v.* Bonner, 75 Ill. 315, 325, *semble*; Kingman *v.* Harmon, 131 Ill. 171, 175. As to the law where the interest taking effect after the term is contingent see *Post*, §§ 157-159, 164.

Extremely nice questions may arise as to whether the future interest is regarded as subject to a condition precedent or not. One of

reason, in defining a remainder, emphasis must be laid upon the rule that it is a future interest in real estate after a particular estate of freehold. This particular estate of freehold must be created together with the remainder at the same time.[5]

An analysis of remainders would be incomplete if it were not pointed out that the certainty that a future interest after a particular estate of freehold must take effect, in possession, if at all, by way of succession after the particular estate, may arise by act of the parties or by operation of law.

The certainty that a future interest after a particular estate of freehold, which is sure to take effect, will do so by way of succession, depends wholly upon the expressed intent of the settlor. Has he so limited the future interest that it stands ready to take effect wherever and however the preceding estate may determine? In the same way, the certainty that a future interest after a particular estate of freehold, which is not sure to come into possession, will do so, if at all, by way of succession, may arise by the express language of the limitations. That is so where estates are limited to A for life and after A's death to the right heir of J. S., provided said right heir of J. S. is ascertained before the termination (whenever and in whatever manner) of the preceding life estate in A; or where the gift is to A for life and if B survive the termination of A's life estate, (whenever it may come to an end) then to B in fee.[6] It is equally the case where the gift is to A for life and then to B for life.[7] B's interest is not certain ever to come into possession because he may die before A, but if it does, it must do so by way of succession.

As a matter of fact, however, the contingent future interests limited after a particular estate of freehold, with which

the rules which aids in the solution of this difficulty is known as the Rule of Boraston's Case (3 Co. 21, a. b.). That is stated as follows in Hawkins on Wills, p. 237: "If real estate be devised to A when he shall attain a given age, and until A attained that age the property is devised to B, A takes an immediate vested estate not defeasible on his death under the specified age, the gift being read as a devise to B for a term of years with remainder to A." See *Post*, § 212.

[5] Co. Lit. 143a (1 Gray's Cas. on Prop. 429); Biggerstaff *v.* Van Pelt, 207 Ill. 611, 618, 619.

[6] Gray's Rule against Perpetuities, § 104.

[7] See also *post*, § 82 note 10, 94a.

we most usually have to deal, are those which are limited to take effect upon an event that may happen before or at the time of, or after the termination (whenever or in whatever manner) of the preceding interest, and which, in consequence, if they take effect according to the expressed intent of the settlor, would do so by way of succession or interruption, according as the event happens before or at the time of, or after the termination of the particular estate. These interests, if they took affect according to the settlor's expressed intent, would not be remainders at all, but executory interests which might possibly take effect by way of succession.[8] In fact, however, a rule of the feudal system of land law made them remainders by requiring them to come into possession by way of succession at the termination of the particular estate, or fail entirely.[9] So long as this rule obtained the interests affected by it were properly called remainders. The moment that rule ceased to be effective these future interests could no longer be called remainders. They were then what the expressed intent of the settlor made them—executory interests. Whether, however, this rule of law be in force or not, it seems advisable to deal with this sort of future interest in connection with remainders. This accordingly has been done.

Our complete description of a remainder, then, is this: A future interest in real estate, limited by act of the parties, after a particular estate of freehold created together with it at the same time, and taking effect in possession if at all, only by way of succession, *i. e.*, whenever and however the preceding estate determines.

§ 69. **Remainders vested and contingent:** Thus far, the effort has been merely to describe a remainder. Remainders themselves, however, naturally fall into two classes: *first*, those which are certain to take effect in possession; *second*, those which are not certain to come into possession, because they are, in fact, subject to the happening of a condition precedent. It will not do to say that the line between vested and contingent remainders is the same as that which separates the first of the above two sorts of remainders from the second. Yet this is very largely so. All the remainders of the first

[8] *Post*, § 85.

[9] *Post*, §§ 81-92a.

sort are clearly vested. Substantially, those of the second are contingent remainders. Those of the second class which are regarded as vested call for special consideration which is given them hereafter.[10]

A. REMAINDERS.

PART I.

THE CREATION OF REMAINDERS.

§ 70. Several points which have been passed upon:[11] The first inquiry concerning the creation of remainders may well be: By what form of conveyance may they be created today in Illinois? If the law of remainders goes back to the feudal period of English history, then remainders must originally have been created by feoffment or some other purely common law mode of conveyance. Such is the fact. Today, however, our conveyances in this state operate under the statutes of uses[12] and wills, and under such modern conveyancing acts as those of 1827[13] and 1872.[14] Nevertheless, it is perfectly clear that these modern forms are as effective as feoffment to create future interests by way of remainder.[15]

The rule that a fee cannot be limited upon a fee by way of remainder[16] is a truism. Literally, it is no more than the assertion that a future interest taking effect by way of in-

[10] *Post*, §§ 94 *et seq.*

[11] In Rickner *v.* Kessler, 138 Ill. 636, where, by one clause of a will, A got a life estate, and, by a later clause, the same property was devised to B in fee, B's interest was a remainder.

[12] *Post*, § 150.

[13] *Post*, §§ 151, 152.

[14] *Post*, §§ 151, 152.

[15] In the following cases the remainder was created by a conveyance to uses raised on transmutation of possession: O'Melia *v.* Mullarky, 124 Ill. 566; Roth *v.* Michalis, 125 Ill. 325; Barclay *v.* Platt, 170 Ill. 384.

[16] City of Peoria *v.* Darst, 101 Ill. 609; McCampbell *v.* Mason, 151 Ill. 500; Palmer *v.* Cook, 159 Ill. 300; Summers *v.* Smith, 127 Ill. 645, 650; Smith *v.* Kimbell, 153 Ill. 368, 372. See also Seymour *v.* Bowles, 172 Ill. 521 and Green *v.* Hewitt, 97 Ill. 113.

In a number of cases the court seems to have stated the same doctrine less accurately by saying that a fee could not be "mounted upon a fee by deed." Siegwald *v.* Siegwald, 37 Ill. 430, 438; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeny, 163 Ill. 603, 605; Kron *v.* Kron, 195 Ill. 181; Stewart *v.* Stewart, 186 Ill. 60.

terruption only, cannot be a future interest taking effect by way of succession. In reality it is an indirect way of stating the rule of the feudal land law that the only future interests which were valid were those which took effect only by way of succession.[17] The conclusion is often found in connection with the above supposed rule that two contingent remainders in fee, one to take effect if the other does not, can be properly limited.[18] This is self-evident when translated to mean that after a particular estate of freehold two contingent future interests, limited, one to take effect if the other does not, upon events which may happen before or at the time of, or after the termination (whenever or in whatever manner) of the preceding interest, are valid under the common law or feudal system of conveyancing because of the rule of that system which required such future interests to take effect by way of succession or fail entirely.

It does not seem probable that our supreme court, in *Kingman v. Harmon*,[19] meant so far to overturn the common law definition of remainders [20] as to hold that a contingent future interest after a term for years should be called a contingent remainder. The future interest in that case must, if contingent, be sustained as a springing executory devise.[21]

The general rule of the common law that the feoffer could limit no estate to himself [22] seems to have been so far abrogated in this state by the act of 1827 concerning conveyances, if not also by construing deeds to be bargains and sales under the statute of uses,[23] that one may now convey a fee simple reserving to himself a life estate.[24] Why, then, may he not limit a life estate by deed to third party with a remainder in fee to himself?

[17] Compare *post*, §§ 137-156, 164-167 for law under Statutes of Uses and Wills.

[18] City of Peoria *v.* Darst, 101 Ill. 609; McCampbell *v.* Mason, 151 Ill. 500; Furnish *v.* Rogers, 154 Ill. 569; *post*, §§ 96-98. Cf. Boatman *v.* Boatman, 198 Ill. 414 and Chapin *v.* Nott, 203 Ill. 341; *post*, §§ 100-101. Also Ruddell *v.* Wren, 208 Ill. 508; *post*, § 103. Also Butterfield *v.* Sawyer, 187 Ill. 598.

[19] 131 Ill. 171.

[20] Allen *v.* McFarland, 150 Ill. 455, 464.

[21] *Post*, §§ 164 *et. seq.*

[22] *Post*, § 158; Callard *v.* Callard, Moore, 687 (1 Gray's Cases on Prop. 487).

[23] *Post*, § 150.

[24] *Post*, §§ 157-159.

PART 2.

THE TRANSFER OF REMAINDERS.

§ 71. **Of vested remainders:** A vested remainder is transferable and transmissible by any mode of conveyance by operation of law or by act of the parties appropriate for the passing of title to real estate.[25]

§ 72. **Of contingent remainders—By descent:** To the general rule "that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens," Fearne[26] adds only the practical exception of the case "where the existence of the devisee, etc., of the contingent interest, at some particular time, may by implication enter and make part of the contingency itself, upon which such interest is intended to take effect." But way of illustration he puts a case where the husband's remainder in fee was contingent upon his surviving his wife, the life tenant, and where he, having died first, the contingency never arose and so his heirs took nothing. There is, therefore, nothing artificial about this exception. The rule and the exception amount only to this: That all contingent remainders descend unless the death of him who is to take upon the happening of the contingency, is such an event as forever makes it impossible for his interest to vest.[27]

[25] It is subject to sale on execution and attachment. Railsback *v.* Lovejoy, 116 Ill. 442; Ducker *v.* Burnham, 146 Ill. 9; Brokaw *v.* Ogle, 170 Ill. 115; Springer *v.* Savage, 143 Ill. 301, 304, (*semble*).

It may be conveyed by the usual quit claim deed. Boatman *v.* Boatman, 198 Ill. 414.

As to how far attornment by the tenant in possession may be necessary to the validity of the conveyance see *post*, § 122. That attornment in case of the grant of a remainder was necessary at common law, see Lit. §§ 567-569 (1 Gray's Cases on Prop. 442). In O'Melia *v.* Mullarky, 124 Ill. 506, a vested remainder after a life estate was conveyed by deed in 1867. It does not appear that the life tenant ever attorned, but no point was made of the lack of attornment.

[26] Fearne C. R. 364; see also Gray on the Rule against Perpetuities § 118.

[27] In the 6th ed. of Washburn on Real Property, vol. 2, § 1557, it is laid down that "where the person is *ascertained* who is to take the remainder, if it becomes vested, and he dies, it will pass to his heirs." In Kent's Commentaries 14th ed. vol. 4, star page, 261 it is said that "all contingent estates of inheritance, as well as springing executory uses and possibili-

There is, however, much in the Illinois Reports to lead the unwary to the conclusion that if a remainder is contingent upon some event which may occur after the death of the remainder-man, and the remainder-man dies before the life-tenant and before the contingency happens, the remainder is gone, and the grantor takes by way of reversion. This is the natural inference from a number of cases where the whole question seemed to be the general one of whether the remainder was vested or contingent.[28] In all the remainder was held to be vested, but in several the language of the court is such [29] as to give the impression that if the remainder had been held to be contingent—no matter what the contingency might be—the heirs of the remainder-man would take nothing. A closer examination, however, of the cases will reveal that the real question was not whether the remainder was vested or contingent, but whether it was vested or contingent upon the remainder-man's surviving the life-tenant.[30] Of course if it were the

ties, coupled with an interest, where the person to take is certain, are transmissible by descent. * * * If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised or descend at the Common Law." (Quoted in Ridgeway *v.* Underwood, 67 Ill. 427). It is submitted that this language is on its face suggestive of highly artificial rules concerning the descent of contingent remainders and, so far as it means anything different from the simple suggestion of Fearne, it is misleading.

[28] Green *v.* Hewitt, 97 Ill. 113; Nicoll *v.* Scott, 99 Ill. 529; Scofield *v.* Olcott, 120 Ill. 362; O'Melia *v.* Mullarky, 124 Ill. 506; Siddons *v.* Cockrell, 131 Ill. 653; Grimmer *v.* Friederich, 164 Ill. 245; Welliver *v.* Jones, 166 Ill. 80; Hawkins *v.* Bohling, 168 Ill. 214; McConnell *v.* Stewart, 169 Ill. 374; Knight *v.* Pottgieser, 176 Ill. 368.

[29] Hawkins *v.* Bohling, 168 Ill. 214; Green *v.* Hewitt, 97 Ill. 113, 117; Scofield *v.* Olcott, 120 Ill. 362, 370.

[30] In a number of cases it was made very plain by the court that this is the proper distinction. Nicoll *v.* Scott, 99 Ill. 529; Grimmer *v.* Friederich, 164 Ill. 245; Knight *v.* Pottgieser, 176 Ill. 368; Smith *v.* West, 103 Ill. 332, 337.

That the real question was whether the remainder was vested or contingent upon the remainderman surviving the life tenant is, in other cases, to be inferred from the fact that the only contingency which could possibly have been found was one that the remainder-man should survive the life tenant. Green *v.* Hewitt, 97 Ill. 113; Scofield *v.* Olcott, 120 Ill. 362; O'Melia *v.* Mullarky, 124 Ill. 506; Siddons *v.* Cockrell, 131 Ill. 653; Welliver *v.* Jones, 166 Ill. 80; Hawkins *v.* Bohling, 168 Ill. 214; McConnell *v.* Stewart, 169 Ill. 374.

latter and the remainder-man did not survive nothing could pass to his heirs.[31]

The recent case of *Chapin v. Nott*,[32] however, almost irresistibly produces the impression that our supreme court has finally come to believe that upon the death, before the death of the life-tenant, of one, whose remainder is contingent upon an event which may well happen after his death, the remainder is lost. In that case the remainder was subject to a condition precedent[33] that the life-tenant should die without leaving issue him surviving. The remainder-man died before the life-tenant and then the life-tenant died without leaving issue surviving. It was held that the heirs of the remainder-man were entitled—not, however, upon the simple ground that the remainder, though contingent, passes to the heirs at law, but because the remainder was vested. Not only is everything made to turn upon whether the remainder is vested or contingent, but the court actually overturns well settled principles of the common law[34] as to when a remainder is vested and when contingent in order to make this remainder out vested, and so save it to the remainder-man's heirs.[35]

[31] Strode *v.* McCormick, 158 Ill. 142; Bates *v.* Gillett, 132 Ill. 287.

[32] 203 Ill. 341.

[33] *Post*, § 101.

[34] *Post*, § 105.

[35] There is much in Kellett *v.* Shepard, 139 Ill. 433 that is similar to the above case. There the will gave the testator's daughter a life estate and after her death limited a remainder to her children, and, if she died leaving no issue, then to the testator's heirs at law. The daughter had no children at the testator's death. The remainder to them was, therefore, contingent, and upon the well settled common law rules the remainder over, if the daughter died without leaving issue, to the testator's heirs was certainly contingent. There would then be a reversion in fee to the testator's heirs until the contingent remainder in fee to them should vest. The daughter was one of the heirs at law of the testator so that she took a life estate, a contingent remainder in fee as one of the heirs at law (*post*, § 233), and also a reversion in fee The very act then of her dying without leaving issue surviving caused her contingent remainder in fee to become vested and it then descended to her heirs at law. This is a possible explanation of the language of the court, on page 447, that the remainder was vested. Yet there is evidently the inclination to say that the remainder was always vested subject only to be divested (*post*, § 100, note 18 (c)) by the death of the life tenant leaving children, and that upon this ground the remainder in fee to the daughter passed to her heirs.

In Kirkpatrick *v.* Kirkpatrick,

§ 73. **By devise:** Is a contingent remainder devisable? This was not a question about which the common law concerned itself because, at common law, lands were not devisable. Whether contingent remainders were devisable depended, then, upon the scope of the Statute of Wills of Henry VIII[1] and subsequent legislation concerning wills. The Statute of Wills provided that "all and every person and persons, having manors, lands, tenements or hereditaments * * * shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them at his free will and pleasure." At first the opinion in England seems to have been against construing the statute as permitting the devising of contingent estates,—the word "having" being understood as if it were "seized of."[2] "But modern decisions," says Fearne,[3] "have extended the same power [referring to the power to devise contingent interests in chattels real] of testamentary disposition to contingent and executory descendible interests by considering the word 'having' in the statute of wills, as equivalent to "having an interest in." Under such a construction of the statute it would seem that a contingent remainder which was descendible was clearly devisable.[4] Can there be any doubt, then,

197 Ill. 144, the only possible condition precedent which would make the remainder contingent, was the exercise of a power by the life tenant. The decision that the remainder was vested is correct enough upon the ground that the condition precedent was in fact expressed as a condition subsequent. (*Post*, § 108). The impression is, however, left that if for any reason the remainder had been contingent it would not have descended upon the death of the remainderman before the exercise of the power by the life tenant.

[1] 32 Hen. VIII. c. I. (1540); (4 Gray's Cases on Property p. 122).

[2] Fearne C. R. p. 367.

[3] Id. Note also that by the statute of Frauds (29 Car. II. c. 3; 4 Gray's Cases on Property, page 124) the interest in lands which were devisable depended upon what was devisable under the statute of wills of Henry VIII. In the Wills Act (7 Wm. IV. and 1 Vic. c. 26, III., 4 Gray's Cases on Property p. 129) it was in terms provided that "all contingent, executory or other future interests in any real or personal estate" should be devisable.

[4] Fearne C. R., pp. 366-371; *infra*, note 6.

but that under our Illinois statute on wills a contingent remainder is devisable? That statute provides[5] in the first section that every male person, etc., "shall have power to devise all the estate, right, title and interest, in possession, reversion or remainder which he or she hath or at the time of his or her death shall have, of, in and to any lands * * * ."

Of course there is always this practical qualification upon the rule that contingent remainders are devisable. If the remainder is contingent upon the remainder-man's being alive at a certain time, his death before that time forever prevents the remainder becoming vested, and, the possibility having ceased, one may as well say that nothing passes by the devise.[6]

In *Harvard College v. Balch*,[7] there is much to lead the unwary to the conclusion that our supreme court regards a contingent remainder as not devisable. The remainder in that case was subject to a condition arising out of the power of the life tenant to dispose of the fee by will. The failure of the life tenant to do this was an event which might have happened after the death of the remainder-man, so that when the remainder-man died before the life tenant the court might well have said that the remainder passed by the will of the remainder-man whether it was vested or contingent. This it did not do, but rested its decision wholly upon the ground that the remainder was vested. This, doubtless, was correct enough, but it is likely to be inferred from the cursory examination of the court's opinion that if the remainder had been contingent, it would not have been devisable.

[5] R. S. 1845 p. 536; R. S. 1874 p. 1101, Ch., 148, sec. 1.

[6] Fearne C. R., p. 370, declares such contingent remainders devisable "as would be descendible to the heirs of the object of them dying before the contingency or event on which the vesting or acquistion of the estate depended." As we have seen, (*Ante*, § 72) the only restriction upon the descent of contingent remainders was that the death of the ancestor be not of itself an event which forever cuts off the vesting of the remainder.

As regards the devisability of contingent remainders, Washburne and Kent both say simply: They are deviseable when the person to "take is ascertained." (2 Washburne Real Property (6th ed.) § 1557; 4 Kent's Com. (14th ed.) star page 261). It is submitted that Fearne's statement is the more complete and explicit.

[7] 171 Ill. 275.

§ 74. **Inter vivos—In the absence of statute—At law:** There is no doubt but that, at common law, contingent remainders were not, as such, transferable by any conveyance at law before the contingency happened.[8] They were, however, properly transferred by way of estoppel "by fine (or by a common recovery, wherein the person entitled to the contingent estate comes in as a vouchee * * *)."[9] Following the analogy it seems clear that, by a deed with covenants sufficient to pass an after acquired title by estoppel,[10] a contingent remainder may so far be affected that, upon the happening of the contingency, which caused the estate to vest, the estate would inure to the grantee as an after acquired title.[11]

§ 75. **In equity:** Our supreme court has clearly held that the expectancy of one as the heir of a living person may be released to the ancestor and in equity such an assignment will be enforced for the benefit of the other heirs.[12] It has been held, also, that the expectancy of such an heir is assignable in equity to a stranger, who may, upon the death of the ancestor, have a bill for specific performance to compel a conveyance.[13] Whether the stranger in such a case need only have given such consideration as would, in general, support

[8] Fearne C. R. p. 366.

[9] Fearne C. R. p. 366; 1 Preston on Conveyancing p. 301.

[10] Observe that under the English authorities there were only two cases where the after acquired title or estate actually *passed* by estoppel to the transferee. *First*, where the mode of assurance was a feoffment, a fine or a common recovery. *Second*, where the assurance was by lease. (Rawle on Covenants for Title 5th ed. p. 360). In the United States either by statute or decision the same effect is generally given to deeds containing covenants of warranty (Rawle on Covenants for Title 5th ed. pp. 364 *et. seq.*)

[11] Walton *v.* Follansbee, 131 Ill. 147, 159-160; Williams *v.* Esten, 179 Ill. 267, 271 (*semble*). In Thomas *v.* Miller, 161 Ill. 60, the remainderman did not survive the life tenant so that, though the deed contained covenants of warranty, it never became effective.

Observe that in Ridgeway *v.* Underwood, 67 Ill. 419, 428, the court quotes from Story's Equity Jurisprudence, sec. 1040., to the effect that contingent interests may pass by estoppel when conveyed by lease and release.

[12] Crum *v.* Sawyer, 132 Ill. 443, 460-461; Longshore *v.* Longshore, 200 Ill. 470, 479; Bishop *v.* Davenport, 58 Ill. 105; Galbraith *v.* McLain, 84 Ill. 379; Kershaw *v.* Kershaw, 102 Ill. 307; Simpson *v.* Simpson, 114 Ill. 603.

[13] Parsons *v.* Ely, 45 Ill. 232; Ridgeway *v.* Underwood, 67 Ill. 419, 427 (the interest assigned

a bill for specific performance of a contract,[14] or whether he must have paid the fair market value of the expectancy, or even its "arithmetical value,"[15] is a matter not apparently discussed by the court. It should not, however, be open to doubt but that the attempted conveyance, upon a proper consideration, of a contingent remainder would operate in Illinois as an assignment in equity according to long settled authority elsewhere.[16]

As the cases now stand there is this practical difficulty with an attempted conveyance operating as the assignment of a contingent remainder in equity: the conveyance must, on its face, show an intent to assign the future interest.[17]

§ 76. By statute—The act of 1827: It is a fair subject of inquiry whether the first section of the act of 1827 concerning conveyances[18] does not, by its proper construction, permit the conveyance of contingent remainders by a deed without covenants. This statute provides that "livery of seizin shall in no case be necessary for the conveyance of real property; but every deed, mortgage, or other conveyance in writing * * * signed and sealed by the party making the same * * shall be sufficient, without livery of seizin, for the giving, granting, selling, mortgaging, leasing or otherwise conveying or transferring any lands, tenements or hereditaments in this state, so as, to all intents and purposes, absolutely and fully to vest in every donee, grantee, bargainee, mortgagee, lessee, or purchaser all such estate or estates as shall be specified in any such deed, mortgage, lease or other conveyance."

was a springing executory interest. See *post*, § 181); Hudnall *v.* Ham, 183 Ill. 486, 500, 501.

[14] 2 Pom. Eq. Jurisp. § 927, note 3.

[15] "Attitude of Public Policy Towards the Contracts of Heirs Expectant and Reversioners," by Thomas H. Breese, 13 Yale Law Journal 228.

[16] 3 Pom Eq. Jurisp. § 1287, 1271; Fearne C. R. 549-551; Smith's notes to Fearne C. R. § 749-750.

[17] There seems to be an inclination on the part of our supreme court to hold that a quit claim deed in the usual form does not refer to any interest other than that which is, at the time such deed is executed, transmissible by direct conveyance *inter vivos*. The cases looking toward this construction have come up in regard to the assignment in equity of future interests by way of executory devise and are considered fully, *post*, § 181.

[18] L. 1827 p. 95; R. S. 1845, ch. 90 p. 456; R. S. 1874 ch. 30 sec. 1, p. 272; 1 A. & D. R. E. S. pp. 75, 101.

It is apparent that one object of this Act is to do away with any suggestion or contention that livery of seizin is, in any case, necessary. Possibly its effect, in providing a substitute for common law conveyances, may extend only to providing a substitute for conveyances which by the common law, must have been by livery of seizin. If so, it is clear that this act could not be made the basis of any argument that the conveyance of contingent remainders by deed is permitted, since such an interest could not possibly have been transferred by livery of seizin at common law.[19] On the other hand, if the widest effect be given to the language of this section, which declares that "every deed, mortgage, or other conveyance in writing * * signed and sealed, * * * shall be sufficient * * for the * * conveying or transferring any lands * * so as * * absolutely and fully to vest in every donee, etc. * * all such estate or estates as shall be specified in any such deed, mortgage, lease or other conveyance," there would seem to be a complete statutory authority permitting the conveyance of contingent remainders by deed without covenants.[20]

The *dictum* of *Walton v. Follansbee*[21] and the natural inference from *O'Melia v. Mullarky*[22] tend, however, to the rule that a simple deed, without covenants of warranty, is inoperative to pass the contingent remainder before the contingency happens, or to secure the estate to the grantee upon the happening of the event upon which the estate is to vest.[23]

[19] As a general rule all interests which could must have been conveyed by livery of seisin. Reversions and remainders could not be so transferred, since no entry could be made upon the tenant in possession. They must, therefore, have been conveyed by grant or some other mode which did not require an entry upon the land.

[20] This conclusion is much aided by the manner in which the English Courts handled the language of the statute of wills so as to make contingent remainders devisable. (*Ante*, § 73).

Observe also that in England by the statute of 8 and 9 Victoria c. 106, s. 6, contingent remainders can be transferred by a simple deed. (Williams Real Property 17th ed. p. 423).

See also 1 Stimson's American Statute Law, § 1420, for American Statutes.

[21] 131 Ill. 147, 159.

[22] 124 Ill. 506. Here the plain intimation is that if the remainder had been contingent it never would have passed by the deed.

[23] In Furnish *v.* Rogers, 154 Ill. 569, it was held that since a minor had only a contingent remainder she had no interest which could be sold by her guardian.

§ 77. **By the statutory quit claim deed—The statute:** In section 10 of the Act on Conveyances[24] it is provided that every deed "in substance in the form prescribed" in that section shall be held "a good and sufficient conveyance * * * in fee of all the then existing legal or equitable rights of the grantor in the premises therein described." Here the statute speaks of the grantor's "rights." Surely a contingent remainder is a right within the meaning of this act. Yet in *Williams v. Esten*[25] the court, while quoting the above statute in support of the validity of the conveyance by a quit claim deed of a contingent shifting executory devise to the holder of the interest in possession, seems to admit that a deed complying with the same statute would be insufficient to transfer a contingent remainder to a stranger. So, in *Boatman v. Boatman*,[26] the court seems to assume, without question, that, if the remainder was contingent, it could not possibly pass by a quit claim deed which was, doubtless, "in substance" at least, in the statutory form.

§ 78. **Argument that a contingent remainder is not even a "right":** It may be urged in support of the view that a statutory quit claim deed is ineffective to transfer a contingent remainder, that sec. 10 of the Act on Conveyances,[27] though it makes the deed valid to transfer "rights", yet has no application because a contingent remainder, in the eye of the common law, is nothing—not even a "right",—until the contingency has happened.[28] Let us see if this is so!

A vested remainder is certainly something. It is at least a "right" and passes by quit claim deed. Wherein does it differ from a contingent remainder? You say one is a present interest and the other is a possibility merely. Yet, while a vested remainder continues a remainder, it is only an ideality. The present estate in possession has at least the corporeal at-

[24] L. 1872 p. 282 sec. 10; R. S. 1874 p. 274 sec. 10.

[25] 179 Ill. 267.

[26] 198 Ill. 414.

[27] *Ante*, § 77.

[28] "A contingent remainder, such as appellants had in the premises * * does not rise to the dignity of an estate in the land and confers no interest in the seisin. Strictly speaking it is not an estate at all, but a mere chance of having one if the contingency turn out favorably to the remainderman." Mr. Justice Wilkin in Butterfield *v.* Sawyer, 187 Ill. 598, 601, 602.

tribute of possession, but a vested remainder is wholly an imaginary conception,—not less so than a contingent remainder. From the point of view of reason it is purely arbitrary to say of two idealities that one is something and the other nothing. The ideality of a contingent remainder can just as well be conceived of as something as the ideality of a vested remainder.[29]

It is true that there was, at common law, a practical difference in the attributes of these two idealities. One was indestructible and transmissible by grant. The other was destructible[30] and not transmissible by grant. But the reason for this difference was not that one was inherently something and the other inherently nothing, but it lay in this,—that the feudal system, under which both sprang up, accepted one and hesitated about the other. The ideality which we call a vested remainder the feudal system accepted without question. It gave it all the attributes of a present actual interest because that is what accepting it meant, and there was no ground for giving it one attribute and not another. It called the vested remainder an existing actual interest, because that was a dramatic, concrete way of saying—"we accept it and we choose to conceive of this ideality as a reality." On the other hand the feudal system hesitated about contingent remainders. Upon its face the usual contingent limitation contemplated the possibility of a gap betwen the termination of the particular estate and the vesting of the remainder, and such a gap was inconsistent with the fundamental idea of the feudal system that there must always be a tenant to the freehold to discharge the feudal dues.[31] The feudal system, therefore, at first chose not to accept contingent remainders at all.[32] To say that they were nothing at all amounted to no more than saying that they were void—that they were not to be recognized at all—that they were not to be conceived of as anything.

[29] This is not less obvious when it is noticed that where land is limited to A for life with a remainder in fee to A's children (unborn), and, in the event that A dies without leaving any children or other issue him surviving, then to B in fee, our Supreme Court has held the remainder to B vested, that is—something. (Boatman *v.* Boatman, 198 Ill. 414, *post*, § 100; Chapin v. Nott, 203 Ill. 341, *post*, § 101).

[30] *Post*, §§ 81 *et seq.*

[31] *Post*, §§ 87, 145.

[32] Williams Real Property, 17th

When, therefore, after the time of Hen. VI, they came to be accepted[33] it was upon the condition that no gap occur.[34] Until, then, the contingency had happened during the continuance of the particular estate, the contingent remainder was void.[35] It was nothing at all. The feudal system did not choose to regard it as a reality. There was, for this reason, a serious technical difficulty with recognizing the transferability of that which, until an event had happened, was looked upon as void. This hesitation of the feudal system to accept contingent remainders at all has been translated into the formula that, until the contingency happen, there is nothing—not even, as it is now urged, a "right" within the meaning of our statute.

It is submitted, however, that, in the centuries since the time of Hen. VI, there has been some development in the conception of the reality of a contingent remainder. Would it not shock the sense of a court to hear it urged at the present day that a contingent remainder was void until the contingency happened? Even the expression of the result, which was arrived at upon the supposition that the remainder was void until the contingency happened, has been long since expressed as a technical rule to the effect that the remainder is destroyed, unless the contingency happens before the termination of the particular state.[36] Such a form of expression assumes the contingent remainder to be something before the contingency happens. How otherwise could it be "destroyed"? The idea that the contingent remainder was absolutely void until the contingency happened has long since been so far abandoned that the contingent remainder is clearly transmissible by descent to the heir.[37] It was so far a right that it might be

ed. p. 411, *post*, § 87.

[33] *Supra*, note 32.

[34] Future Interests in Land, Edward Jenks, 20 Law Quart. Rev. 280, 282-283.

[35] "It appears, however, to have been adjudged, in the reign of Henry VI., that if land be given to a man for his life, with remainder to the right heirs of another *who is living*, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said that, at the time of the grant, the remainder was in a manner void." (Williams Real Property, 17th ed. p. 412).

[36] *Post*, §§ 81 *et seq.*

[37] *Ante*, § 72.

released to the reversioner.[38] While it was, at first, doubted whether it had become sufficiently an interest to be devisable within the terms of the Statute of Wills of Hen. VIII, yet it was finally settled to be so.[39] And now in the modern English statutes, in terms providing that contingent remainders shall be transmissible by devise[40] and by deed,[41] the legislature speaks of them as if they were not only something but a recognized estate or interest in land. If there be added to this, whether with or without the action of the legislature, the abrogation of the rule that contingent remainders are destructible,[42] they are as surely a "right" in land as an executory devise, of which our supreme court has said:[43] "These limitations [executory devises] are not held to be mere possibilities, but are regarded as substantial interests or estates." The rule of the common law that you cannot, by a transfer *inter vivos*, convey a contingent remainder stands out, therefore, as a useless relic of the original hesitation of the feudal system to accept contingent remainders at all.[44]

The proposition, then, that a contingent remainder is nothing at all till the contingency happens, if taken literally, is either untrue or would apply equally well to a vested remainder. If taken historically, it long ago became an anachronism. Let it not, then, be made the basis for holding a statute, which declares that a deed in substance in the statutory form of a quit claim deed shall pass all the "legal and equitable rights of the grantor," insufficient to permit the conveyance, by such deed, of a contingent remainder.

§ 79. Public policy of today is in favor of allowing the free transfer of contingent remainders: If the rule that a contingent remainder could not, at law, be conveyed *inter vivos* had rested solely upon the idea that the contingent remainder was void till the contingency happened, it might not have held out after the contingent remainder came to be regarded as an

[38] Williams Real Property, 17th ed. p. 422. Since Williams *v.* Esten, 179 Ill. 267, 273, we may fairly assume that the release by a contingent remainderman to the tenant in possession is equally valid.

[39] *Ante*, § 73.

[40] *Ante*, § 73, note 3.

[41] *Ante*, § 76, note 19.

[42] *Post*, §§ 81-92a.

[43] Waldo *v.* Cummings, 45 Ill. 421, 428. *Post*, § 180.

[44] Williams Real Property, 17th ed. p. 423.

interest in land. But the feudal system undertook to look upon the contingent remainder much the same as a right of entry for condition broken, and to declare that the public policy which forbade the assignment of such rights of entry applied to contingent remainders.[1] Whatever public policy or legal theory of the feudal period of the history of the law forbade the conveyance of contingent remainders must have disappeared several centuries ago. Certainly it had disappeared when in the 17th and 18th centuries equity began to enforce the attempted conveyance of a contingent remainder as a contract to transfer title whenever the estate vested so as to be the subject of conveyance.[2] It was logical, therefore, that among the first English land law reform acts we should find one making contingent interests transferable by deed like present interests in possession.[3]

It may fairly be assumed that in this country public policy has, from the earliest times, favored the most absolute freedom of alienation. The objection to the transfer of contingent remainders that such transfer savored of champerty and maintenance could hardly have obtained.[4] In a community like Illinois, which had no political life as a state till 1818, it is submitted that there never has existed any public policy contrary to that embodied in the Act of Parliament which made contingent remainders transferable by deed on the same terms that any interest in possession may be transferred.[5] Our supreme court seems to recognize this. It has

[1] Williams Real Property, 17th int. ed. p. 422; The Mystery of Seisin, F. W. Maitland, 2 Law Quart. Rev. 481. The rule, therefore, that a contingent remainder could not, regardless of the consideration paid, be transferred *inter vivos*, at law, became too well established to be changed except by the legislature.

[2] Fearne C. R. 549-551; Smith on Executory Devises § 750. *Ante*, § 75.

[3] 8 and 9 Vict., c. 106, § 6. (1845).

[4] The end of any such principle of public policy in this country is marked by the statutes (Stimson, Am. Stats. § 1401; Ill. Laws 1827, p. 95, sec. 4; R. S. 1845 ch. 24, sec. 4; R. S. 1874 ch. 30, sec. 4), or decisions in the absence of statute (Cresson *v.* Miller, 2 Watts, (Pa.), 272; Poyas *v.* Wilkins, 12 Rich. (S. C.,) 420; Hall *v.* Ashby, 9 Ohio 96) which have made the devisee's right of entry transferable like any present interest in possession.

[5] Witness the history of our land laws: The whole tendency of our conveyancing acts has been to make transfer free by making it simple and inexpensive. The re-

already seized upon sec. 14 of the Landlord and Tenant Act of 1873 to hold that no attornment is necessary.[6] This is particularly significant because sec. 14 is modeled directly upon the statute of Hen. VIII which was admitted in *Fisher v. Deering*[7] to be ineffective to abolish attornment. *Boatman v. Boatman*[8] is itself a strong indication that our supreme court is fully alive to the public policy in favor of permitting the contingent remainder to pass by the quit claim deed. There the remainder was certainly, by all the rules of the common law, contingent,[9] and yet the court extended the common law definition of a vested remainder, for no other purpose it would seem, than that the remainder involved in that case might pass by the quit claim deed.

Is it not, then, almost unaccountable that we should fail to take advantage of the obvious opportunity which was given by the introduction, in 1872,[10] of statutory forms of conveyance, to shape our law regarding the transfer of contingent remainders in accordance with that public policy which has all along prevailed in this state with ever increasing force? Is it not a failure of insight on our part into the historical tendencies of the law, that we have harkened back to and perpetuated rules, the foundations of which lie buried in the feudal system of five centuries ago, or to the partial mitigation of those rules which equity adopted two and three centuries ago and which have sometime since fallen behind the demands of modern conditions upon the law?

§ 80. Upon execution sale: The taking of interests in real estate upon execution sale is a matter dependent entirely upon statute. Whether a contingent remainder can be so sold upon execution will depend upon the statute which describes the interests which may be levied upon. Since 1845 at least the statutes in this state have provided[11] that "all and singular

cording acts, the sweeping provisions of sec. 1 of the act of 1827 concerning conveyances (*ante*, § 76), the statutory forms provided by the act of 1873 (*ante*, § 77), and finally our adoption of the Torrens system, have always been in furtherance of this object. See also *post*, § 153, on public policy in favor of free alienation.

[6] *Post*, § 122.

[7] 60 Ill. 114.

[8] 198 Ill. 414.

[9] *Post*, §§ 105 *et seq.*

[10] *Ante*, § 77.

[11] R. S. 1845 pp. 300-301; **R. S.** 1874, ch. 77, secs. 3, 10.

the lands, tenements, real estate'' of judgment debtors shall be liable to be sold on execution. By another section of the same act it is provided that ''the term 'real estate' when used in this act ''shall include lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto. * * * .'' Why, then, may not a contingent remainder be taken upon execution under such a statute? Certainly the language includes contingent interests more clearly than did the language of the Statute of Wills of Hen. VIII.[12] Nevertheless, without any consideration whatsoever of points as obvious as these, our supreme court seems to have actually held that a contingent remainder is not subject to sale upon execution before the contingency happened.[13]

It may possibly be said that the statute designating what may be taken on execution should be strictly construed. This means no more than that nothing which is not plainly indicated by the statute shall be included in it. It does not mean that a court shall approach the statute with a prejudice to deprive it of its plain meaning. The statute expressly includes ''all legal and equitable *rights* and interests.'' Is not a contingent remainder at least a ''legal right''? Even assuming that contingent remainders were included in Acts on Wills by extraordinary intendment, have we not enough in the Act on Executions to support a levy upon a contingent remainder? It is significant that in Missouri under statutory provisions,

[12] *Ante*, § 73.

[13] Haward *v.* Peavey, 128 Ill. 430. After holding in this case that the remainder levied upon was contingent the court merely said: "It follows that, at the time the land in question was sold under execution, Robert Haward's interest was only a contingent remainder, which was not subject to levy and sale, and that no title therefor passed to the purchaser by the marshall's deed."

In Ducker *v.* Burnham, 146 Ill. 9 the remainder was held vested, but the court in the beginning of its opinion said: "If it is contingent it is not subject to levy (2 Freeman on Judgments—4th ed.—sec. 354)." Upon turning to this reference in Freeman we find the learned author stating that at common law contingent remainders were not subject to execution, and then going on to say, "In some of the states the statutes declaring what shall be subject to execution include these contingent interests"; and in support of this he cites White *v.* McPheeters, 75 Mo., 286, 292, which, under a statute in all respects like that in the text above quoted, allowed the contingent remainder to be levied upon. (See *infra*, note 14).

almost identical with those of this state, it has been held that a contingent remainder is subject to levy on execution.[14]

The law may be settled in Illinois that a sale upon execution of a contingent remainder is invalid, but the state of the decisions can hardly be regarded as satisfactory until the supreme court has noticed the broad language of the statute which defines what may be taken upon execution.

PART 3.

THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS.[1]

§ 81. Introductory: The books mention only two sorts of contingent future interests after a particular estate of freehold,—contingent remainders and springing executory interests by way of use and devise. The practical consequences of the distinction between them, as given in the same sources, may be summed up as follows: Contingent remainders have been valid future interests at least since the time of Henry VI, but were destructible, that is, they failed entirely unless, before or at the time the preceding interest actually determined, they became ready to take effect in possession, whenever and however, the determination of the preceding interest occurred. Springing executory interests, on the other hand, as legal estates were wholly invalid under the feudal or common law system of land law. When they were held to be valid legal interests in conveyances operating under the statutes of uses and wills, they also became indestructible, that is, they took effect, according to the intent of the settlor, when the event upon which they were limited happened, and without regard

[14] White *v.* McPheeters, 75 Mo., 292. The court in that case said, "Under our statute which declares that the term 'real estate' as therein used shall include all estates and interests in lands [R. S. 1879 § 2356-j] and that all real estate whereof a defendant shall be seized either in law or equity, shall be subject to seizure and sale under execution [R. S. 1879 § 2354-i] the interest of the said McPheeters [the contingent remainderman] in the real estate in controversy, whether it be regarded either as a vested or contingent remainder, was liable to be subjected to the payment of his debts." See also note in 16 Harvard Law Rev. 377.

[1] This part originally appeared as an article in the Law Quarterly Review, XXI, p. 118. Observe the reply to it by Mr. Edward Jenks in the same review, XXI, 265.

to the time of its occurrence with reference to the termination of the preceding estate.

Recent law reform legislation in England[2] seems to have made this distinction first of less importance and finally of none at all, except as regards cases arising under limitations existing prior to the time the Contingent Remainders Act of 1877 took effect. The Real Property Act of 1845[3] provided that any contingent remainder existing after 1844 should be capable of taking effect "notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects, as if such determination had not happened." This act, however, failed to provide for the case where the preceding estate of freehold terminated from causes other than those mentioned. A contingent remainder was, therefore, still liable to be defeated by the death of the life tenant before the contingency had happened. In 1877 another Contingent Remainders Act[4] was passed by which the liability of the future contingent interest to destruction by the expiration of the preceding estate (in any manner) before the happening of the event upon which the subsequent interest was to vest, has been abolished. This act applies only to remainders arising under instruments executed since August 2, 1877.

It is believed that a recent line of English cases, commencing with *In re Lechmere and Lloyd*[5] in 1881, and concluding with *Battie-Wrightson v. Thomas*[6] in 1904, go very far toward accomplishing, without statute, a large part, if not all, that was actually effected by the Contingent Remainders Act of 1877. These cases may not practically cause much disturbance in English conveyancing, because, since 1845, the power of the holder of the particular estate to destroy contingent remainders has ceased, and, since 1877, the destruction of contingent remainders in any manner is becoming increasingly less. In by far the greater number of jurisdictions of the United States, however, there are still no contingent re-

[2] A Century of Law Reform, pp. 294, 295, Lecture by Arthur Underhill.

[3] 8 and 9 Vict., c. 106, sec. 8.

[4] 40 and 41 Vict., c. 33.

[5] 18 Ch. Div. 524 (1881); (5 Gray's Cases on Prop. 82).

[6] [1904] 2 Ch. 95.

mainders acts.[7] In some the act which does exist is of partial effect only, like the English Act of 1845.[8] In most of these states there is neither decision, nor *dicta,* nor any practice of conveyancers in favor of holding that a contingent future interest is destroyed because of the too early failure of the preceding interest.[9] Here, then, the existence of such a line of English cases as I have referred to is of considerable importance, as furnishing a possible basis for the contention that the rule which made certain contingent future interests destructible and thereby defeated the expressed intent of the testator or settlor, no longer exists.

It is the purpose of this part of the present chapter on remainders to inquire into the true scope and tendency of *In re Lechmere and Lloyd* and the cases following it in order that it may be ascertained what ground they furnish for the assertion that, without the aid of statute, contingent remaind-

[7] The only states which seem to have a complete Contingent Remainders Act are given in Washburn on Real Property, 6th ed. § 1600, note, as follows: Ala., Ga., Ind., Ky., Mich., Minn., Mont., N. Y., N. Dak., Va., W. Va., Wis.

[8] Maine: Rev. Stat. 1871, c. 73, sec. 5. Mass: Rev. Laws (1902) p. 1268, sec. 8. The acts in both these states antedate the English Contingent Remainders Act of 1845. The Mass. act appears in R. S (1836) ch. 59, sec. 7; the Maine act in R. S. (1841) ch. 91, sec. 10.

In South Carolina (1 Rev. Stat. 1893, ch. 66; Code of Laws (1902) vol. 1, § 2465) the act goes no farther than to provide that a contingent remainder shall not be "defeated by feoffment with livery of seisin."

In Texas the statute goes no farther than to provide that the remainder shall not be defeated by the alienation of the particular estate, either by deed or will, or by the union of such particular estate with the inheritance by purchase or descent. Battis' Ann. Civ. Stat. (1897) § 626.

[9] 1st: Cases where the destruction of contingent remainders was held to have occurred:

District of Columbia: Craig *v.* Warner, 5 Mackey, (D. of C.), 460.

Mississippi: Irvine *v.* Newlin, 63 Miss. 192.

South Carolina: Redfern *v.* Middleton, Rice L. (S. C.) 459; Faber *v.* Police, 10 S. C. (10 Rich.) 376; McElwee *v.* Wheeler, 10 S. C. (10 Rich). 392.

Pennsylvania: Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322; Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296; Stump *v.* Findlay, 2 Rawle, (Pa.) 168; Bennett *v.* Morris, 5 Rawle, (Pa.) 15; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Dunwoodie *v.* Reed, 3 Serg. & R. (Pa.) 435, is only *contra* to the extent of maintaining that a common recovery by the holder of the particular estate does not bar the contingent remainder. Upon this point it was clearly overruled.

2nd: Cases containing *dicta* rec-

ers are no longer destructible. To this end it will be necessary to classify all the possible sorts of contingent future interests which may be limited to take effect after the termination of a particular estate of freehold, to note the proper distinction between them,—the name to be given each,—and the extent to which they are recognized as legal estates. Such, accordingly, is the scheme of exposition adopted.

§ 82. The three possible sorts of contingent future interests which may be limited to take effect after a particular estate of freehold: The first of these includes all those which are limited upon an event which, according to the expressed intent of the settlor, must happen, if at all, before or at the time when the preceding interest terminates, no matter when or in what manner that may occur. Thus, to A for life, and after A's death to the right heir of J. S., provided said right heir of J. S. is ascertained before the termination (whenever and in whatever manner) of the preceding life estate in A.[10] The second includes all those future contingent interests which are to take effect upon an event which, according to the expressed intent of the settlor, must happen, if at all, after the expiration of the preceding estate. Thus, to A for life and one year after A's death to B and his heirs. The third includes the large class of cases where the future interest is limited upon an event which, according to the actual expressed intent of the settlor, may happen before or after or at the time of or after, the termination of the preceding interest. Thus, to A for life, and then to all the children of A, who, either before or after the death of A, attain twenty-one; also, to A for life, and then to all the children of A who survive A. Into one or the other of these three classes of cases, it is submitted, every contingent future interest, limited after a particular estate of freehold, must fall.[11]

ognizing the doctrine by which contingent remainders may be destroyed: Edwards *v.* Woolfolk's Adm'r. 56 Ky. 376; Dennett *v.* Dennett, 40 N. H. 498; Madison v. Larmon, 170 Ill. 65. See also Young *v.* Harkleroad, 166 Ill. 318, and Spencer *v.* Spruell 196 Ill. 119, *post*, § 115.

[10] It is believed that such an expressed intent as is here supposed is of fairly rare occurrence. In Symes *v.* Symes [1896] 1 Ch. 272, North J. seems to have hinted that such an intent was expressed in the limitations there involved. See also *ante*, § 69.

[11] *Ante*, § 67.

§ 83. **With regard to the first and second of these three classes of future interests:** There is no difficulty in distinguishing between the first and second of these three classes of future interests, in naming them, or in stating the law as to their validity. The future interest of the first sort is bound to take effect, if at all, by way of succession. It is, therefore, a remainder.[12] It is a contingent remainder because it is subject to a condition precedent other than the termination of the preceding estate. It must have been as unobjectionable, under the feudal system of land laws as a vested remainder itself. The guess may, therefore, be hazarded that so long as any remainders have been recognized it has been valid. By its very terms, however, it is liable to be defeated by the non-happening of the event before the termination of the preceding interest, and it makes no difference whether the preceding estate terminates prematurely by forfeiture, surrender or merger, or in its natural course as by the death of a life tenant. The Contingent Remainders Act of 1845 would seem, according to its literal language, to change this so far as the destruction of the future interest by the premature termination of the particular estate is concerned, while the Contingent Remainders Act of 1877 would seem not to affect it at all. The future interest of the second class, on the other hand, is bound to take effect, if at all, by way of interruption. It is, therefore, clearly a springing executory interest, since in taking effect in possession, it cuts short the resulting interest in fee to the settlor. It was unequivocally void as a legal interest before the statutes of uses and wills. Its validity was first recognized when it was created by conveyances operating under those statutes. Once held to have been validly created, it also came in time to be regarded as indestructible.

§ 84. **With regard to the future interest of the third sort there are three difficulties:—(1). When have you such a future interest in a particular case?** A future interest of the third class occurs most clearly when land is limited to A for life, then to such children of A, as, either before or after his decease, attain the age of twenty-one years, in fee. Here, there can be no question but that the event upon which the future interest is to vest may happen either before or after

[12] *Ante*, § 68.

the termination (whenever and in whatever manner) of the preceding interest. It is clear enough, also, that it is the expressed intent of the settlor that the future interest shall take effect when the event happens without regard to when it occurs with reference to the termination of the preceding interest. It is believed that the case is not essentially different where the limitations are to A for life, then to such children of A as attain the age of twenty-one years in fee simple. The expressed intent is exactly the same as in the case first put. The future interest is to take effect when the event happens without the slighest reference to when the preceding estate determines. The only difference is the purely verbal one, that in the first case the intent is, if possible, a little more emphatically stated. It is not believed that one can say it is more clearly stated. The difference is merely one of words.

If one should be tempted to disagree and say that the intent in the latter case was that the future contingent interest should only take effect if the event happened before the termination (whenever and in whatever manner) of the preceding interest, several recognized results should furnish a sufficient answer. If land be conveyed to trustees in trust for A for life, then in trust for such children of A as attain twenty-one in fee simple, it is perfectly clear that the children of A, who reach twenty-one either before or after the death of A, will take.[13] This could not be unless the intent had been so expressed in the limitations declared. If in the case of legal limitations of this sort it were actually expressed to be intended that A's children should take only provided they reached twenty-one before the termination of A's life estate, the English Contingent Remainders Act of 1845 must have been without justification because it would have operated generally to defeat the expressed intent of the settlor. Upon the same hypothesis as to the actual intent of the settlor, the act of 1877 would have scarcely any application at all. It is submitted that the foundation of both statutes is that the creator of the contingent future interest always intends it to take effect when the event happens without reference to the termination of the preceding interest. Finally, the opinions of English

[13] Astley *v.* Micklethwait, 15 Ch. Prop. 78); Challis Real Property, Div. 59 (1880), (5 Gray's Cas. on 2nd ed. page 111.

judges, have, of recent years, been quite explicit as to the meaning of the settlor or testator in such a case. In *Festing v. Allen*,[14] after a gift to the issue of the life tenant who attained twenty-one, there was a gift over "for want of any such issue." At the death of the life tenant there were several children, but none had reached twenty-one. The gift to the children failed, but the gift over could not take effect because the event had not happened upon which it was limited, that is, because "for want of such issue" meant "for want of issue of the life tenant as should, either before or after the death of the life tenant, reach twenty-one."[15] In *Dean v. Dean*[16] the legal limitations were to A for life and then to such children of A as either before or after the death of A should attain twenty-one. In discussing whether the expressed intent of the settlor was, in this case, any different from what it was where the limitations were to A for life and then to such children of A as attain twenty-one, Chitty, J. says, very frankly: "So far as the testator's intention is concerned, the meaning of the limitations is the same; in both cases the testator intends that all the children who attain twenty-one, whether before or after the death of the tenant for life, shall take; and it would seem strange to anyone not acquainted with the nicety of the law relating to real property in this country, that any different legal effect should be given to a mere difference in words which mean the same thing."

If the limitations be to A for life, and then to such children of A and B as shall be living at the death of the survivor of A and B, B may die before A and then, at A's death, the life estates continuing till that time, the future interest will vest in interest and in possession at the same time, viz., *eo instanti* upon the termination of the life estate. On the other hand, if B outlive A the life estate of A will come to an end before the children who are to take are ascertained. We have here, therefore, a case where the event upon which the future interest is to take effect may happen at or after the termination of the preceding interest. There can be no doubt, however, but that it is the clear expressed intent of the tes-

[14] 12 M. & W. 279 (1843).

[15] Perceval *v.* Perceval, L. R. 9 Eq. 386 (1870) *accord.*

[16] [1891] 3 Ch. 150.

tator or settlor that the future interest is to take effect when the event happens entirely regardless of whether it occurs at or after the termination of the preceding estate—that is, whether B dies before or after the death of A. Thus, in *Cunliffe v. Brancker*,[17] Jessel, M. R., speaking of exactly such a future interest created by will says, it is not impossible that the will should take effect "through any defect of expression of intention, but through the fault of the rule of law." The case is not different if the limitations are to A for life, then to such children of A as survive him. Here the contingency can happen after the termination of the particular estate, if that occurs prematurely by forfeiture, surrender, or merger. Otherwise it happens, if at all, *eo instanti* upon the termination of the preceding interest. So far, however, as the expressed intent of the settlor is concerned the future interest is to take effect when the event happens, regardless of when that may occur with reference to the termination of the preceding interest.

The assertion, it is believed, may fairly be made that whenever a future contingent interest be limited after a particular estate of freehold, upon an event which may happen either before or after, or at or after the termination (whenever or in whatever manner) of the preceding interest, you have a case, in the absence of anything expressed to the contrary, where the future interest is by virtue of the language used, intended to take effect whenever the event happens and without the slightest reference to when the preceding estate determines. In short, you have a future interest of the third class.

§ 85. **(2). What will you call it?** If we name the future interest of the third class with reference solely to the expressed intent of the testator, it must be classed with future limitations of the second sort. The possibility that it may, in fulfilling the expressed intent of the settlor, take effect after the termination of the preceding estate of freehold makes it, to begin with, like a springing future interest. It differs, however, from future interests of the second class in that it may take effect as a remainder, *i. e.*, by way of succession, if the event upon which it is limited happens before or at the termination of the preceding interest. It belongs, in the first

[17] 3 Ch. Div. 393, 401 (1876).

instance, with future interests of the second class, but it may be turned into a future interest taking effect like one of the first sort. It may pass from an interest which takes effect by way of interruption to one which operates by way of succession.[18]

If the future interest of the third class is called a contingent remainder and thus assimilated to a future interest of the first class, it must be because some rule of law steps in and, like the rule in Shelley's case,[19] defeats, to a certain extent, the intention of the settlor by requiring such a future interest, if it take effect at all, to do so as a remainder by way of succession and not as an executory interest. Such a rule would add, by operation of law, what is added by the act of the settlor in future interests of the first class—*i. e.*, the proviso that the future interest, which, without the proviso, is like one of the third class, shall take effect only in case the event upon which it is limited shall happen, either before or at the time of the termination (whenever and in whatever manner) of the preceding interest. The future interest of the third class must, therefore, be a contingent remainder, if at all, by operation of law and not by act of the parties.[20]

§ 86. **(3). To what extent does the law enforce it as a legal estate?—An historical problem:** The rule as to the extent to which future interests of the third class were enforceable as legal estates, would, in a system of law newly created and consistent with modern notions and conditions, undoubtedly be what the English Contingent Remainders Acts of 1845 and 1877 have made it,—that the intent of the creator of the future interest shall be carried out. If the event upon which the future interest is limited happens at all, the future interest will vest in interest or in possession, by way of succession or by way of interruption according as the contingency happens before or at the time of, or after the termination of the preceding estate. The English system of land law upon which our land laws on this side of the Atlantic are, for the most part, founded is, however, by no means a modern creation. It has its foundation in the middle ages—in the

[18] *Ante*, § 69.
[19] *Post*, § 133.
[20] *Ante*, § 69.

feudal organization of society. Historically, therefore, it is a feudal system of land law except in so far as time and the action of the legislature, have changed it. It is by no means, therefore, to be supposed that, apart from modern statute, the rule which is consistent and rational from the point of view of the modern organization of society, exists as law. The question, to what extent does the law enforce a future interest of the third class as a legal estate, must, therefore, be answered with reference (a) to the feudal or common law of land, and (b) to the changes which were wrought by the statutes of uses and wills.

§ 87. **(a) Under the feudal system of land laws:** The feudal system of land law, which prevailed exclusively for legal estates down to the enactment of the statutes of uses and wills of Henry VIII, regarded the intent of the settlor in the case of future interests of the second class as absolutely impossible of being carried out. There seems to be some ground for asserting that at first it adopted the same attitude toward future interests of the third class.[21] This attitude was perfectly rational and consistent from the point of view of the feudal system which depended for its very existence upon the necessity that "there should at all times be a tenant invested with the seisin, ready on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims of the seisin and to preserve it for the successors in the title."[22] In such an organization of society the possibility that there would be a gap, of always more or less uncertain duration, in the seisin between the termination of the particular estate and the taking effect in possession of the future interest caused the whole future interest to be discarded as void. It must, however, ultimately have been perceived that these contingent future interests could take effect as remainders by way of succession; that they would do so, if the event upon which they were limited happened before or at the termination of the particular estate; and that, if they actually did take effect in this manner, they

[21] Williams Real Property, 17th Int. ed. p. 411, notes (d) and (e); Gray's Rule against Perpetuities, § 134, 1 Gray's Cases on Prop., 435 note 1, *ante*, § 78.

[22] Leake, Digest of Land Law, p. 47.

were unobjectionable under the feudal system of land laws. It is not surprising, therefore, to find a case in 1430 where one was allowed take effect provided it did so in this unobjectionable manner.[23]

At this point the future interest of the third class became, in effect, a future interest of the first class, *i. e.*, a contingent remainder. It was, however, a future interest of the first class or a contingent remainder, by operation of law as distinguished from a regular future interest of the first class or contingent remainder which was such by act of the parties. This is clear, because, by the expressed intent of the settlor, it was a future interest of the third class,—*i. e.*, an executory future interest which might, in certain events, take effect as a remainder by way of succession. By operation of law,—that is by a rule of law, which to a certain extent defeated the intention of the settlor,—the future interest would become a valid estate in possession, if events did so happen that it took effect by way of succession. Otherwise it was void according to the rule of the times which admitted of no future legal interests taking effect by way of interruption. Actually and historically, then, practically all contingent future interests after a particular estate of freehold, which have been called for several centuries, contingent remainders, are in reality nothing more than executory future interests so limited that they may take effect like remainders by way of succession, and, by a rule of law required to take effect in that way or not at all. It was this rule of law which actually made the contingent remainder in these cases. The rule was not a rule of contingent remainders, for it was the rule which turned an executory future interest into a contingent remainder,—the rule which created contingent remainders.[24] There is, there-

[23] Williams on Real Property, 17 Int. ed. pp. 412-413. Gray's Rule against Perpetuities, § 134; *ante*, § 78.

[24] Since this rule does not obtain today where the future interests are all equitable, Prof. Gray would seem to be entirely justified in saying (Rule against Perpetuities, § 324) that "there are strictly no equitable remainders," Mr. Jenks (Law Quart. Rev. XX: 285 note 1) to the contrary notwithstanding. There are of course equitable interests which take effect by way of succession only. There are, however, no future interests in equity which by a rule of law are compelled to take effect by way of succession or fail, and in so doing

fore, in our final analysis absolutely no difference between the rule that a contingent remainder, must, regardless of the intent of the settlor, become ready to take effect in possession at or before the termination (whenever and in whatever manner) of the preceding interest, or fail entirely, and the rule that an executory future interest, which possibly can, must be ready to take effect in possession at or before the termination (whenever and in whatever manner) of the preceding estate, or fail entirely. In a word, the rule by which contingent remainders were said to be destructible was no other than the rule which originally allowed an executory interest after a particular estate of freehold to take effect by way of succession like a remainder.

§ 88. (b) **Under the statutes of uses and wills—Prior to Carwardine v. Carwardine (1757):** It is possible that before the time of Henry VIII this rule of the feudal system, which required legal executory interests to take effect by way of succession or fail, was avoided where the interests were limited by way of use. In Sugden on Powers[25] it is said that, before the statute of uses, a feoffment to the use of A for years, remainder to the right heirs of J. S., gave valid equitable interests to A and to the heirs of J. S. The heirs of J. S., therefore, took if they ever came into existence at all. If that be so it may be surmised that, if the feoffment were to the use of A for life, remainder to the right heirs of J. S., the same result would follow. No feudal principle would be violated in either case for the seisin was in the trustee or feoffee to uses all the time.[26]

After the statutes of uses and wills of Henry VIII, by devises and conveyances to uses the validity of future interests of the second class, viz., those limited upon a contingency which could not possibly occur till after the termination of

defeat the intention of the settlor. Nor did the feudal system of land law, which gave us remainders in legal estates, recognize the existence of any equitable interests in land.

[25] 8th ed. p. 34, § 24.

[26] Mr. Jenks in a recent article (Law Quart. Rev. XX. 280, 285) seems of a contrary opinion. He says: "Thus (before the statute of uses), a feoffment to A and his heirs, to the use of B for life and, after B's death, to the use of the eldest son of C (a bachelor) and his heirs, would have created a true contingent remainder in favor of C's eldest son."

the particular estate, became perfectly valid.[27] The reasons in support of this as now given, are as follows: As such interests were valid by way of use before the statute, and, as the statute turned uses into legal estates, springing uses became springing legal estates. Before the statute of uses upon a feoffment to the use of the feoffee's will springing uses might be created by will.[28] So, after the statute of wills, direct springing devises of legal interests were permitted.[29] The result in both instances was doubtless aided by the fact that conveyances to uses and devises after the statutes of uses and wills were modes of transferring title without the common law formality of livery of seisin or grant and attornment.[30] Then, it is believed that the feudal organization of society was so far giving way to the more modern or commercial order of things, that the reasons for the feudal prohibition upon such springing interests no longer existed. If these reasons were sufficient to make valid (and, therefore, indestructible) future interests of the second class, which could not possibly take effect as remainders by way of succession, how much more ought they to have been sufficient to make valid future interests of the third class which might possibly take effect in that way.[31] How supremely absurd it is to say that if a future interest cannot take effect otherwise than by interruption, it may do so, but if it may take effect either by way of interruption or succession, it must do so in the latter way or fail altogether.

Historically, however, the law did not work out these *a priori* logical results. Springing and shifting uses and executory devises were no sooner held valid than the impression seems to have obtained that they were destructible.[32] The

[27] Bro. Feff. al Uses, 340a, pl. 50; Sugd. Powers p. 34 (8th ed.); Gray's Rule against Perpetuities, §§ 136-138.

[28] Pollock, Land Laws, p. 91.

[29] Id. p. 98.

[30] Digby, Hist. of Law of Real Prop., p. 332. *Post*, § 122.

[31] "The repugnance of the common law to a freehold to commence in *futuro*, and the dread of perpetuities" (Sugden on Powers, 8th ed. p. 34) are reasons which apply much more strongly to future interests of the second class which could not possibly take effect by way of succession than to future interests of the third class which could.

[32] Gray's Rule against Perpetuities, §§ 142, 143.

analogy between their destructibility and that of contingent remainders at common law must have been entirely superficial, because, at common law, the contingent remainder was destroyed by the termination of the preceding estate so that the future interest was forever prevented from taking effect by way of succession. Where, then, you had an interest which never could take effect by way of succession, if it were valid at all, it must have been indestructible. The impression that the future shifting interest might be destroyed by the levying of a fine by the one seized in possession of the preceding interest, seems, however, to have prevailed at least till 1599.[33] It is assumed that the same impression in fact existed as to future interests which could only take effect as springing uses or executory devises. It was during this period that, by a series of cases decided in 1592, 1595 and 1598, it became firmly established that a contingent future interest of our third class created by way of use or devise, was void unless it took effect by way of succession—that is, that it was a contingent remainder and destructible.[34] Afterwards, it is true, sound principles prevailed as to contingent future uses and executory devises which could not possibly take effect otherwise than by way of interruption, and it was held that, if valid at all, they were indestructible.[35] The holding, however, that contingent remainders were destructible—or more accurately, that contingent future interests of our third class failed entirely unless they took effect by way of succession—continued as the survival of a period when the courts either failed to perceive, or refused to act upon the perception that to hold springing interests valid at all, was to hold them indestructible.[36] By 1664 there was, it would

[33] Gray's Rule against Perpetuities, §§ 144-147.

[34] Gray's Rule against Perpetuities, § 141.

[35] Pells *v.* Brown, Cro. Jac. 590, (1620), held a shifting executory devise indestructible: Gray's Rule against Perpetuities, § 159. In Snow *v.* Cuttler, 1 Lev. 135, (1664) the validity of a springing executory devise of our second class was assumed to be valid. As it was also suggested that it would be subject to some rule against remoteness it probably was regarded as indestructible. Gray's Rule against Perpetuities, § 165.

[36] As indicating the extreme persistence of the common law hostility to springing future interests, see the early intimations (Sugden on Powers, 8th ed., § 24) and finally the decisions of Adams *v.* Savage, 2 Ld. Raym. 854, 2 Salk.

seem, reason to believe that springing interests of our second class, as well as those which were preceded by no particular estate at all, had become valid and indestructible, but subject to a rule against remoteness.[37] Renewed efforts seem, therefore, to have been made at this time[38] to defeat the rule which required our contingent future interests of the third class to take effect by way of succession or fail entirely. This was in reality nothing more than the effort to carry out logically the result of holding springing future interests of the second class valid and indestructible and to prevent the illogical survival of the feudal restrictions upon the creation of future interests. It failed, however, presumably because the continuance of the old law had become established.[39] Doubtless the making of titles had proceeded upon the assumption that future interests of our third class might be utterly defeated.

§ 89. **From Carwardine v. Carwardine (1757)[40] to Brackenbury v. Gibbons (1876):[41]** *Carwardine v. Carwardine,* in 1757, was the case which seems to have marked for failure all efforts to turn the law from the course which it had taken. The rule there put forward by Lord Chancellor Northington, to meet the contention that a future interest of the third class, which had failed to take effect by way of succession might do so by way of interruption as a springing executory interest, was that "it was a certain rule of law, that if such a construction could be put upon a limitation as it might take effect by way of remainder, it should never take place as a springing use or executory devise." The making of this rule in form a rule of law of construction rather tended to obscure the real character and significance of it, for it is not believed that any-

679, (1703), 5 Gray's Cases on Property, 119, and Rawley *v.* Holland, 22 Vin. Ab. 189 pl. 11, (1712), to the effect that a contingent future interest limited by way of use after a term of years, was wholly void.

[37] Gray's Rule against Perpetuities, § 165.

[38] Weale *v.* Lower, Poll. 65 (1672); Southcot *v.* Stowell, 1 Mod. 226, 237, 2 Mod. 207 (1678); Sugden on Powers, 8th ed. §§ 33-34.

[39] Weale *v.* Lower, Poll. 65 (1672); Southcot *v.* Stowell, 1 Mod. 226, 237, 2 Mod. 207 (1678); Carwardine *v.* Carwardine, 1 Eden, 27, 34 (1757-8); Sugden on Powers, 8th ed., pp. 34-37, §§ 33-37.

[40] 1 Eden, 27, 34; Sudgen on Powers, 8th ed., pp. 40-42, §§ 35-37.

[41] 2 Ch. Div. 417.

one ever seriously supposed that this was a rule of law of construction by which it was determined that the settler's actual intention was that the future interest was to take effect, if at all, by way of succession, viz., by the happening of the event upon which it was limited before or at the time of the termination of the particular estate. The actual expressed intent, as has already been fully demonstrated,[42] was quite the contrary. The formula which Lord Northington put forward was a rule of construction in exactly the same sense that the Rule in Shelley's case was a rule of construction[43]—*i. e.*, it wasn't a rule of construction at all, but a rule of law which defeated the actual intent which the settlor expressed. The rule that a future interest was to be construed a remainder if it possibly could be, was precisely the same as if it had read: If a contingent future interest possibly can take effect by way of succession, it must do so, or fail entirely, even though the expressed intent of the settlor is thereby defeated. This was the exact equivalent of the rule as it existed for legal estates before the statute of uses. There was, however, this difference in rationale in the existence of the rule before and after that statute: At common law it existed to aid the carrying out of the settlor's intent so far as was consistent with the principle of feudal land law. After the statute of uses it persisted in order to defeat the settlor's intent, contrary to the spirit of the newer, non-feudal system of conveyancing.

From the time of *Carwardine v. Carwardine* (1757),[44] down to *Brackenbury v. Gibbons* (1876),[45] the results actually reached point irresistibly to the conclusion that the so-called rule by which contingent remainders by way of use or devise, were destructible was the literal equivalent of the common law or feudal rule which, in reality, required all executory future interests after a particular estate of freehold that could possibly do so, to take effect by way of succession or not at all—that is, made future interests of our third class void except as the event upon which they were limited happened before, or *eo instanti* on the termination of the particular estate. Every future interest which, from the time of *Carwar-*

[42] *Ante*, § 84.
[43] *Post*, § 133.
[44] 1 Eden, 34.
[45] 2 Ch. Div. 417.

dine v. Carwardine, down to the present time, has been held to be a contingent remainder and so liable to fail, will be found to be a contingent future interest of the third class. Conversely all future interests of our third class will be found, until *In re Lechmere and Lloyd* (1881),[46] to have been held to be contingent remainders and destructible.

Not by way of proof, but merely as illustrative of the truth of the above broad statements in particular instances, the following examples may be mentioned: If land be limited by way of use or devise to A for life and then to such children of A as survive him, the future interest is one of the plainest cases of a contingent remainder. It is, of course, destructible. It is also a future interest of the third class because the event upon which it depends may happen, according to the expressed intent of the settlor, at or after the termination of the particular estate. The case is not in the least different if the future interest be limited to such children of A as survive A and his wife B. It belongs equally to our third class and it was held in *Cunliffe v. Brancker*,[47] a destructible future interest—a contingent remainder. Again suppose land be limited by way of use or devise to A for life and after his death to such of his children as attain twenty-one in fee. Here the event upon which the future interest is to take effect may happen before or after the termination of the particular estate. The intent expressed is that the children who reach the required age shall take when that time comes, without any reference to whether it occurs before or after the termination of A's life estate. It is, therefore, a future interest of our third class. It is clearly enough a contingent remainder and destructible. It was so held in *Festing v. Allen*.[48] The case is not in the least altered if the future interest be limited to such children of A as, either before or after his death, attain the age of twenty-one in fee. It is then the very clearest case of a future interest of our third class. It was held by Hall, V.-C., in

[46] 18 Ch. Div. 524 (5 Gray's Cas. on Prop. 82).

[47] 3 Ch. Div. 393 (1876).

[48] 12 M. & W. 279. Also *accord:* Russel *v.* Buchanan, 7 Sim. 628 (1836); Bull *v.* Pritchard, 5 Hare, 566 (1847); Holmes *v.* Prescott, 33 L. J. Ch. 264, 10 Jur. N. S. 507 (1864); Rhodes *v.* Whitehead, 2 Dr. & Sm. 532 (1865). See, however, Browne *v.* Browne, 3 Sm. & G. 568 (1857).

Brackenbury v. Gibbons (1876),[49] to be a contingent remainder and destructible upon the ground that the case was precisely the same as *Festing v. Allen.*

By the time the most recent of these cases was decided it was fully appreciated that the rule of law which was applied was not one of construction, but one which defeated the emphatically expressed intention of the settlor or testator. The formula which Lord Northington used in *Carwardine v. Carwardine,* was, therefore, altered to this: "Every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise [or springing use]."[50] In this form it was exactly the rule of the common law which gave effect to executory future interests, limited after an estate of freehold, if they happened to become ready to vest in possession at or before the termination of the preceding interest. It was neither more nor less than the rule that an executory future interest after a particular estate of freehold which might possibly take effect by way of succession, must do so or fail entirely.

§ 90. In re Lechmere and Lloyd:[51] In *Lechmere and Lloyd's* case, we have the beginning of a very considerable change. In that case there was presented to Jessel M. R. the same question that was decided by Hall V.-C. in *Brackenbury v. Gibbons.*[52] The limitations involved in both cases were the same. They were substantially to A for life, and after his death to such children of A as, either before or after his death, attain twenty-one. The Master of the Rolls held that the gift did not fail as to those children of A who had not reached twenty-one at A's death, but that the gift to such children took effect as an executory devise. He conceded that *Festing v. Allen,*[53] was law, but distinguished *In re Lechmere and Lloyd* upon the ground that the limitations contained the words "either before or after the death of A." But the addi-

[49] 2 Ch. Div. 417.

[50] Per Jessel M. R. In re Lechmere and Lloyd, 18 Ch. Div. 524, 528, (5 Gray's Cas. on Prop. 82), quoting with approval the language of Hall V.-C. in Brackenbury *v.* Gibbons, 2 Ch. Div. 417, 419.

[51] 18 Ch. Div. 524 (1881), (5 Gray's Cas. on Prop. 82).

[52] 2 Ch. Div. 417, 419.

[53] 12 M. & W. 279 (5 Gray's Cas. on Prop. 71).

tion of these words did not make any change in the expressed intent of the testator. It is not clear that the Master of the Rolls thought it did. Certainly the equity judges who, subsequently followed the decision in *In re Lechmere and Lloyd*, did not think so.[54] Nor can any ground of distinction be predicated upon the supposition that the limitation in *In re Lechmere and Lloyd* is to two distinct classes, for it is to a single class as clearly as in *Festing v. Allen*, and in both cases that single class is composed, so far as the expressed intent of the settlor is concerned, of the children of the life tenant, who reach twenty-one at any time, regardless of whether before or after the termination of the preceding estate. Did the expression peculiar to the limitations in *In re Lechmere and Lloyd* make any difference in the application of the rule which Hall V.-C. laid down and to which Jessel, M. R. agreed, that "every gift which can take effect as a remainder absolutely excludes it being treated as an executory devise"? Hall V.-C. said it did not. The Master of the Rolls said it did. It is submitted that Hall V.-C. was correct from the point of view of the character of the rule as established by the authorities, and indicated by its origin. All that the rule of law required was that at the time the limitations were created there should be a possibility that events upon which the future interest was limited to take effect might so happen that the future interest could take effect by way of succession. If that possibility existed then the future interest must so take effect or fail absolutely. This possibility as clearly existed in *In re Lechmere and Lloyd* as in *Festing v. Allen*, because in the former case as well as in the latter, all the children of A might reach twenty-one before his death. The Master of the Rolls must have differed from the Vice-Chancellor in regard to the meaning which he put upon the rule. If his proposition is, that if, in the events which happen after the future interest is created, it cannot possibly take effect except as an executory interest, then it will do so, the whole doctrine of the destructibility of contingent future interests is

[54] Dean *v.* Dean [1891] 3 Ch. 150, Chitty, J.; Blackman *v.* Fysh, [1892] 3 Ch. 209, Kekewich, J.; Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95.

disposed of. If he means that the gift will be executory provided, at the time it is created, the intent of the testator cannot otherwise certainly be given effect, then, also the whole doctrine of the destructibility of future interests falls.[1] The truth is, therefore, that *In re Lechmere and Lloyd* made a real and very substantial departure from the law as it must, in the light of history and the authorities, have existed since contingent future interests after a particular estate of freehold were allowed at all.

If, however, Hall V.-C. was right from the point of view of history and authority, it is submitted that the Master of the Rolls was right from the point of view of land law reform and upon principle. Jessel's effort in *In re Lechmere and Lloyd* was as notable an example of law reform as was Lord Mansfield's in *Perrin v. Blake*.[2] The two instances are not dissimilar. In each the reformer laid hold of a more than usually emphatic expression of intent to declare that a rule of law which defeated a settlor's or testator's intention should not prevail. Lord Mansfield's effort never became law and has been long since condemned.[3] Jessel's has prevailed. The reason is twofold. Both Jessel's and Lord Mansfield's effort was to get rid of a feudal rule which defeated the settlor's intention. Jessel was a full century farther away from the feudal system than Lord Mansfield and he was only supplying by judicial decision the defect which existed in the Contingent Remainders Act of 1845, and which prospectively had already been remedied by the act of 1877. Furthermore, Lord Mansfield tried to break in upon a rule which had a continuous history of mathematical application since 1324,[4] and of which it could only be said that it was illogical and without reason since the allowance of contingent remainders in 1430.[5] Jessel on the other hand did no

[1] So if, as the note in 7 L. Q. R. 302 suggests, Jessel, M. R. translated the rule to mean, "If a gift would fail as a contingent remainder it may be construed as an executory devise," there is no longer any rule of law by which contingent future interests are destructible.

[2] 1 W. Bl. 672, (5 Gray's Cas. on Prop. 98).

[3] *Post*, § 133.

[4] Gray's Cases on Property, p. 91, note.

[5] This would be maintained upon the ground that the Rule in Shelley's case originated at a time when the gift to the heirs of the life

more than incline toward the rule which might, and logically should have, prevailed in conveyances to uses and devises under the statutes of uses and wills, especially after it became well settled law that springing and shifting uses and executory devises were indestructible, but might be invalid upon the ground of remoteness.[6]

§ 91. Blackman v. Fysh and Battie-Wrightson v. Thomas:[7] After *In re Lechmere and Lloyd* three courses were possible. *First,* Jessel's decision might have been repudiated and Hall V.-C. followed. *Second,* it might have been allowed to stand as a correct result for those cases where, in a will, the testator has, by an unusual emphasis, made it clear that the future interest shall take effect as an executory devise, if necessary in order that his intention be carried out. *Third,* the decision of the Master of the Rolls might have been extended logically so that it would overrule *Festing v. Allen,* and practically accomplish all that the Contingent Remainders Acts of 1845 and 1877 had done. The second course was at once adopted in preference to the first and the exact result of *In re Lechmere and Lloyd* seems now so firmly adhered to that its repudiation may be regarded as impossible.[8] The whole question has, therefore, become; to what extent will it be logically extended? We shall have our answer to this when the English Courts decide (1) what shall be done when a case like *Festing v. Allen* again arises, and (2) whether the future interest will be destroyed where it is contingent upon surviving the life tenant and the life estate terminates prematurely by surrender or merger. The first of these questions has already been dealt with in England. In at least one American jurisdiction there is an indication of the result which would be reached in the second. In both instances the impression left is very strong in favor of the

tenant, if it took effect according to the intent of the parties, would be a contingent remainder and so void *in toto.* See Williams on Real Property, 17th Int. ed., p. 326, note (e). *Post,* § 128.

[6] [1892] 3 Ch. 209.

[7] [1904] 2 Ch. 95.

[8] Miles *v.* Jarvis, 24 Ch. Div. 633 (1883); Dean *v.* Dean [1891] 3 Ch. 150; Blackman *v.* Fysh [1892] 3 Ch. 209; Battie-Wrightson *v.* Thomas [1904] 2 Ch. 95. See also Challis' conservative statement of the rule established by In re Lechmere and Lloyd: Law of Real Property, 2nd ed. p. 114.

logical extension of the doctrine of *In re Lechmere and Lloyd.*

A case where the limitations were like those in *Festing v. Allen* and not governed by the act of 1877 arose in *Blackman v. Fysh*,[9] with this difference, however, that in the latter case it was provided that if the life estate should be taken upon execution by creditors it was to be forfeited and the future interest was to take effect as if the life tenant were dead, that is, in favor of children who should reach twenty-one. The life estate was taken on execution and the question was whether the children, who had not attained twenty-one at that time, could take. Kekewich, J. held that they could. This was affirmed upon the ground that since the life estate was cut short by forfeiture, the future interest limited upon that event was a shifting executory devise and never could have been anything else. Kekewich, J., however, treated the case as if it were like one where the future interest was limited to take effect after a life estate, and where the life estate had terminated by its very terms before the event happened upon which the future interest was to vest. In this view the case was like *Festing v. Allen.* The learned judge considered that the doctrine of *In re Lechmere and Lloyd* applied so that that the future interest could take effect according to the intention of the testator as an executory devise. Upon such an analysis of the case the Court of Appeal were, on the contrary, clearly of the opinion that the future interest would have been a contingent remainder and therefore destructible. That would seem equivalent to a denial that *Festing v. Allen* was to be departed from.

Now, however, in *Battie-Wrightson v. Thomas,* decided in March, 1904,[10] the Court of Appeal seems to take precisely the same position toward *Festing v. Allen* which Kekewich, J. assumed in *Blackman v. Fysh*, with the violent result that the contingent future interest after the particular estate, was held void for remoteness. Under the will involved in *Battie-Wrightson v. Thomas,* which was dated 1854, there was a series of limitations in strict settlement under which William became tenant for life, with a contingent future interest to his eldest son (unborn at the testator's death) in tail, with a further future interest in tail to Charles. Then there was a

[9] [1892] 3 Ch. 209. [10] [1904] 2 Ch. 95.

codicil, dated 1868, by which the testator made the remainder to the eldest son of William, already contingent upon the birth of such son, still further contingent upon such son's attaining the age of twenty-four years. This made the devise to the eldest son of William substantially on all fours with the devise in *Festing v. Allen*.[11] The eldest son of William failed to reach the age of twenty-four years before the death of his father, the life tenant in possession, and a summons was thereupon taken out on his behalf to construe the will and codicil. Charles and the heir at law were made parties. The claim of the eldest son of William was easily disposed of upon the ground that he did not take a vested interest. He, therefore, failed whether his interest were a contingent remainder or an executory devise. If it was the former, it was destroyed. If it was the latter it was too remote. The contest then arose between the heir at law and Charles. The outcome here depended upon what sort of interest the plaintiff had taken. If he had a contingent remainder which failed apart from any question of remoteness, then Charles took. If the plaintiff took an executory devise which failed for remoteness, then there was an intestacy.[12] It looks as if this question might have been disposed of upon the ground that the will and codicil were republished by a codicil of 1878, and hence the limitations created were subject to the Contingent Remainders Act of 1877, under which the future interest of the plaintiff would clearly have taken effect (apart from any question of remoteness) according to the intention of the parties as an executory devise. It was argued for Charles that the act of 1877 did not apply, and for the heir at law that it did. But the Court of Appeal does not seem to have passed upon this point. Nor does the application of the act of 1877 seem to have been, in any way, a factor in the decision. So far as the court refers to the time of execution of the will and codicil they give their original dates—1854 and 1868. The Court of Appeal actually held that the plaintiff took an executory devise which was

[11] There was the immaterial difference that in Festing *v.* Allen the future interest was limited to a class.

[12] Upon the rule of Moneypenny *v.* Dering, 2 DeG. M. & G. 145, Gray's Rule against Perpetuities, § 252 *et seq.*

void for remoteness, so that Charles' interest failed and the heir at law took. They seem to rest the case wholly upon the ground that it was the actual expressed intent of the testator that the plaintiff should take no matter whether he came of age before or after the termination of the life estate, and that under the doctrine of *In re Lechmere and Lloyd* that intent must be given effect. It is submitted that this comes as near breaking in upon the actual decision of *Festing v. Allen* as anything can, and in doing so it takes the first step in the logical extension of the rule of *In re Lechmere and Lloyd*.[13]

§ 92. **Frazer v. Board of Supervisors**:[14] It is believed that the final test of whether the doctrine of *In re Lechmere and Lloyd* will be carried to its logical conclusion must come when the case arises where the limitations are to A for life and then to such children of A as survive him, and where the life estate terminates prematurely by merger. Will the children's interest fail?[15] This case it would seem, cannot now

[13] With the inclination manifested in England since In re Lechmere and Lloyd to release future interests which, according to the intent of the parties, must be springing future interests after a particular estate of freehold, from that rule of law which requires them to take effect by way of succession if possible or fail, it is not surprising to the writer that such a decision as that in Frost *v.* Frost, 43 Ch. Div. 246, has been reached. The disposal of that rule of law leaves the intent of the settlor to take effect and what has heretofore been a contingent remainder by operation of law becomes, in its inception, an executory interest. Even if it be conceded, therefore, that, so long as the rule which turned future interests by way of interruption into future interests by way of succession continued, the Rule against Perpetuities had no application to such as were so controlled (*post*, § 257), yet the moment the former rule ceases to operate there is an instant demand for the latter. So far as the former rule is impaired the latter must step in. As however, these things do not happen with mathematical precision it is not surprising to find, in Frost *v.* Frost, that the Rule against Perpetuities was applied in a case where it was not quite clear that the other rule had yet been abrogated.

[14] 74 Ill. 282.

[15] Mr. Jenks in a recent number of the Law Quarterly Review (XX. 286) lays down a test which would seem to answer this question in the negative. He says: "If it is the settlor's intention (and as to this there can rarely be any doubt) that the objects of his bounty shall take in succession, then the limitations, if they are valid at all, must be valid as re-

come up in England because the Contingent Remainders Act of 1845, applied to all contingent remainders "existing" after 1844. Why, however, should not some of our American jurisdictions hold the children's interest indestructible? In most states there is no statute, no binding decision upon the point, and no practice of conveyancers by which titles depend upon the fact that contingent remainders have been destroyed by forfeiture, surrender or merger. Here, then, if anywhere, we may look for the completion by judicial decision, of that law reform which Jessel inaugurated in *In re Lechmere and Lloyd.*

One case in such a jurisdiction is known to exist which goes far toward taking this final and logical step. It is *Frazer v. Board of Supervisors*, decided by our supreme court in 1874.[16] The limitations involved in that case were created by deed and ran to A and the heirs of her body. By the statute of entails[17] this gave A a life estate with a remainder in fee to her lineal heirs. At least before any children were born, this last was a contingent future interest of the third class,[18] which, according to the general rule, would fail if it did not vest before or at the time of the termination of the particular estate. Before any children were born to A she reconveyed to the grantor in whom the reversion in fee stood,[19] pending the vesting of the contingent future interest. Thereupon the life estate certainly determined by

mainders. If, on the other hand, the settlor intends that, in certain events, a later interest shall displace an earlier, then the later interest, if it is valid at all, must be valid as an executory limitation. This simple truth is the key to the group of cases [referring to In re Lechmere and Lloyd and others following it] which of late years have provoked so much discussion; for in all of them it was manifest that the limitations in dispute could only take effect by disposition of a prior interest." If the learned writer is putting forth a test which depends upon the actual intent of the parties,—and this seems to be his purpose—then all future interests of the third class must take effect in the first instance as executory interests and Mr. Jenks' only example of a contingent remainder would be one created by act of the parties and dealt with above as future interest of the first class. If Mr. Jenks' test depends upon an intent other than the actual intent—viz., on a sort of general intent as distinguished from specific intent,—then his test is worthless.

[16] 74 Ill. 282.

[17] R. S. 1874, Ch. 30, sec. 6; *post*, §§ 114 *et seq.*

[18] *Post*, § 116.

[19] *Post*, § 121.

merger.[20] It was held, however, that the interest of any child that might be born to A and survive her, was not destroyed. This was put upon the ground that the future interest was created by statute and hence to cause its destruction would be to defeat the intention of the legislature.[21] It would seem, however, as if the Illinois Statute on Entails was fully effective, and that the legislature had fully accomplished its purpose, when it created the future interest. Thereafter the estate of the unborn lineal heirs should be left to the mercy of the usual rules of law. Would anyone, for instance, contend that, simply because it was created by statute, it could not be void for remoteness if the Rule against Perpetuities applied generally to contingent remainders, or that it could not be void as violating the rule against double possibilities, if that existed?[22] It is believed, therefore, that the result reached by the Illinois Court upon this occasion, exhibits a strong inclination to get rid, by any possible means, of the rule by which contingent future interests of the third class fail unless they take effect by way of succession.[23]

[20] Egerton *v.* Massey, 3 C. B., N. S. 338 (1857), (5 Gray's Cas. on Prop. 74); also Craig *v.* Warner, 5 Mackey (D. C.) 460; Bennett *v.* Morris, 5 Rawle (Pa.) 15. Observe that there can be no merger when the life estate and remainder to the same person are created by the same instrument. Thus, in Kellett *v.* Shepard, 139 Ill. 433, where the daughter took a life estate with a contingent remainder in fee and a reversion in fee as heir at law (*ante*, § 72, note 35) there was very properly no merger of the life estate and reversion because both were created by the same will. To have permitted the merger would, therefore, have been to destroy the intended operation of the will at the very moment it was to take effect. (Plunket *v.* Holmes, 1 Lev. 11, (1661), 5 Gray's Cas. on Prop. 50.

[21] It is an interesting matter for speculation as to how far our Supreme Court would carry such reasoning. For instance, how far may it be contended that, in a conveyance operating under section 1 of the Act Concerning Conveyances (*ante*, § 76), a contingent remainder may be created which would, in the words of the statute, so "absolutely and fully" vest a title to the contingent remainder that it could not be destroyed by the termination of the particular estate before the contingency happens?

[22] In Peterson *v.* Jackson, 196 Ill. 40, 51, the court in commenting upon Frazer *v.* Board of Supervisors said: "The question was whether her [the life tenant's] reconveyance cut off the contingent remainder, and it was correctly held that it did not."

[23] In Kyner *v.* Boll, 182 Ill. 171, the revisioner in fee pending the birth of issue who were to take the

§ 92a. **Conclusion:** It is submitted, then, that in any American jurisdiction, even though its land laws may be founded upon those of England, and though there may be no contingent remainders act in force, yet, if neither actual decision nor the practice of conveyancers has settled the law to the contrary, it may fairly be contended that there is practically no such future interest as a contingent remainder, —that is, there is no rule of law which says that a springing future interest after a particular estate of freehold which may be turned into a vested remainder or take effect in possession *eo instanti* upon the termination of the particular estate, must fail entirely unless it does so. This position, it is believed, finds its chief support upon authority in the recent line of English cases beginning with *In re Lechmere and Lloyd* and ending with *Battie-Wrightson v. Thomas.*[24] It would be interesting for us on this side of the Atlantic to know whether English lawyers, in spite of the fact that they might not be, would regard us as justified in this deduction.

remainder after the life estate, conveyed in fee to the life tenant. This, ordinarily, would operate as a merger of the life estate in the fee, thus destroying the contingent remainder if it were destructible. It did not do so in this case, however, because a child of the life tenant was *en ventre sa mere* at the time of the conveyance (*post*, § 93), and, under the holding of our court, the children of the life tenant took a vested interest as soon as born (*post*, § 116) and, therefore, as soon as they might be conceived, they were considered as born for their own benefit.

However, in Pinkney *v.* Weaver, 216 Ill. 185, the heirs of the grantor did convey a reversion in fee to the life tenant before any remainder-man was born or *en ventre*, so that there must have been a merger and destruction of the contingent remainder if it was destructible. Furthermore, the conclusion of the court might have been reached by holding the contingent remainder destroyed. It is significant, however, that they assumed its continued existence and found other grounds for their decision.

See, however, *ante*, § 81, note 9 for some *dicta* of our Supreme Court recognizing the rule that contingent remainders are still destructible.

[24] *Ante*, §§ 90, 91.

PART 4.

WHEN THE CONTINGENT REMAINDER VESTS.

§ 93. Remainder-man en ventre sa mere: Since the destruction of the contingent remainder occurred because it had not vested before the particular estate terminated, it often became necessary to determine the precise moment when the vesting occurred. This gave rise to difficulties in the case where the remainder was contingent because the remainder-man was unborn and the particular estate terminated while the remainder-man was *en ventre sa mere.* Section 14 of the Act concerning Conveyances,[1] protects the remainder-man in this case. It is obviously modeled after the statute of Wm. III.[2] In *Kyner v. Boll*[3] it would seem that this act might have

[1] L. 1837 (spe. ses.), p. 14; R. S. 1845, ch. 24, sec. 14; L. 1872, p. 282, sec. 14; R. S. 1874, ch. 30, sec. 14 (1 A. & D. R. E. S., pp. 91, 124, 213). The act is worded as follows: "When an estate hath been, or shall be, by any conveyance, limited in remainder to the son or daughter or to the use of the son or daughter of any person, to be begotten, such son or daughter, born after the decease of his or her father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death."

[2] 10 & 11 Wm. III, c. 16 (1699), 5 Gray's Cas. on Prop. 53, 54. See Smith *v.* McConnell, 17 Ill. 135, 140.

As the Stat. of Wm. III was worded it did not cover the case where the remainder to the unborn child was limited in a will. That case was provided for in accordance with the rule of the statute by the decision in Reeve *v.* Long, 3 Lev. 408, (5 Gray's Cases on Prop. 53). See Smith *v.* McConnell, 17 Ill. 135, 140. The Illinois Act, however, applies equally to remainders created by deed or will. It is, however, like the statute of Wm. III in not applying to the case where the remainder is limited to a third person contingent upon the birth of a child,—viz., where it is for the benefit of another that the child *in utero* should be considered born. For the proper result in such a case see Blasson *v.* Blasson, 2 DeG. J. & S. 665 (1864) and In re Burrows, Cleghorn *v.* Burrows, L. R. [1895] 2 Ch. 497.

[3] 182 Ill. 171. *Ante,* § 92, note 23.

Acceleration of Remainders: Marvin *v.* Ledwith, 111 Ill. 144, presents a typical case of acceleration of remainders. The will, in that case, gave the widow a life estate with a vested remainder in fee to L. The widow renounced

been called upon to meet any contention that the contingent remainder to an unborn child was destroyed by the merger of the life estate and reversion while the child was *en ventre sa mere.*

PART 5.

REMAINDERS WHEN VESTED AND WHEN CONTINGENT.

§ 94. Remainders vested when—General definition: A future interest is a remainder because it is limited after a particular estate of freehold created together with it at the same time, and because it must, either by the expressed direction of the settlor or by operation of law, take effect, if at all, in possession after the particular estate, by way of succession, *i. e.*, whenever and however the preceding estate determines.[1] Logically, the fact that the future interest is to take

and, in a contest with the heir at law, L was held immediately entitled. As to acceleration of executory interests see *post*, § 184.

Miscellaneous ways in which the question whether a remainder is vested or contingent may come up:

1. Upon a bill by the remainderman as vendor for specific performance of the contract of sale: Chapin *v.* Crow, 147 Ill. 219; Healy *v.* Eastlake, 152 Ill. 424.

2. Upon a bill to set aside a will for uncertainty in its provisions: Mather *v.* Mather, 103 Ill. 607.

3. In ejectment, where the question arises as to how the plaintiff's estate shall be described in the judgment, according to R. S. 1874, ch. 45, sec. 30, clause 7: Field *v.* Peeples, 180 Ill. 376.

4. If the remainder is vested the rule against perpetuities does not apply: See *post*, §§ 254 *et seq.;* Howe *v.* Hodge, 152 Ill. 252; Madison *v.* Larmon, 170 Ill. 65; Chapman *v.* Cheney, 191 Ill. 574.

5. Contingent remaindermen, it seems, cannot maintain a Bill for Partition: Seymour *v.* Bowles, 172 Ill. 521; Ruddell *v.* Wren, 208 Ill. 508. See also Madison *v.* Larmon, 170 Ill. 65. See also Dee *v.* Dee, 212 Ill. 338, 354.

6. Upon a bill to construe a will the court sometimes declares whether a remainder is vested or contingent: Thompson *v.* Adams, 205 Ill. 552; Orr *v.* Yates, 209 Ill. 222.

7. A contingent remainderman may be bound by a decree by representation merely: McCampbell *v.* Mason, 151 Ill. 500; Temple *v.* Scott, 143 Ill. 290. In this latter case the contingent remainderman was *in esse* and was not made a party to the suit, but the trustee was, so the contingent remainderman was bound. See also Thompson *v.* Adams, 205 Ill. 552.

In Burton *v.* Gagnon, 180 Ill. 345, the court went very far (*post*, § 178) in making out a vested remainder so that the remaindermen would be bound by a partition decree to which they were parties.

[1] *Ante*, § 68.

effect by way of succession has nothing whatever to do with its being vested or contingent. The terms vested and contingent logically distinguish the remainder which is sure to take effect, from that which is not. They differentiate the remainder which is not subject to a condition precedent, other than the termination of the preceding interest, and the one which is. This, then, is the fundamental line of distinction between vested and contingent remainders.

It may be announced with certainty that results have so far conformed to this line of distinction that a remainder which is sure to take effect in possession, *i. e.*, one subject to no condition precedent, other than the termination of the preceding interest, is vested.[2] Thus, a gift to A for life with a remainder to B in fee[3] furnishes the clearest case of a vested remainder in B.[4]

Logically, all remainders (that is, again, all future interests after a particular estate of freehold which are bound to take effect, if at all, by way of succession after the particular estate) which are not sure to take effect in possession because subject to a condition precedent in fact, other than the termination of the preceding interest, should be called contingent. Such, however, is not the way the law has developed. The constant pressure resulting from many hard consequences ut-

[2] Observe that the language used by Professor Gray (Rule against Perpetuities, § 101) to distinguish vested from contingent remainders, is quoted with approval by our Supreme Court in Eldred *v.* Meek, 183 Ill. 26, 36. See also expressions to much the same effect by the court in Harvard College *v.* Balch, 171 Ill. 275, 280; Marvin *v.* Ledwith, 111 Ill. 144, 150.

[3] Marvin *v.* Ledwith, 111 Ill. 144; Knight *v.* Pottgieser, 176 Ill. 368; Green *v.* Hewitt, 97 Ill. 113; Clark *v.* Shawen, 190 Ill. 47; Rickner *v.* Kessler, 138 Ill. 636; see also Vestal *v.* Garrett, 197 Ill. 398; Nicoll *v.* Scott, 99 Ill. 529, 548; Springer *v.* Savage, 143 Ill. 301; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; see also O'Melia *v.* Mullarky, 124 Ill. 506, 509; Barclay *v.* Platt, 170 Ill. 384; *post*, §§ 186 *et seq.*, 208 *et seq.*

[4] Observe that the remainder is none the less vested according to the above definition because its termination is contingent; that is, because it is subject to a condition subsequent. Thus, in McConnell *v.* Stewart, 169 Ill. 374, where land was devised to A for life with a remainder in fee to the children of the testator, and in case of the death of any child or children of the testator after his death *and after the death of A*, without issue, then the property to go to B, it was held that the children took vested remainders.

terly defeating the settlor's intention, which arose from holding a remainder contingent, has caused some remainders that are not sure ever to come into possession, because they are subject to a condition precedent other than the termination of the preceding interest, to be held vested.[5] It is the purpose of the sections immediately succeeding[6] to point out what remainders may properly be dealt with in this way.

§ 94a. **Remainders in fact subject to a condition precedent yet vested when—Gift to A for life, remainder to B for life:** In this case B's interest is not sure ever to come into possession, because B may die before A. It is, therefore, as much subject to an actual condition precedent as if the settlor had expressly provided that B should take a life estate only if he outlived A. Yet B's remainder is vested.[7] Professor Gray says[8] that this is because, during the continuance of the remainder, that is the life of B, B's interest is ready to come into possession, whenever and however A's estate determines. But that, it is submitted, is only the reason why B's interest, if it ever takes effect at all, is bound to do so by way of succession. That reasoning, then, only makes B's interest a remainder.[9] It is logically immaterial on the question as to whether B's interest is a vested or a contingent remainder. The holding of B's interest vested is, it is submitted, simply the easiest case for the relaxation of the logical distinction between vested and contingent remainders, adopted it may fairly be assumed, in the face of the hard consequences which the feudal land law dealt out, where remainders were contingent. The ground upon the holding that B has a vested remainder might now, it is believed, be properly rested on the ground

[5] The tendency in this direction is indicated by the constant reiteration by the courts that a future interest is to be construed vested if it can be: Scofield *v.* Olcott, 120 Ill. 362, 374; Carper *v.* Crowl, 149 Ill. 467, 483; Allen *v.* McFarland, 150 Ill. 455, 464; Grimmer *v.* Friederich, 164 Ill. 245, 248; Hawkins *v.* Bohling, 168 Ill. 214, 219; McConnell *v.* Stewart, 169 Ill. 374, 379; Knight *v.* Pottgieser, 176 Ill. 368, 373; Ayers *v.* Chicago Title & Trust Co., 187 Ill. 42, 60; Clark *v.* Shawen, 190 Ill. 47, 55; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 150; Boatman *v.* Boatman, 198 Ill. 414, 419; Kohtz *v.* Eldred, 208 Ill. 60, 68.

[6] *Post*, §§ 94a-108.

[7] Madison *v.* Larmon, 170 Ill. 65.

[8] Rule against Perpetuities, § 102.

[9] *Ante*, § 68.

that the condition, though precedent in fact, is subsequent in form.[10]

§ 95. Gift to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs—Three possible veiws as set out by Professor Gray. Suppose, writes Professor Gray,[11] referring to remainders subject to a condition precedent, "the contingency if it happens at all, must happen before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs. Here if the condition ever affects B's estate at all, it will prevent it from coming into possession; it will never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

"(1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent * * *.[12]

"(2) Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time,

[10] *Post*, §§ 95, 102.

[11] Rule against Perpetuities, §§ 104-106, and 108.

[12] In Knight *v.* Pottgieser, 176 Ill. 368, 376, the court rather significantly said: "A fee in the remainder, subject to be divested by the death of the person seized prior to the death of the life tenant, is not, for any practical purposes, to be distinguished from a remainder contingent upon the remainderman surviving the life tenant." This is not strictly true, for there would be a difference as to the mode of transfer if the remainder, in one event, were contingent, and, in the other, vested. (*Ante*, §§ 71-80.) There might also possibly be a difference as to the destructibility of the future interest (*ante*, §§ 81-92a). What the court obviously meant was, that, in either case, the remainder is subject to precisely the same contingency, and takes effect or not, so far as the contingency is concerned, under the same circumstances, whether it is vested or contingent.

if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to A for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive A should he at that moment die."

(3) Whether the remainder is vested or contingent may be made to depend upon the language employed. "If," to quote again from Gray's Rule against Perpetuities,[13] "the conditional element is incorporated into the description of, or the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A, his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."

§ 96. State of the Illinois cases—In favor of the first view—City of Peoria v. Darst:[14] Our supreme court has at different times, with singular impartiality, adopted each of the three views set out in § 95. The first and leading case in favor of the position that whenever the contingency, if it happen at all, must happen before the termination of the particular estate the remainder is contingent, is *City of Peoria v. Darst.* There the material limitations of the deed were to "Mary M. Clark for and during her natural life, remainder to George Douglas Morton and Mary Helen Morton in fee simple, as joint tenants,—that is, the said Mary M. Clark to have a life estate in said property, and at her death the fee simple title to the property to vest in George D. and Mary Helen Morton, or in the survivor of them." Then follows this separate clause: "If, however, both of them should die before the termination of Mary M. Clark's estate, and to leave no child or children, then, at the death of said Mary M. Clark, the title is to vest in the city of Peoria * * * ." At the time this deed was executed George Douglas Morton and Mary

[13] § 108.

[14] 101 Ill. 609.

Helen Morton were unmarried and both died unmarried and without children before the death of Mary M. Clark. In partition proceedings, the court decreed that the fee simple estate in the premises conveyed, passed by descent to the heirs of George Douglas Morton and Mary Helen Morton, and that Darst and one other were, therefore, owners in fee of an undivided one-fourth of the premises.

It is impossible to see how this decree could be sustained even admitting that George Douglas Morton and Mary Helen Morton took a vested remainder in fee, since the gift to Peoria would, then, be perfectly valid as a shifting future interest under the statute of uses, if not under section 1 of the Act on Conveyances.[15] The reversal of the decree and the sustaining of the gift to Peoria was, therefore, correct regardless of whether the remainder was vested or contingent. But the supreme court was willing to admit,—and indeed seems to have actually supposed it to be the law—that the gift to Peoria could not possibly take effect as a shifting interest after a vested remainder in fee,[16] so that the ultimate gift could only be supported by holding the limitation to George Douglas Morton and Mary Helen Morton a remainder contingent upon their surviving the life tenant, thus, bringing the limitations within the well recognized rule that after one contingent remainder in fee you may have another contingent remainder in fee limited in the alternative.[17]

A glance at the wording of these limitations will show that, under the second of the three views of § 95, the remainder must have been vested, because, during the life of the remainder-men, there were persons at all times ready and entitled to take possession as remainder-men should the particular estate have, during that time, determined. Whether the remainder to G. D. M. and M. H. M. was vested under the third view of § 95 must depend upon the form in which the limitations were expressed. In determining this, it would be improper to do otherwise than proceed upon the construction adopted by the supreme court. It might be urged that the court regarded the condition as, in form, precedent. But this can only be so upon the ground that the deed declares

[15] *Post*, §§ 149-152.

[16] *Post*, § 139.

[17] *Ante*, § 70.

that "at her [the life tenant's] death the fee simple title to the property to vest in" G. D. M. and M. H. M. Nothing else in the conveyance lends any countenance to the idea that there is any condition precedent in form. It is true also that the court in its opinion[18] observes that "the first clause of the *habendum* names the death of Mary M. Clark as the time for the title to vest in George D. and Mary Helen Morton." Perhaps it is upon this ground that Professor Gray in his Rule against Perpetuities, cites *City of Peoria v. Darst* as an example of a remainder contingent under the third view because subject to a condition precedent in form.[19] It is submitted, however, that the court did not even regard the condition as precedent upon this ground, much less regard it as precedent in form. If the condition had been precedent upon the ground suggested then the remainder would have been contingent upon the remainder-men surviving the life tenant and upon that alone. On this hypothesis, if the remainderman died before the death of the life tenant leaving children, such children never could have taken. Nor would Peoria have taken under such circumstances, but there would have been a reversion in fee to the grantor. The court not only did not take this view but expressly declared that, by the proper construction of the limitations, the remainder to G. D. M. and M. H. M. was "dependent upon the event of both or one of them surviving their mother [the life tenant], or having issue." "In case of such surviving or having issue," the court goes on to say, "then the fee simple title, at the death of the mother is to vest in the children [G. D. M. and M. H. M.] or the survivor; but in the contrary event, the title is to vest in the City of Peoria." This clearly indicates that in the mind of the court the remainder was to vest at once if the remainder-man survived the life tenant or died before the life tenant leaving issue. In short, the condition attached to the remainder is to be found, not in the words of the clause "and at her [the life tenant's] death" but in the subsequent clause "If however, both of them [G. D. M. and M. H. M.] should die before the termination of Mary M. Clark's estate, and to leave no child or children, then, at the death of said

[18] 101 Ill. 609, at p. 618.

[19] Gray on Rule against Perpetuities, § 108. n. 2.

Mary M. Clark," to the City of Peoria. This is precisely the point made, and dwelt upon, by the court in its opinion. The inference by the court, that this clause made the remainder to G. D. M. and M. H. M. subject to a condition precedent, is correct so far as the *fact* is concerned, since the event upon which Peoria is to take, if it ever affect the remainder at all, will prevent its coming into possession at any time. But the remainder is, in *form*, subject, not to a condition precedent, but to a condition subsequent. The opinion of the court that the remainder was contingent cannot, therefore, be supported upon the third view of § 95, because "after words giving a vested interest a clause is added divesting it."[20] The remainder to G. D. M. and M. H. M. could, then, only be held contingent under the first view upon the ground that, if the contingency affected G. D. M. and M. H. M.'s estate at all, it would prevent it from ever coming into possession. It would never divest it after it had come into possession, for the condition, to affect the estate, requires that the remainder-man die before the termination of the life estate leaving no child or children.

[20] Phayer *v.* Kennedy, 169 Ill. 360, seems, at first sight, to be in every way identical with City of Peoria *v.* Darst, *supra*. It is conceived, however, that, in Phayer *v.* Kennedy, the court may have taken the view that the remainder was subject to a condition precedent in form as well as in fact. There, a testator, by the first clause of his will, devised to his wife for life. The second clause was in the following words: "It is my will that after the death of my said wife all said property and estate, real, personal and mixed, shall go to, become and be the absolute property and estate forever of my daughter, Ellen McKenzie, forever, in the fullest and most perfect manner possible, to be by her held, possessed and enjoyed in the most full and complete manner, and disposed of as she may think best." Then followed the third clause in these words: "In the event that my said daughter, Ellen McKenzie, shall depart this life after my decease but before the death of my said wife, or in the event that my said wife should outlive or survive my said daughter, Ellen McKenzie, then it is my will that my property and estate, real, personal and mixed, shall go to, become and be the absolute property and estate of my said wife, to be her absolute property and estate forever, to do with and dispose of as she may think best."

Ellen died in the lifetime of the wife so that the event described in the third clause, upon which the wife was to take, happened. On a petition by the administrator of the wife to sell the

§ 97. **McCampbell v. Mason**[1]: In this case, also, our supreme court seems inclined to adopt the first view of § 95. The facts of the case were these: J. M. Bryant conveyed to his children, the parties of the second part, by name, to have and to hold to the said parties of the second part, "for and during the lives respectively of said parties of the second part, and to the issue, or heirs of the bodies respectively, of said parties of the second part in fee simple, said issue or heirs of the bodies of said parties of the second part taking *per stirpes*: Provided, that if any one or more of the said parties of the second part shall die without leaving issue, or heirs of his, her or their bodies, then his, her or their portion or portions are to survive and go to and be held by the surviving party or parties of the second part respec-

lands in question to pay the wife's debts, it was decreed that the wife had title in fee at her death and that the land be sold. This was affirmed.

Here, as in City of Peoria *v.* Darst, the decision is perfectly sound even supposing that Ellen took a vested remainder in fee, since the gift over may take effect as a valid shifting interest by way of executory devise. (*Post*, § 164.) But here again, as in City of Peoria *v.* Darst, it was contended, and the court seems, in spite of the fact that the limitations were by will, to have been ready to admit, that the limitation to the wife could not be supported as a shifting interest. The wife, therefore, could only take on the hypothesis that Ellen's remainder was contingent upon her surviving the life tenant; thus invoking the rule that, after a contingent remainder in fee, you may have another contingent remainder in fee limited in the alternative. That Ellen's remainder was subject to a condition precedent in form that she should survive the life tenant appears, if anywhere, from the language of the second clause of the will which gives a remainder to Ellen in fee "after the death of my said wife." These words taken literally created the same condition precedent in fact as did the language of the third clause: "In the event that my said daughter, Ellen McKenzie, shall depart this life after my decease but before the death of my said wife," then to the wife absolutely. In the first instance the condition (if the words be taken literally) is precedent in form. In the latter case it is subsequent in form. It is difficult to say, in this state of the case and after the court laid particular stress upon the literal effect of the words "after the death of my said wife," that the remainder was not construed to be subject to a condition precedent in form as well as in fact. Hence, the case is supportable upon the third view of § 95, since "the conditional element is incorporated into the description of, or the gift to the remainderman." See *post*, § 102.

[1] 151 Ill. 500.

tively for life or lives and then to the issue, or heirs of the body of such survivor or survivors in fee simple; and provided, further, that if all of said parties of the second part shall die without leaving issue or heirs of their bodies, then each and all of said parcels of land or lots shall revert to the heirs of the said party of the first part." Under a power in this deed J. M. Bryant mortgaged the premises conveyed. The mortgage was foreclosed and sold under a decree to Mason. Between the time the bill to foreclose was filed and the entry of a decree, six children were born to one of the grantees for life mentioned in the above deed. All of these except Leila McCampbell were made parties to the foreclosure. Mason subsequently filed a burnt record petition to establish his title against Leila. A decree was entered for the complainant finding Leila bound by the foreclosure. This was affirmed. The court supported this decision even supposing that the limitation "to the issue, or heirs of the bodies respectively of said parties of the second part" gave to the children of the parties of the second part a vested remainder as soon as they were born.[1] But the court also chose to rest its decision upon the ground that the remainder in fee "to the issue or heirs of the bodies" of the grantees for life was contingent.[2]

It is believed that this conclusion can only rest upon the first view of § 95. Upon the second the remainder was clearly vested as soon as any child was born to the grantees for life. Whether the remainder was contingent upon the third view is again a question of the form in which the condition is expressed. "To the issue or heirs of the bodies" might well have been regarded as a limitation to persons who could not under any circumstances be ascertained until the death of the life tenant and so subject to a condition precedent in form as well as in fact. But there were reasons why the court could not consistently do this.[3] Accordingly, it was not attempted. There was here no ground for saying that the remainder "to the issue, etc.," was subject to a condition precedent in form

[1] 151 Ill. 500 at pp. 510-511.

[2] *Id.* At pp. 508-510.

[3] The statutory remainder in fee upon the limitation of what would at common law have been as estate tail is a remainder in fee to the "heirs of the body" of the donee (*post*, § 114 *et seq.*), and yet our supreme court has always announced that this remainder was vested as soon as a child was born to the donee. (*Post*, § 116).

because limited "after the death" of the life tenant, and we find, therefore, no such reason as that advanced. In truth, there was no ground for saying that the remainder was contingent except the one the court put it on,—namely, the proviso of the deed, "that if any one or more of the said parties of the second part shall die without leaving issue, or heirs of his, her or their bodies, then his, her or their portion or portions are to survive and go to and be held by the surviving party or parties of the second part respectively for life or lives, and then to the issue, or heirs of the body of such survivor or survivors in fee simple." But this proviso, even though it contain a condition precedent in fact that the issue of the life tenants must survive the life tenants in order to take, gives expression to the condition as in form subsequent, so that under the third view of § 95 the remainder must have been vested. The reasoning of the court is, then, consistent only with the first view.

It should be observed that here as in *City of Peoria v. Darst*,[4] the court seems to feel driven to holding the remainder "to the issue, etc.," contingent in order to maintain the validity of the ultimate gift in case the life tenant died leaving no such issue, etc. If the remainder "to the issue, etc.," were vested, the limitation after that would be a fee on a fee, *i. e.*, a shifting interest by deed, and so, as our supreme court seems to have thought,[5] absolutely void.

§ 98. **Furnish v. Rogers**:[6] Here the gift by will was to J. S. of lands and money, "all of which is to go to her children, should she marry; if she should die childless, then it is to be divided between her mother and the rest of my grandnieces," etc. J. S. married and had one child. Upon a bill filed for a construction of this will the supreme court was of the opinion that J. S. had a life estate only in the lands and that the remainder to the child or children was contingent upon such child or children surviving J. S. This condition the court found solely from the fact that "it is further provided that if she [J. S.] die childless the estate is to be divided" among her mother and others. As this latter is an event which must happen, if at all, before the remainder

[4] *Ante*, § 96.
[5] *Post*, § 139.
[6] 154 Ill. 569.

to the children comes into possession, it was clearly a condition precedent in fact, but it is equally clear that it is expressed as subsequent in form, since, "after words giving a vested interest, a clause is added divesting it." The remainder, then, should have been held vested upon the third view of § 95 as well as on the second. The opinion of the court that the remainder is contingent must, then, be supported upon the first view of § 95.[7]

Here, also, as in *City of Peoria v. Darst*, and *McCampbell v. Mason*,[8] the court obviously adopted this interpretation because, although the future interests were created by will, they were afraid that, unless the remainder to the children were held contingent so that the two future interests in fee would take effect as contingent remainders in double aspect, the second limitation in fee would not be valid.[9]

§ 99. **Seymour v. Bowles**:[10] Here, the grantor conveyed to "Susan Bowles and her minor heirs, and in case of the death of either of the heirs without issue the property right to revert back to the surviving heirs." Three of the minor children of Susan Bowles filed a bill for partition against a fourth minor child and Susan Bowles upon the theory that Susan Bowles and her minor children took as tenants in common. A demurrer to the bill was sustained. This was affirmed. The view taken by the supreme court that, upon the proper construction of the deed, Susan took a life estate with remainders in fee might have been a sufficient ground for their decision. But the court, doubtless to prevent the experiment of useless amendments, went on to say that there could be no partition subject to the life estate because the remainders were not vested but contingent. The court declares the remainder to be to Susan's "then minor children

[7] *Ante*, § 96.

[8] *Ante*, § 97.

[9] This would seem to be the proper force of the language of the Court on page 572: "It was not the limtation of a fee after a fee, but two contingent remainders in fee so limited that one could be substituted for the other, and when once vested, was to be an indefeasible estate. The remainder, once vested in the children or their descendants, would be indefeasible, and the other contingent remainder could not be substituted."

[10] 172 Ill. 521.

who should survive her, or, if any of them should then be dead leaving issue, to such issue." In short, just as in *City of Peoria v. Darst,*[11] the remainder was to vest if a minor child survived the life tenant, or if a minor child died leaving issue surviving. There is nothing, however, from which the court can say that these conditions, though existing in fact, are expressed as in form precedent; nor is the remainder limited "after the death of" the life tenant. The court, therefore, looks alone, for the existence of the condition precedent, to the clause "in case of the death of either of the heirs without issue the property right to revert back to the surviving heirs." This, the court said, meant "in case of the death of either of the minor children without issue *before the death of Susan Bowles.*"[12] It, therefore, contained a condition precedent in fact, since the estate in remainder would be affected, if at all, before it ever came into possession. But, obviously, the condition was expressed as subsequent in form. The remainder must, therefore, have been vested under the third view of § 95. It was clearly vested under the second. The attitude of the court, then, is consistent only with the first view of § 95.[13]

[11] *Ante,* § 96.

[12] The reason for this addition of the words "before the death of Susan Bowles" to the original limitations was doubtless as follows: These future interests were created by deed and the court was very much under the impression that no shifting interest (fees on fees) could be created by deed (*post,* § 139). Hence the ultimate gift in case of the death of either of the minor children without leaving issue could not be supported if it meant death of either of the minor children after the death of the life tenant. (Observe also that if death without issue after the death of the life tenant was meant, the court would have had to meet the question of the ultimate gift being upon an indefinite failure of issue. (*Post,* §§ 199 *et seq.*)

[13] Observe the following cases where the tendency is strong to infer from a gift over on an event which is in form a condition subsequent terminating the preceding estate, that the preceding interest is contingent: Ruddell *v.* Wren, 208 Ill. 508, *post,* § 103; Voris *v.* Sloan, 68 Ill. 588, 592, 593 (*semble*). See also cases in the chapter on Vesting of Legacies, *post,* §§ 219-221. Such reasoning of course tends to support the first view of § 95. It may be worth noting that the inference from the presence of a gift over may often be that the preceding interest is vested: Fearne C. R. Smith's notes § 362a. *Post,* §§ 219-221.

§ 100. In favor of the second view—Boatman v. Boatman:[14] Without in the least noticing the scope and logical effect of the cases in the four preceding sections, our supreme court has, in the recent case of *Boatman v. Boatman*, given a decided opinion in favor of the second view of § 95—that a remainder would be vested at any time "if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder." In that case the limitations were by will as follows: To E for life. "At his death, if he leaves any child or children surviving him, then said land is to go to such child or children, but if he dies leaving no child or children surviving him, then said lands to go to his brothers and sisters." After the death of the testator E died leaving no widow or child or children or descendants of a child or children. E's brother Clarence died prior to E's death, and Clara, E's sister, conveyed prior to E's death, by quit claim deed all her interest in the lands devised. In partition proceedings, it was decreed that Clarence's future interest descended to his heirs at law, and that Clara's future interest was transferred by her quit claim deed. This was affirmed.

The decree might well have been supported regardless of whether the remainder was vested or contingent, on the ground that the remainder in this case, even if contingent, might have descended,[15] and that the quit claim deed was, under sec. 10 of the Act Concerning Conveyances, effective to pass a contingent remainder.[16] Nevertheless, the court put its decision wholly upon the ground that the remainder was vested and not contingent.

It can hardly be claimed that the remainder to the brothers and sisters was not, in fact, subject to a condition precedent other than the determination of the preceding estate. Before

[14] 198 Ill. 414.

[15] *Ante*, § 72.

[16] *Ante*, §§ 77-79. In Boatman *v.* Boatman the quit claim deed may not have been in the exact language of the statutory form, but, if the statute makes a quit claim deed effective to pass a contingent interest as argued, *ante*, §§ 77-79, it gives that effect to every deed "*in substance*" in the statutory form.

the brothers and sisters could take, E, the life tenant, must have died "leaving no child or children surviving him." The contingency of E dying, leaving any child or children surviving him, is an event which, if it affect the remainder at all, must do so before it ever comes into possession. The contingency upon which the brothers and sisters are to take is, therefore, in its nature a condition precedent. Nor could the court have regarded the condition precedent in fact as expressed in the form of a divesting clause so that the remainder might be considered vested under the third view of § 95. The form of words used incorporates the conditional element into the description of, or the gift to, the remainder-man in the most uncompromising manner. The conclusion of the court that the remainder is vested is to be sustained, then, only upon the second view of § 95. If the definition[17] of a vested remainder, quoted by the court with approval, be read in connection with the actual decision of the case, it would seem as though the court had consciously adopted this second view as the correct one.[18]

[17] "A vested remainder has been defined as follows: 'A vested remainder is an estate to take effect after another estate for years [?], life or in tail, which is so limited that if that particular estate were to expire or end in any way at the present time, some certain person who was *in esse* and answered the description of the remainder-man during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency.' (20 Am. & Eng. Ency. of Law, —1st ed.— 838)." From Boatman *v.* Boatman, 198 Ill. 414 at p. 420.

[18] A tendency toward the second view may be observed in a number of cases decided prior to Boatman *v.* Boatman:

(a) In Smith *v.* West, 103 Ill. 332, on pp. 338 and 339 the court quotes with approval from Moore *v.* Littel, 41 N. Y. 72 (one of the cases which settled it for New York that under a statute of that state the second view of § 95 regarding the proper definition of a vested remainder was correct) as follows: "Decisons and text writers agree, that by the common law a remainder is vested where there is a person in being who has a present capacity to take in remainder, if the particular estate be then presently determined; otherwise the remainder is contingent * * * *." See also Chapin *v.* Crow, 147 Ill. 219, 223.

(b) In Siddons *v.* Cockrell, 131 Ill. 653, there was a devise to the widow for life or until remarriage. The only gift to the children was in these words: "But in case of the death of my wife leaving any of my children surviving, I will, devise and bequeath to them all of

§ 101. **Chapin v. Nott:**[1] In this still more recent case our supreme court has emphatically repeated the doctrine of

my estate, etc." One child died before the widow's life estate terminated. It was decreed below that such child had a vested remainder which descended to his heirs at law and this was affirmed. That the remainder to the child was vested seems supportable only upon the second view of § 95. But whether vested or not, by the clear language of the will only those children were to take who survived the life of the widow, so that it is impossible to see why the decree should have been affirmed.

(c) In Kellett *v.* Shepard, 139 Ill. 433 the devise was to the testator's daughter for life with a remainder to her child or children should she have any, "but in case she died having no issue, in such case to go to and descend in reversion to my heirs at law." It was held that "heirs at law" meant such as were heirs at law of the testator at the time of his death (*post*, § 233). On page 447 of the report there is much language to the effect that the interest of the "heirs at law" under the will was *vested*. This could only be so upon the second view of § 95, since there is, here, the express condition precedent in form as well as in fact that the "heirs at law" are to take only in case the life tenant died "having no issue." It would seem, however, as if this talk about vested and contingent remainders was unnecessary since the daughter had died "having no issue," and the only question was who were to take as "heirs-at-law." If the daughter as one of the "heirs at law" had taken a contingent remainder it would nevertheless have passed by descent, so that upon her death "having no issue" the remainder to her as one of the heirs at law of the testator would pass to her heirs (*ante*, § 72). The observations that the remainder to the heirs at law of the testator was vested may have meant no more than that there was no contingency of survivorship.

(d) For the tendency of Burton *v.* Gagnon, 180 Ill. 345, in support of the second view of § 95, and the extension of its application to shifting executory devises, see *post*, § 78.

(e) Observe that our supreme court in handling the statutory remainder in place of an estate tail, (*post*, §§ 114 *et seq.*) has refused to regard the remainder in fee "to the person or persons whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the course of the common law by virtue of such devise, gift, grant or conveyance," as other than a remainder in fee, which is vested the moment a child is born. This can only be supported upon the second view of § 95, (*post*, §§ 116, 117) unless you actually read the statute as limiting a remainder to "children."

(f) Observe, also, that the cases of remainders in default of appointment (*post*, § 108) may be sustained upon the second view of § 95, and have been cited by our supreme court in support of it.

[1] 203 Ill. 341.

Boatman v. Boatman,[2] declaring the definition there given of a vested remainder to be "the rule as established in this state," and that "this court is now committed to the doctrine that when there is a person in being, specifically designated, who would have a right to the possession of the lands upon the ceasing of the intermediate or precedent estate, in such case the remainder is a vested one."

In *Chapin v. Nott* the grantor in a quit claim deed, reserving to himself a life estate, conveyed "to Maud Chapin and to the heirs of her body, if she has issue; in the event that the said Maud Chapin dies without issue, then the lands herein described are to revert to" Jasper Berry, Mrs. Sadie Miller and Mrs. Elizabeth V. Nott to be divided equally between them. Elizabeth V. Nott died before Maud Chapin, and then Maud Chapin died without ever having had issue. The heirs of Elizabeth V. Nott claimed an undivided one-third interest in the lands. In partition proceedings they had a decree in their favor and this was affirmed.

At first sight it might seem as though the remainder to Berry, Miller and Nott was held to be vested for no other purpose than that it might be transmissible by descent. Certainly the only inference which the court expressly draws from the fact that the remainder is vested is that it descends to the heirs of Nott. But if this were the only reason for holding the remainder vested, it might well be said of the result reached, that it was correct no matter whether the remainder be vested or contingent, since, if it were contingent it would be transmissible by descent.[3]

[2] *Ante*, § 100.

[3] *Ante*, § 72.

It is an interesting matter of speculation, however, whether a more serious difficulty did not in fact drive the court into holding the remainder vested in order to support the decree. At common law Maud had an estate tail with a vested remainder in fee to Berry, Miller and Nott. Observe that in this view the failure of issue referred to is an indefinite failure of issue (*post*, § 203). By the Illinois statute (*post*, § 114), Maud would have a life estate with a remainder in fee to the heirs of her body (which would be contingent at least so long as she had no children (*post*, § 116), and the further limitation would be a contingent remainder in fee upon an indefinite failure of issue.

Our supreme court might have been fearful that, under these circumstances, the last limitation would be void for remoteness. This apprehension would have been jus-

As in the *Boatman* case,[4] the ultimate remainder was clearly subject to a condition precedent in fact, since the passing of the estate to the heirs of the body of Maud, if it ever happened at all, would have prevented the remainder to Nott from ever coming into possession. The remainder to Nott was, also, uncompromisingly subject to a condition precedent in form, since it was to take effect only "in the event that the said Maud Chapin dies without issue." The remainder to Nott could, then, only be vested upon the second view of § 95.[5]

§ 102. In favor of the third view: Finally, we have in Illinois a line of cases where the remainder is in fact subject to a condition precedent which, if it affects the remainder at all, must do so before the termination of the preceding estate, and where, nevertheless, the remainder is contingent or vested according as the condition is "incorporated into the description of, or the gift to the remainder-man," or, "after words giving a vested interest, a clause is added divesting it." Thus, if the remainder be to B if, or in the event, he survive the life tenant, it is, under the third view of § 95, clearly contingent.[6] The cases so hold.[7] On the other hand, if the

tified unless the rule that contingent remainders must vest at or before the termination of the preceding interest or fail entirely be still in force in this state (*post*, § 271). That there is much ground for argument that contingent remainders are no longer destructible in Illinois see *ante*, §§ 81-92a.

[4] *Ante*, § 100.

[5] See, also, in further support of the second view of § 95:

Orr *v.* Yates, 209 Ill. 222, 236. In this case the remainder was subject to the condition precedent in fact that the remainderman survive the life tenant. It was expressed as a condition precedent also. Nevertheless, the remainder was said to be vested.

So, in Ruddell *v.* Wren, 208 Ill. 508, the court declared that the remainder, limited, in case the life tenant should die without leaving any child or children, to the testator's brothers and sisters, without any further gift over in case any one or more of said brothers and sisters should be dead at the life tenant's death, would have been vested. (See *post*, § 103.)

[6] Gray's Rule against Perpetuities § 108. See also Mr. Justice Holmes' notes to Kent's Com.: 4 Kent Com. (12th ed.) 203, note 1.

[7] Chapin *v.* Crow, 147 Ill. 219; Temple *v.* Scott, 143 Ill. 290; Mittel *v.* Karl, 133 Ill. 65; Haward *v.* Peavey, 128 Ill. 430; Phayer *v.* Kennedy, 169 Ill. 360, *ante*, § 96; Walton *v.* Follansbee, 131 Ill. 147, 159; Madison *v.* Larmon, 170 Ill. 65. Observe, however, that Siddons *v.* Cockrell, 131 Ill. 653, *ante*, § 100 note 18 (b) comes perilously near holding the remainder vested un-

limitations be to A for life, remainder to B in fee, but, if B should depart this life before A, then B shall take no estate, the remainder would, under the third view of § 95, be clearly vested.[8] So it has been held in this state.[9]

It is apparent that under this third view the whole question becomes one of the expressed intention of the settlor or testator. He may, at will, make the remainder vested or contingent. This has been fully recognized by our supreme court on several occasions, and more especially in *Haward v. Peavey*.[10] The will in that case gave an estate to the widow for life and then limited a remainder to "such of my children, George, Robert, James and Thomas, as may be then alive or the lawful issue of such of them as may be dead having lawful issue." In holding this a contingent remainder in Thomas the court said:[11] "But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened and thereby become certain. If the latter the estate vests im-

der the *second view* in just such a case. Also Orr *v.* Yates, 209 Ill. 222, *ante*, § 101, note 5. Perhaps Smith *v.* West, 103 Ill. 332, and Ebey *v.* Adams, 135 Ill. 80 may be reconciled under the third view —the former case containing a condition of survivorship expressed in the form of a condition subsequent, while in the latter case the same sort of a condition, by proper construction, was expressed as in form precedent. *Post*, § 113.

[8] Gray on Rule against Perpetuities, § 108.

[9] Bowler *v.* Bowler, 176 Ill. 541. After giving William P. Bowler a life estate in the property the language of the deed was as follows: "And the title of the same is not to vest in the said William H. Bowler, his heirs and assigns, until after the death of the said William P. Bowler; and it is further understood, and is a condition in this conveyance, that if the said William H. Bowler should depart this life before the said William P. Bowler, that in that case this conveyance is to be null and void."

Chapman *v.* Cheney, 191 Ill. 574 may, it is submitted, be sustained consistently with the principle of the text. See *post*, § 209, 210. Also Lunt *v.* Lunt, 108 Ill. 307; *post*, § 220.

Observe that the reasoning upon which remainders in default of appointment were sustained as vested made them in form subject to a condition subsequent. *Post*, § 108.

Regarding the effect of an express direction as to vesting see *post*, § 209.

[10] 128 Ill. 430.

[11] Pp. 439-440.

mediately, subject to be defeated by the happening of the condition. * * * * It is plain that in the present case the estate devised was, so far as Robert Haward was concerned, subject to a contingency, viz., his being alive at the time the particular estate should be determined by the death or re-marriage of the widow. Whether this contingency constituted a condition precedent or subsequent must be determined by the language of the will."[12] After thus expressing itself, the court goes on to contrast, with significant soundness, the cases where the contingency of survivorship of the life tenant is expressed as precedent and the remainder held contingent, with the case of *Blanchard v. Blanchard*,[13] where the same contingency was expressed as a condition subsequent and the remainder was held vested.

§ 103. In favor of the first and second views at the same time: In *Ruddell v. Wren*[14] the testator devised to his daughter Elnora Alice Alkire for life, and after her death to her surviving child or children, if she had any, absolutely. Then the will proceeded: "in case my said daughter shall die without leaving any child or children, then and in that event I give, devise and bequeath, in equal parts, share and share alike, all my real and personal estate to my brothers and sisters, and in case any one or more or all of them shall be dead at the time of the death of my said daughter, then the share of such deceased brother or sister shall go to and be equally divided among his or her children, share and share alike." A bill for partition was filed by one who claimed under the daughter of the testator's brother who had died before the death of the testator. The bill was dismissed below for want of equity, and this was affirmed upon the short, decisive ground that "brothers and sisters" named in the will included only those living at the time of the testator's death.

As a second ground of decision, however, the court held that the remainder to the brothers and sisters was contingent. It

[12] Observe language to the same effect in McCartney *v.* Osburn, 118 Ill. 403 at p. 421, referred to in Temple *v.* Scott, 143 Ill. 290 at p. 298. Also Phayer *v.* Kennedy, 169 Ill. 360 at p. 364; and Ducker *v.* Burnham, 146 Ill. 9, 25, 26; Hinrichsen *v.* Hinrichsen, 172 Ill. 462, 465.

[13] 1 Allen (Mass.) 223, 5 Gray's Cases on Property p. 85.

[14] 208 Ill. 508.

is clear that the remainder was subject to two conditions precedent in fact—*i. e.*, two conditions which, if they ever affected the remainder at all, would prevent it from coming into possession. Thus, the brothers and sisters could only take "in case my said daughter [the life tenant] shall die without leaving any child or children." They could not take, even in that event, unless they survived the life tenant, since it was provided that "in case one or more or all of them [the brothers and sisters] shall be dead at the time of the death of my said daughter [the life tenant]" then the share of the one so dying was to go over. Now, it is perfectly clear that the first of these conditions precedent is expressed, in form, as a condition precedent while the second, though equally precedent in fact, is expressed, in form, as subsequent. Under the first and third views of § 95, therefore, the remainder to the brothers and sisters must have been a contingent remainder. Under the second view of § 95 it must have been vested subject to be divested if the life tenant had children. The holding of the court, then, might stand as a repudiation of the *Boatman* case, *Chapin v. Nott,* and the whole second view and as supporting the third view. But the opinion of the court does not take that position. It declares that if the remainder were subject only to the condition (precedent in substance and in form), that the life tenant die "without leaving any child or children," it would be *vested* under the *Boatman* case and *Chapin v. Nott.* Thus, the decision is made to square with the second view. Then the court holds that the remainder is contingent under the language of the condition (precedent in fact but subsequent in form) that if any brother or sister dies before the death of the life tenant, the gift over shall take effect. This can only be so upon the hypothesis that the first view of § 95 is the correct one. We have, therefore, the holding that a remainder, which might be contingent under the first or third views of § 95, is contingent under the first, and the claim is seriously put forward that this result is not inconsistent with the second view.

§ 104. **Propriety of these several views—In general:** Whatever opinion we may have of one or the other of these three views of § 95 regarding the holding vested, remainders which

are, in fact, subject to a condition precedent, it may fairly be said that the using of them all is not to be justified.

As to the propriety of the first view, Professor Gray says,[1] the preference of the law for vested interests has prevented its being adopted.[2] It is believed that our supreme court would never have taken up with it if it had not felt itself committed to the rule that shifting interests by deed were invalid.[3] As to the third view, Professor Gray says it represents the view of the common law. The second view, if not required by statute, is, it is submitted, open to criticism.

§ 105. The second view criticised: The second view of § 95 revises the whole common law conception of a vested remainder. Results already obtained under it in the *Boatman* case[4] and *Chapin v. Nott*[5] are in direct conflict with the common law authorities.[6] In both these cases, also, the court held a remainder in fee, after a contingent remainder in fee, vested. In *Chapin v. Nott* the arguments of counsel forced the court to take this position openly. Yet this was an inconceivable result at common law.[7]

The second view of § 95 must, however, produce a still more unheard of series of results. Take, for instance, what are, in effect, the limitations in *Chapin v. Nott:* to A for life, remainder in fee to A's lineal heirs, with a further limitation, if A dies without issue in any generation, to B in fee. Before A has any children B's interest is, under the second view,

[1] Rule against Perpetuities, § 105.

[2] Surely the learned author overlooked the significance of City of Peoria *v.* Darst, *ante*, § 96, which he cites as in *accord* with the third view.

[3] *Ante*, §§ 96-99.

[4] *Ante*, § 100.

[5] *Ante*, § 101.

[6] Loddington *v.* Kime, 1 Salk. 224, 5 Gray's Cases on Property, 54 (1697); Doe *v.* Holme, 3 Wils. 237, 241 (1771); Goodright *v.* Dunham, 1 Douglas, 264, (1779); Doe *v.* Perryn, 3 T. R. 484; Doe *v.* Elvey, 4 East's Rep. 313; Fearne C. R. 373 *et seq.*

In the Boatman case *supra*, note 4, the court seems to find some comfort in the fact that at common law a gift to A with a remainder if A died without issue to B gave B a vested remainder. But that was because A took an estate tail so that B's remainder was a vested remainder in fee after an estate tail (Gray on Rule against Perpetuities § 443).

[7] At common law the remainder in fee after a contingent remainder in fee was always contingent. See cases cited *supra*, note 6.

vested. But upon the birth of a child to A that child, under the same view, must take a vested interest. B's vested remainder in fee must, therefore, have been divested, and he would have a future interest contingent upon A's death without issue. This sudden turning of a vested remainder into a contingent future interest is remarkable enough, but, more wonderful still, unless it be regarded in Illinois as a destructible contingent limitation,[8] this future interest, safe and valid as a vested remainder, becomes void for remoteness[9] the moment it takes on the character of a contingent future interest.[10] Suppose, now, that A's only issue dies, can it be possible that B would again become seized of a vested remainder in fee? Could, that which, upon the birth of issue of A, had become a contingent future interest and void for remoteness, be turned back into a valid vested remainder, by the death of such issue in the lifetime of A? With these results in mind, one might be pardoned for preferring the simplicity of the common law, which, following the expressed intention of the settlor or testator, called a future interest, plainly subject to a condition precedent in substance and in form, contingent, and left it subject to the rules of law applicable to such contingent future interests.

Finally, if this second view be carried out logically, it would make a remainder to the life tenant's "surviving children" vested as soon as any child is born,[11] thus overthrowing at least one line of actual decisions[12] in this state.

§ 106. Analysis of authorities relied upon for the second view: In *Smith v. West*[13] the New York case of *Moore v. Littel*[14] was quoted from with approval in support of the second view of § 95. But the rule, under which the New York case was decided, was the result of a statutory definition of a

[8] *Ante*, §§ 81-92a.

[9] *Post*, §§ 271, 272.

[10] Why, also, if it be created by deed, must not our Supreme Court find it invalid as a fee on a fee, according to the rule of Palmer *v.* Cook, 159 Ill. 300, *post*, § 139. And, if so, why must not the vested interest in the donee's issue be void for the same reason?

[11] Orr *v.* Yates, 209 Ill. 222, 236, *ante*, § 101, note 5, would seem to go almost as far as that.

[12] *Ante*, § 102 note 7, *post*, § 109.

[13] 103 Ill. 332, 338.

[14] 41 N. Y. 72.

vested remainder which changed the common law definition.[15]

In *Boatman v. Boatman*[16] the court relied upon the fact that remainders in default of appointment were held vested,[17] and on the authority of the Am. & Engl. Ency. of Law.[18] But remainders in default of appointment were, on somewhat artificial reasoning no doubt, always held vested upon the third view as being subject to a condition, precedent in fact, but subsequent in form.[19] The English authority,[20] which established this holding, never countenanced the idea that such a view as the second could be supported.[21] As to the definition from the Encyclopedia, the learned author of it, in a foot note, points out that, by the addition of the last eight words, the definition is saved from the objection that it permits to be held vested the sort of remainder which our supreme court, relying upon the Encyclopedic definition, held in the *Boatman* case to be vested. And now in the second edition of the same Encyclopedia[22] we find the *Boatman* case referred to as incorrectly decided.

In *Chapin v. Nott*[23] the court bethought itself of gathering up the expressions in earlier Illinois cases which looked toward the second view. It cited for the first time in this connection the holding which seems always to have been repeated in this state that the statutory remainder, created upon the limitation of what, under the statute *de donis*, would have been an estate tail, was vested as soon as a child was born.[24] As, however, this result seems to have been reached without the citation of authority or the application of any reasoning, or even the most casual reading of the Statute on Entails[25] it can exist as a foundation for the second view only as an added accumulation of error.

§ 107. Inclination of the Illinois court toward the second view explained: However severely the adoption of the second

[15] Gray on Rule against Perpetuities § 107. See also 20 Am. & Engl. Encycl. 1st ed. p. 844 note 2, and p. 845 note 1.

[16] 198 Ill. 414, *ante*, § 100.

[17] *Post*, § 108.

[18] 1st ed. vol. 20, p. 838.

[19] *Post*, § 108.

[20] Doe *v.* Martin, 4 T. R. 39, (1790), (5 Gray's Cases on Property, 62).

[21] Consider Doe *v.* Martin, *supra* note 20, in connection with the English cases cited *supra* note 6.

[22] Vol. 24, p. 418, note 1.

[23] 203 Ill. 341, *ante*, § 101.

[24] *Post*, § 116.

[25] *Post*, §§ 114, 116.

view by our supreme court may be criticised, that criticism would be incomplete unless it were pointed out that very good sense lies at the bottom of the attitude of the court, and that a very sound inclination on its part has simply found expression in the wrong way.

The law of remainders belongs to the period of feudalism. Especially are those rules regarding the creation of remainders, and concerning the transfer[26] and destructibility[27] of contingent remainders, the result of the feudal system of conveyancing. The whole development of the law has been toward avoiding the effect of the interference of the feudal system with the carrying out of the settlor's intention.[28] The feudal restrictions upon the creation of future interests, which permitted only such as took effect in succession and forbade all interests by way of interruption, *i. e.,* springing and shifting future interests, have long since been avoided by conveyances operating under the Statutes of Uses and Wills.[29] With regard to the difference between vested and contingent remainders the tendency has been to make that of less and less importance by doing away with the rules regarding the destructibility[30] and transfer[31] of contingent remainders. Thus, the modern English statutes make contingent remainders freely transferable by deed,[32] and destructible only by the non-happening of the event or contingency upon which they are to vest.[33]

It is believed that our supreme court has always been fully imbued with this same modern spirit of law reform. In *Frazer v. Board of Supervisors*[34] it laid hold of sec. 6 of the Act on Conveyances as an excuse to make the statutory contingent remainders, raised in place of an estate tail, indestructible.[35] We may confidently assume that the same court would have been very sensitive to find, that, under our statutes, contingent remainders were transmissible by descent, devise, by quit claim deed, and even by execution sale. The personnel of the court had, however, changed when this opportunity arose, and the very recent cases indicate an unfortunate inclination to reach

[26] *Ante*, § 78.
[27] *Ante* §§ 81-92a.
[28] *Ante*, §§ 79, 90, and *post*, § 153.
[29] *Post*, §§ 145, 146, 164.
[30] *Ante*, §§ 81 *et seq.*
[31] *Ante*, §§ 71 *et seq.*
[32] *Ante*, § 79.
[33] *Ante*, § 81.
[34] 74 Ill. 282.
[35] *Ante*, § 92.

what is believed to be the unnecessary conclusion that a quit claim deed is not sufficient, under sec. 10 of the Act Concerning Conveyances, to transfer a contingent remainder,[36] and the unjustifiable one[37] that a contingent remainder cannot descend, though the event, upon which it is to vest, may happen after the death of the contingent remainder-man.[38] The present court, finding itself in this position, of necessity had to warp the definitions of vested and contingent remainders out of shape to avoid the unmodern results which naturally followed.[39] It is submitted, however, that our law would have a better development if the supreme court should, on the one hand, cling to the distinction between vested and contingent remainders worked out by the English cases in accordance with the third view of § 95, and, on the other, recognize that contingent remainders are descendible, and that, under the statute prescribing the effect of a quit claim deed, such a deed is sufficient to transfer the contingent remainder.

§ 108. Remainders to a class and in default of appointment: Speaking of these in connection with vested and contingent remainders, Professor Gray says[40] they "call for a word of special mention."

Of remainders to a class he says:[41] "Sometimes a remainder is given to a class of persons, *e. g.*, to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A for life, remainder to the children of A and their heirs as tenants in common. Here although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each

[36] Boatman *v.* Boatman, 198 Ill. 414; *ante*, § 77.

[37] *Ante*, § 72.

[38] Chapin *v.* Nott, 203 Ill. 341.

[39] It is certainly significant that the holding of our supreme court in the first case which sustains the second view of § 95, (Boatman *v.* Boatman, 198 Ill. 414, *ante*, § 100), resulted in the giving effect to a quit claim deed to transfer the remainder. In the other case sustaining the second view, (Chapin *v.* Nott, 203 Ill. 341, *ante*, § 101), the holding the remainder vested caused it to descend to the remainderman's heirs when he died before the contingency happened.

[40] Gray's Rule against Perpetuities § 109.

[41] Id. § 110.

child nevertheless, on its birth has a vested remainder. The remainder is said to 'open' and let in the after-born children."[42]

Of remainders in default of appointment the same learned author says:[43] "If in a settlement or will a power to appoint is given, and a remainder limited in default of appointment, the remainder is not rendered contingent by the fact that the execution of the power may destroy it. Such execution of the power is a condition subsequent divesting estates previously vested."[44] Observe that the remainder here is really subject to a condition precedent in fact. It is only by a somewhat artificial mode of reasoning that the condition is taken to be in form a condition subsequent so that the remainder may be held vested within the third view of § 95; yet this is the ground upon which the remainder has always been supported as vested, even where the third view of § 95 is admittedly the proper test.[45]

§ 109. Remainders contingent when: Assuming a contingent future interest after a particular estate of freehold to be a remainder, the clearest case of a contingent remainder is where the remainder-man is not ascertained because not in

[42] Voris *v.* Sloan, 68 Ill. 588, 594; Mather *v.* Mather, 103 Ill. 607, (*semble*); Cheney *v.* Teese, 108 Ill. 473, 482; Lehndorf *v.* Cope, 122 Ill. 317; Schaeffer *v.* Schaeffer, 141 Ill. 337, 345; Barclay *v.* Platt, 170 Ill. 384; Knight *v.* Pottgieser, 176 Ill. 368, 373; Field *v.* Peeples, 180 Ill. 376, 381; Kyner *v.* Boll, 182 Ill. 171, 177; Boatman *v.* Boatman, 198 Ill. 414, 420; Turner *v.* Hause, 199 Ill. 464, 471; Flanner *v.* Fellows, 206 Ill. 136, 140; Rudolph *v.* Rudolph, 207 Ill. 266. Observe that in Bates *v.* Gillett, 132 Ill. 287, as the will was construed the class described consisted of those who should survive the life tenant. Hence, the remainder to each member of the class was contingent upon his or her surviving. The court in its opinion seems to argue that, because the whole class is not ascertained till the period of distribution, the gift is contingent upon all the members of the class surviving that period. See *post*, § 225.

[43] Gray's Rule against Perpetuities § 112.

[44] Ducker *v.* Burnham, 146 Ill. 9; Harvard College *v.* Balch, 171 Ill. 275; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144.

In Ducker *v.* Burnham, 146 Ill. 9, 20, it was said that the remainder is not contingent because a power to use up the corpus of the estate by the life tenant made the quantum of estate in remainder uncertain. See, also, Hawkins *v.* Bohling, 168 Ill. 214, 220; Boatman *v.* Boatman, 198 Ill. 414, 420.

[45] *Ante*, §§ 95, 102.

being.[46] A common sort of contingent remainder occurs where it is an expressed condition precedent to the remainder-man's taking that he survive the life tenant.[47] Under the rule of the *Boatman* case,[48] however, it is not absolutely certain that these will continue to be regarded as contingent remainders.[49] Certainly, since that case, our supreme court seems not to regard as contingent a remainder limited upon the death of the life tenant without issue him surviving, so long as the life tenant is without any children at all.[50]

§ 110. Some problems of construction—In general: The difficulty of ascertaining when a remainder is vested and when contingent is frequently complicated with a question of construction upon which the ultimate result depends. In such cases the intent of the testator or the grantor as expressed in an instrument in writing is the basis for the construction reached. But the operation of construing is a mental process which different minds may perform differently. With regard to such questions of construction it is here proposed only to indicate so far as possible the complexion of the mental operations of our supreme court.

§ 111. Construction that no condition at all exists: Remainders are often brought within the general definition of vested remainders by regarding the apparent condition as no condition at all. "Thus," says Professor Gray,[1] "a devise to a widow for life, if she does not marry again, but if she does, then to A, is held to give an estate to the widow till she

[46] Frazer *v.* Board of Supervisors, 74 Ill. 282; Harrison *v.* Weatherby, 180 Ill. 418; Peterson *v.* Jackson, 196 Ill. 40.

[47] Haward *v.* Peavey, 128 Ill. 430; Mittel *v.* Karl, 133 Ill. 65; Temple *v.* Scott, 143 Ill. 29; Chapin *v.* Crow, 147 Ill. 219; Madison *v.* Larmon, 170 Ill. 65; Lombard *v.* Witbeck, 173 Ill. 396. In Walton *v.* Follansbee, 131 Ill. 147 the remainder to the children was made contingent upon the husband surviving his wife, the life tenant.

For other examples of remainders which have been held contingent see *ante*, §§ 96-99, 102, 103.

[48] *Ante*, § 100.

[49] Orr *v.* Yates, 209 Ill. 222, 236.

[50] *Ante*, § 101. There are other remainders which are held to be vested which at first sight might seem to be contingent (*ante*, § 100, 101 note 5, *post*, §§ 111, 112); and still others which have been held contingent which might be thought to be vested (*ante*, §§ 96-99 and *post*, §§ 112, 113).

[1] Rule against Perpetuities § 103 note 1.

marries or dies, and a vested remainder to A.[2] * * * So in the case which is of daily occurrence in practice, where an estate is given to A for life, and on his death to B the remainder to B is vested."[3] So, also, where there is a devise to A for life, with remainder to the testator's surviving children and their heirs, and "surviving" is construed to mean children of the testator surviving him and not children of the testator surviving the life tenant,[4] the remainder is vested.

§ 112. Condition precedent of survivorship:[5] In several cases it looks, at first sight, as if our supreme court had found a condition of survivorship when none in fact existed, thus holding a remainder contingent which would more properly seem to have been vested.[6] On the other hand, quite unaccountably, the supreme court has held that there was no condition of survivorship of the life tenant when in fact such a condition was plainly expressed.[7]

In this connection, also, must be mentioned the cases where it was a question whether the equitable remainder in fee after a life estate was contingent upon the remainder-man's attain-

[2] Siddons *v.* Cockrell, 131 Ill. 653; Green *v.* Hewitt, 97 Ill. 133. But see Thompson *v.* Adams, 205 Ill. 552, 558-559.

[3] Cheney *v.* Teese, 108 Ill. 473; O'Melia *v.* Mullarky, 124 Ill. 506; Ducker *v.* Burnham, 146 Ill. 9; McConnell *v.* Stewart, 169 Ill. 374; Knight *v.* Pottgieser, 176 Ill. 368; Bowler *v.* Bowler, 176 Ill. 541.

See, however, the effect given these words in Bates *v.* Gillett, 132 Ill. 287, 296 and Phayer *v.* Kennedy, 169 Ill. 360, 364, *ante*, § 96 note 20.

See also remarks *ante*, § 96, regarding the use of such words in City of Peoria *v.* Darst, 101 Ill. 609, 618.

[4] Nicholl *v.* Scott, 99 Ill. 529; Grimmer *v.* Friederich, 164 Ill. 245 (cited with approval in Clark *v.* Shawen, 190 Ill. 47, 55); Arnold v. Alden, 173 Ill. 229; see *post*, § 197, note on Gift to Survivors II.

[5] See also *post*, §§ 113, 197, note on Gifts to Survivors.

[6] Walton *v.* Follansbee, 131 Ill. 147, 159. See also City of Peoria *v.* Darst, 101 Ill. 609; McCampbell *v.* Mason, 151 Ill. 500; Seymour *v.* Bowles, 172 Ill. 521; Furnish *v.* Rogers, 154 Ill. 569. Observe also Phayer *v.* Kennedy, 169 Ill. 360; Bates *v.* Gillett, 132 Ill. 287.

The true import, however, of all but one of these cases has been touched upon elsewhere. See *ante*, § 96 for explanation of City of Peoria *v.* Darst; *ante*, § 97 for explantion of McCampbell *v.* Mason; *ante*, § 99 for explanation of Seymour *v.* Bowles; *ante*, § 98 for explanation of Furnish *v.* Rogers; *ante*, § 96 note 20 for explanation of Phayer *v.* Kennedy.

[7] Siddons *v.* Cockrell, 131 Ill. 653. See also Smith *v.* West, 103 Ill. 332, *post*, § 113.

ing a certain age, or whether it was vested in interest at once upon the testator's death subject to a postponed enjoyment till the devisee in remainder reached the age specified. In *Lunt v. Lunt*[8] and *Chapman v. Cheney*[9] the remainder was held vested subject to the postponed enjoyment.[10]

§ 113. Miscellaneous cases: A conveyance to Maria J. and Michael J., her husband, and "the survivor of them, in his or her own right" creates in the husband and wife an estate for life with a contingent remainder to the survivor of them.[11]

In a devise of income to two children for life and "upon their decease, their children to have and receive one-half part or portion thereof," "upon their decease" was held to mean "upon the decease of either one."[12]

In *Ebey v. Adams*[13] there was a devise of a life estate to the widow with a remainder to executors upon trust to sell, pay legacies and distribute the residue to the testator's children "or their heirs." One child died before the life tenant. It was held that her heirs took in her place because the gift was alternative to a child or her heirs whichever should be in existence at the time of distribution.[14] Are these limitations in the alternative then vested or contingent? In *Smith v. West*[15] the court inclines to hold the first gift vested with a shifting executory devise over. In *Bates v. Gillett*[16] and *Thompson v. Adams*[17] the view is, apparently, put forward that both limitations should be construed as contingent remainders in double aspect.

[8] 108 Ill. 307; *post*, § 220.

[9] 191 Ill. 574; *post*, § 209.

[10] See also Howe *v.* Hodge, 152 Ill. 252. *Post*, § 210.

[11] Mittell *v.* Karl, 133 Ill. 65. (See Vick *v.* Edwards, 3 P. W. 372, Fearne C. R. pp. 356-357).

[12] Fussey *v.* White, 113 Ill. 637.

[13] 135 Ill. 80. In Fussey *v.* White, 113 Ill. 637 the devise was of *income* to two children "or their heirs." It was held that upon the whole will the children got only a life estate and that "or their heirs" meant that if a child died leaving accrued income in arrear, not having been paid over to him, that would go to his heirs.

[14] See also Hobbie *v.* Ogden, 178 Ill. 357, *post*, § 123.

[15] 103 Ill. 332. It is not clear, however, that the court was not applying the doctrine of the Boatman case (*ante*, § 100), to find an interest really contingent, vested under the second view of § 95.

[16] 132 Ill. 287. See also Ebey *v.* Adams, 135 Ill. 80, *semble*.

[17] 205 Ill. 552, 558-559.

PART 6.

STATUTORY ESTATES IN PLACE OF AN ESTATE TAIL.[1]

§ 114. Statutes: There are today in Arkansas, Colorado, Missouri and Vermont statutes concerning estates tail, in every respect material to the present inquiry, identical with section 6 of the Illinois Act on Conveyances.[2] This last is as follows: "In cases where, by the common law,[3] any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be, and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute, to the person or persons whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance."

Of these the Missouri Act of 1825[4] seems to have been the

[1] The substance of this part originally appeared in an article in the Yale Law Journal vol. XIII., p. 267, which was written to supplement and answer some views on the same subject by John Maxcy Zane in an article on Determinable Fees, Harvard Law Rev., vol. XVII., p. 297.

[2] R. S. 1874 Ch. 30, Sec. 6. Hurd's R. S. (1899) Ch. 30, Sec. 6.

[3] The present Missouri Statute (R. S. 1899, Vol. 1, par. 4592) reads, "where by the Common *or Statute law of England* any person might become seized in fee tail, * * * " so that it may be regarded as clearly referring to estates tail created by the statute *de donis* of Edward I. The same construction is put upon the language of the Illinois Statute: "The General Assembly must have intended to refer to estates tail created by the statute *de donis*. They speak of persons becoming seized of such estates by the common law, when we have seen that estates tail grew out of the statute *de donis*, and not out of the common law. * * * If, as is contended by the defendants in error, the General Assembly intended to restore the common law as it stood before the adoption of the statute *de donis*, they would simply have repealed that statute, and left the donee with power, on the birth of issue, to alien the estate, and re-purchase, and thus cut off both the remainder and reversion." Per Walker, C. J., in Frazer *v.* Board of Supervisors, 74 Ill. 282, at pages, 287, 288.

[4] R. S. 1825, Act concerning conveyances, Sec. 4; R. S. 1835, Act regulating conveyances, Sec. 5.

first. It remained in force in Missouri until 1845, when it was so altered[5] as to read that "upon the death of such grantee or devisee [in tail], the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them, as tenants in common in fee; but if there be only one child, then to that one in fee; and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs."[6] In 1866,[7] however, the Missouri Legislature restored the Act of 1825 to the statute book. In 1827,[8] Illinois copied[9] the Missouri Act of 1825 and since then the law here has remained in force without change.[10] In Arkansas the statute appeared first in 1837;[11] in Vermont in 1840;[12] and in Colorado in 1867.[13] In these three states the statute has remained in force since its first passage in its present form.[14]

§ 115. Their operation: Do these statutes operate to turn an estate tail of which a grantee actually becomes seized into the statutory life estate and remainder, or do they operate to give to language of a deed appropriate to create an estate

[5] R. S. 1845, Act on Conveyances, Sec. 5; R. S. 1855, Ch. 22, Sec. 5.

[6] Observe that the New Jersey Act of June 13th, 1820 (Rev. Stat. 1821, page 774, Sec. 2), was in substantially this form, giving the remainder in fee to "children" of the donee. It seems to have continued in force in New Jersey down to the present time. (Elmer's Digest, p. 130, Sec. 6; Stat. of N. J. 1874, p. 341, Sec. 11; Nixon's Digest 1709-1855, p. 196, Sec. 11; Gen'l Stats. of N. J. 1709-1895, Vol. 2, p. 1195, Sec. 11).

[7] R. S. 1866, Ch. 108, Sec. 4; Wagner's Mo. Stat. 1870, p. 1351, § 4; R. S. 1879, p. 675, § 3941; R. S. 1899, Vol. 1, § 4592.

[8] L. 1827, p. 95; 1 A. & D. R. E. S., p. 75.

[9] It would seem as if the Illinois Statute of 1827 must have been copied from the Missouri Act of 1825. The two are absolutely identical in language, except that the Illinois Act has omitted six words which in the Missouri Statute make it apply to all estates tail created and existing at the time when the act went into effect.

[10] R. S. 1845, p. 104; R. S. 1874, p. 273.

[11] R. S. 1837, p. 189, Ch. 31, Sec. 5.

[12] R. S. 1840, Ch. 59, Sec. 1, p. 310.

[13] R. S. 1867, Ch. 17, Sec. 5.

[14] *Arkansas*: Sandels & Hill, Digest of Statutes 1894, p. 352, Ch. 29, Sec. 700. *Vermont*: G. L. 1862, Ch. 64, Sec. 1, p. 446; V. S. 1894, Ch. 105, Sec. 2201, p. 426. *Colorado*: R. S. 1877, Ch. 18, Sec. 6; Mill's Ann. Stats., Vol. 1, p. 584, Sec. 432 (1891).

tail the effect, when finally uttered upon the delivery of the deed, of language apt and sufficient to create the statutory estates? The result in *Spencer v. Spruell*,[15] seems to present a decisive answer to this question. There the conveyance by deed ran to A and the heirs of her body. The deed was fully delivered so far as the grantor was concerned by being put into the hands of a third person and thereby placed irrevocably out of the grantor's control. It looks (though the report is not clear upon the point) as if at the time the deed was executed, A had children alive. The donee in tail, A, refused to accept the conveyance. It was held that, in consequence, the deed never had any effect at all, because A never became actually seized of an estate tail. If the statute had operated only to cause one form of language to be equivalent to another appropriate to confer the statutory estates, the result must have been different. A remainder would then have been limited to minor great grandchildren of the grantor and, under the doctrine of our supreme court, acceptance would have been presumed.[16] The life tenant would have renounced, and the children would, accordingly, at once have taken the fee.[17]

§ 116. The statutory remainder[18]—Is it vested or contingent? It is agreed that so long as there is no issue of the body of the donee in tail the statutory remainder is contingent.[19] The difficulty arises where issue have been born. Do

[15] 196 Ill. 119.

[16] Winterbottom *v.* Pattison, 152 Ill. 334; Coleman *v.* Coleman, 216 Ill. 261.

[17] Of course if A had no children living at the time of the execution of the deed, or if the statutory remainder to the children be regarded as contingent, after a child is born (which it seems it is not in this state, *post*, § 116), and the rule be still in force that a contingent future interest after a particular estate of freehold which can, must vest at or before the termination of the preceding estate or fail altogether, the result reached in the above case is explainable upon the application of that rule.

[18] As to how far the Rule in Shelley's case applies to the statutory remainder, see *post*, § 131. As to the problems which arise concerning a remainder expressly limited after an estate tail, see *post*, §§ 203, 270-273. As to how far the remainder, if contingent, is indestructible, see *ante*, §§ 81 *et seq.*

[19] Frazer *v.* Board of Supervisors, 74 Ill. 282, 290; Atherton *v.* Roche, 192 Ill. 252, 257 (*semble*); Dinwiddie *v.* Self, 145 Ill. 290, 300 (*semble*).

they take a vested remainder or one contingent upon their surviving the donee and being his heir?

There would seem to be a very obvious difficulty with holding the remainder in fee to the heirs of the body of the donee in tail a vested remainder at any time prior to the death of the donee in tail. The statute expressly limits the remainder in fee to the "person or persons whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance." Now, at common law, it was impossible to ascertain to whom the estate would pass until the death of the donee in tail, since, by the course of the common law, the estate tail at that time passed regularly by descent to the first tenant in tail's heir at law, provided such heir at law was of the issue of the body of the tenant in tail,[20] and since no one can be the heir of a living person.[21] The remainder, then, was clearly subject to a condition precedent and the conditional element was incorporated into the description of the remainder-man.[22] The case, under the English authorities, would be one of the typical examples of a contingent remainder.[23] In Arkansas[24] and Vermont[25] the remainder is held to be contingent.

[20] John de Mandeville's Case, Co. Lit. 26b, 4 Gray's Cases on Prop., 9.

[21] Seymour *v.* Bowles, 172 Ill. 521, 524; McCartney *v.* Osburn, 118 Ill. 403, 415; Cooper *v.* Cooper, 76 Ill. 57; Butler *v.* Huestis, 68 Ill. 594, 598.

[22] Gray on Rule against Perpetuities, § 108; *ante*, § 95.

[23] Fearne C. R. 9; Fearne C. R. Smith's Notes, §§ 383-385; Leake, Digest of Land Laws, p. 324; Challis, Real Property (2nd ed.), p. 120. All these writers state the typical case of a contingent remainder of Fearne's fourth class to be to A for life, remainder to the right heirs of J. S., who is at that time living. Challis says: "* * * the remainder cannot vest until the ascertainment, or coming into being, of a person to satisfy the description in the limitation; and in the case of limitations to the heirs of a living person, such ascertainment can only take place upon his death; because *nemo est heres viventis*. It might at first sight be thought that the remainder is vested in the heir presumptive or heir apparent; but as the heir is, by the terms of the limitation, to take as a purchaser, and as the purchaser is to be the person who in fact comes within the description of heir, it is clear that the remainder cannot vest in the heir presumptive or apparent so long as his heirship remains

The Illinois supreme court seems at present to incline strongly toward the doctrine that the remainder is vested [26] upon the ground that a remainder is vested at any time if there is, "at that time, a person ready and entitled to take possession as remainder man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder." [27]

With regard to the Missouri cases, it is important to observe that, where the conveyance involved was governed by the law as it stood from 1845 to 1866, results might properly be reached which were of very doubtful propriety under the Missouri statute in force from 1825 to 1845 and again from 1866 to the present time. For instance, *Garth v. Arnold*,[28] a case where the conveyance was controlled by the law as it stood in 1855, very properly holds that the remainder in fee vests in the issue as soon as any issue comes into being, for the statute in force at that time expressly provided that the remainder "shall go and be vested in the *children* of such grantee, or devisee, equally to be divided between them, as tenants in common in fee." Curiously enough *Garth v. Arnold* does not altogether mislead us as to the actual state of the law in Missouri under the present statute, for it has been held in *Frame v. Humphreys* [29] that the remainder vests as soon as any child is born to the donee,—the Missouri court

only presumptive or apparent, because such a person may not, in fact, ever be the true heir at all, and therefore may never be qualified, under the terms of the limitation, to take the estate at all."

Observe that the English writers had no occasion to deal with the case of a limitation to A for life with a remainder to the heirs of A's body because such a limitation would have been subject to the Rule in Shelley's Case. (*Post*, §§ 187 *et seq.*)

[24] Horsley *v.* Hilburn, 44 Ark. 458, 476.

[25] *In re* Estate Kelso, 69 Vt. 272; *In re* Wells' Estate 69 Vt. 388.

[26] Boatman *v.* Boatman, 198 Ill. 414; Chapin *v.* Nott, 203 Ill. 341; *ante*, §§ 100, 101; Peterson *v.* Jackson, 196 Ill. 40, 47. See also cases cited *post*, § 117.

[27] Gray's Rule against Perpetuities, § 106, 107; see *ante*, § 95.

[28] 115 Fed. Rep. 468.

[29] 164 Mo. 336. Observe, however, that in Rozier *v.* Graham, 146 Mo. 352, and Utter *v.* Sidman, 170 Mo. 284, 304, the Court was noncommittal upon whether the remainder was vested or contingent.

apparently adopting the same definition of a vested remainder which obtains in Illinois.

§ 117. If it be held to vest in a child of the donee in tail as soon as such child is born, is it subject to be divested if the child die before the death of the donee? Even upon the hypothesis that the statutory remainder is vested under the definition of a vested remainder suggested above, it is clear that, upon principle, it should be subject to a condition subsequent, so that, should the remainder man die before the death of the donee in tail, his vested remainder would be divested in favor of such person as should actually answer the description of heirs of the body of the donee in tail at the donee's death. If this be not so—if the remainder be not only vested but indefeasible,—then, instead of a gift to "the person or persons whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the course of the common law," there will be in reality a remainder to the "children" of the donee.

In Missouri and Illinois where there is a tendency to hold the remainder vested, there is also an inclination to hold it indefeasible. But the authorities in each state are not altogether harmonious upon the point.

In Illinois there is an interesting alternation of *dicta* in favor of divesting the remainder and decision against it. In *Butler v. Huestis*[30] the court said "Mrs. Huestis [the donee in tail] under our statute, would take a life estate in the property and the remainder would pass in fee simple absolute to her children, although it might open to let in after born children, *and be divested as to such as should die before the determination of the life estate.*" Yet in *Voris v. Sloan*,[31] the preceding case in the same volume of reports, the court actually held the remainder indefeasible by declaring it error in a decree not to recognize that, upon the death of two children of the donee without issue surviving, the children's share descended to their *mother, the donee in tail,* as well as to the other children. Later, in *Lehndorf v. Cope*,[32] we have a clear cut *dictum* of Mr. Justice Shope that the remainder though vested is subject to be divested. Speaking of this statutory

[30] 68 Ill. 594, 598.
[31] 68 Ill. 588.
[32] 122 Ill. 317, 331.

remainder he says: "The person to whom the remainder is limited is ascertained, the event upon which it is to take effect is certain to happen, and *although it may be defeated by the death of such person before the determination of the particular estate,* it is a vested remainder." However, subsequently in *Welliver v. Jones*,[33] the court again held squarely that the remainder was not subject to be divested, so that, when the sole lineal heir of the donee dies without leaving issue in the life of the donee, the remainder passed by descent to her collateral heirs, viz. her mother the donee, and half brothers and sisters who were children of the donee's husband's first wife. Still later, in *Kyner v. Boll*,[34] there is an express recognition of the propriety of the result reached in *Voris v. Sloan* and *Welliver v. Jones*. Thus the direct authorities in Illinois stand.

There is another line of cases, however, which indirectly indicates that the Illinois Supreme Court has not unqualifiedly given itself over to the idea that the statutory remainder is in terms to the "children" of the donee. Where the limitations are to A for life, remainder to the heirs of the body of A, it has been continuously asserted that the rule in Shelley's case has no application,[35] until, in three quite recent cases,[36] the application of the rule is not even considered. Now, the only ground for saying that the rule in Shelley's case does not apply here, is, that if it did A would take a life estate with a remainder in tail to A, which by the doctrine of merger would give A an estate tail, and this, by the Statute on Entails, would be turned back into the estates as they were originally created, viz., a life estate to A, with a contingent remainder in fee to his lineal heirs.[37] It is apparent enough,

[33] 166 Ill. 80.

[34] 182 Ill. 171, 177. There the Court, after stating that upon the birth of Eugene, the first child of the donee in tail, he took an estate in fee simple subject to the donee's life estate, and subject to open and let in after born children, proceeded as follows: "When the child Eugene died before the birth of another child, such fee so vested in him passed to his heirs-at-law, who were his father and mother, subject to be divested *pro tanto* to let in after born children."

[35] Butler *v.* Huestis, 68 Ill. 594, 599, 600; Voris *v.* Sloan, 68 Ill. 588, 590; Griswold *v.* Hicks, 132 Ill. 494, 500. See *post*, § 131.

[36] Henderson *v.* Harness, 176 Ill 302, 308; Welch *v.* Welch, 183 Ill. 237; Lancaster *v.* Lancaster, 187 Ill. 540.

[37] Such is the reasoning of Mr. Justice Shope in Lehndorf *v.* Cope, 122 Ill. 317, 331. There the deed

then, that if, by the statute on entails, the statutory remainder runs to the "children" so that they have not only a vested, but an indefeasible interest as soon as born, there is no reason why the rule in Shelley's case should not be applied.

In this state of the Illinois authorities, Mr. Zane's statement of the Illinois law in a recent article in the Harvard Law Review,[38] is open to some objections: *First,* he undertakes to say quite positively what the law is. *Second,* judged by what seems to be a clear preponderance of direct authority he states it incorrectly. He says, "If the issue dies in the lifetime of the first taker, its share descends only to its issue, and not to the heir general of the deceased child, and if it dies without issue during the lifetime of the first taker, that particular issue is eliminated, and at the death of the donee in tail the issue then living take the remainder in fee." If the view that the remainder is not only vested but indefeasible, and the actual result of *Voris v. Sloan* and *Welliver v. Jones* are to prevail, then this statement is incorrect, since it was the distinct result of that view and the holding of those cases that upon the death of a child of the donee in the donee's lifetime without issue, the child's vested remainder descended to its collateral heirs. *Third,* Mr. Zane has failed to perceive that his own statement would be perfectly correct if the view prevailed that the statutory remainder was contingent, or, though vested, was subject to be divested. On these hypotheses, if the donee's child is dead with issue at the death of the donee, and those take the remainder who are the donee's lineal heirs by the statute on descent, then by that statute the issue of a deceased child stand in such deceased child's place[39]

ran to "M. A. L. and her heirs by her present husband, H. L." This was held to give M. A. L. a fee tail special at common law which the statute on estates tail turned into a life estate to M. A. L. and a remainder in fee to the bodily heirs of herself and her husband. The Court then said that, even proceeding upon the supposition that M. A. L. took a life estate by the original limitation in the deed, the result would be the same, since M. A. L., by the Rule in Shelley's case, "would, at common law, be seized of an estate in fee tail, and brought directly within the terms of Section 6" of the Act Concerning Conveyances.

[38] Determinable Fees, 17 Harvard Law Rev. 297, 311.

[39] 1 A. & D. R. E. S. 439; Laws 1819, p. 223 (1 A. & D. R. E. S. 446); Laws 1829, p. 191 (1 A. & D. R. E. S., p. 464); R. S. 1845, Ch. 109, Sec. 46 (1 A. & D. R. E. S.

and take as lineal heirs—not of the child, but of the donee. If, on the other hand, the child of the donee dies without issue then the other children take the remainder as the lineal heirs of the donee. Mr. Zane's own explanation of the significance of the results contained in his statement is quite different. "It thus appears," he says, "that during the lifetime of the donee the remainder to the issue is treated as an estate tail; it becomes a fee simple upon the death of the donee in tail. If no issue survive the donee, the other remainder in fee takes effect. It thus appears that there is one species of estate tail upon which the statute has no effect." From this he would appear to believe that the statutory remainder is sometimes subject to be divested and sometimes not —that if the donee's child dies leaving issue the vested remainder of the child becomes indefeasible and then there is a descent to the issue of the child, while if the child die leaving no issue the remainder is subject to be divested in favor of the other children. This, it is submitted, states the law worse than it really is. It adds to a subject already unnecessarily overloaded with artificial and complex distinctions, a refinement which finds no support in the language of the statute upon which it must be supposed to rest.

The Missouri cases must be examined with special care, for if the case be governed by the law as it stood there from 1845 to 1866 the statutory remainder is not only vested, but it is either not subject to be divested at all and so may pass by descent to the heirs general of the child of the donee, or, if subject to be divested, it is in the manner pointed out by the statute, *i. e.*, in favor of the issue of a deceased child of the donee, or if there be none, then in favor of the collateral heirs of such child. Thus, *Garth v. Arnold*,[40] decided with reference to the Missouri Act of 1845 (referred to in the case as in R. S. 1855) may very properly be cited for the proposition that, "if a child dies without issue before the first taker, the vested remainder is not thereby divested, but the heirs of the deceased child take." Again, however, this case cannot entirely mislead us as to the actual state of the Missouri law under the pres-

505); Laws 1871-2, p. 352, Sec. 1 1874, Ch. 39, § 1 (Hurd's R. S. (1 A. & D. R. E. S. 579): R. S. 1901, p. 677).

[40] 115 Fed. Rep. 468 (C. C. A.).

ent statute, for, in *Frame v. Humphreys*,[41] the Missouri court seems squarely to have held that the remainder could not be divested in such a case. It is difficult, nevertheless, to regard the Missouri law as settled this way until the earlier case of *Rozier v. Graham*,[42] where, if the remainder was not actually held contingent, it was at least held subject to be divested, be expressly overruled.

§ 118. **In whom does the remainder vest?—Are the lineal heirs of the donee who take the remainder to be ascertained according to Blackstone's canons or according to modern statutes of descent?** In Arkansas,[43] Illinois,[44] and Vermont,[45] it seems clear that the remainder under the statute vests in such issue of the donee in tail as are his heirs under the statute on descent. In all the cases the point is assumed, no other view being suggested. It is hard to say that this is not a proper result, and yet there are difficulties with it. The holding is precisely one of those which the court ought to have justified when it was made, so as to put forever at rest doubts based upon very plausible reasoning. According to the language of the statute the remainder in fee is limited "to the person or persons whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, *according to the course of the common law.*" It is perfectly clear that the descent if traced literally "according to the course of the common law," must have followed such of Blackstone's canons[46] as are applicable to lineal descent, viz., "the male issue shall be admitted before the female." "Where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether." "The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done had he been living." Thus, the eldest son alone, if there were one, would take the remain-

[41] 164 Mo. 336.

[42] 146 Mo. 352.

[43] Horsley *v.* Hilburn, 44 Ark. 458; Myar *v.* Snow, 49 Ark. 125; Wilmans *v.* Robinson, 67 Ark. 517.

[44] Voris *v.* Sloan, 68 Ill. 588; Lehndorf v. Cope, 122 Ill. 317, 330 (*semble*); Kyner *v.* Boll, 182 Ill. 171, 177 (*semble*); Turner *v.* Hause, 199 Ill. 464, 471 (*semble*).

[45] Thompson *v.* Carl, 51 Vt. 408.

[46] 2 Bl., Com., Ch. 14, pp. 200-240, (4 Gray's Cases on Property, 9).

der in fee, and the rule of primo-geniture would have survived to the present day in this one case. Such a conclusion is not so impossible as it might at first sight seem. It was in fact adopted in two Missouri cases.[47] In the more recent one the court said: "That under this statute, by the grant in the deed, to Mary A. Walker and the heirs of her body, she took only a life estate, is beyond dispute. The serious question is, to whom did the other part, the remainder in fee simple absolute, go? The answer of the statute is, to the persons to whom the estate tail would on her death first pass according to the common law, by virtue of the grant. This grant being of a fee tail general, according to the common law, its course by that law is similar, so far as it goes, to that of an estate in fee simple (Williams, R. P. 120, 17 Int. Ed.), and as at the date of the grant there were living sons and daughters of the said Mary A. Walker, of whom John D. Walker was the eldest, and as to him the estate tail would first pass on the death of his mother according to the common law (I Cooley's Black., 4 Ed. bottom pp. 605 and 606), to him the remainder in fee simple absolute passed under the statute by virtue of the grant, * * *."[48]

There would seem to be only two possible grounds for reaching a different result: *First*, that a modern statute changing the common law mode of descent had, prior to the statute on entailments, altered the course of descent in cases

[47] Frame *v.* Humphreys, 164 Mo. 336; Burris *v.* Page, 12 Mo. 358.

[48] This reasoning evidently prevailed over a strong prejudice against the result which it entailed, for in Rozier *v.* Graham, 146 Mo. 352, at page 360, the Court had said: "It might prove interesting to examine and discuss at length the exceedingly ingenious and plausible argument of the able counsel for Mrs. Mullen that our statute of 1835 [Mo. R. S. 1835, Act of Conveyances, Sec. 5] docking entails has been the means of preserving the common law rule of descent of primo-geniture, but having disposed of the only two grounds upon which his contention could possibly exist in this case, the stress of work forbids that we should enter upon such a discussion. While it is somewhat startling, we do not think it is altogether new, and we feel justified in saying that however plausible the theory evolved from the mere words of the statute, no such construction ever has been given that statute in this State, or ever will be. There are no mourners for the doctrine of primo-geniture in this State."

of estates tail and that the act concerning entails, in referring to "the course of the common law," really indicated the common law as modified by the modern statute. *Second*, that a statute of descent, passed subsequent to the act regarding entails, by implication modified it so that, "according to the course of the common law," must be read "according to the statute of descent."

An examination of the statutory history of Illinois will show how difficult it is, in that state at least, to sustain the results of the cases there, upon either of the grounds suggested.

At the time the Act of 1827 concerning entails was passed, there had been in force in Illinois as a territory and as a state since 1787, a statute changing the common law course of lineal descent so that children and descendants of a deceased child shared in equal parts, the descendants of a deceased child or grandchild taking the share of their deceased parent in equal parts among them.[49] Did these acts change the course of descent in the case of an estate tail? If so, did the Act of 1827 refer to the course of descent as changed by them?

It is clear that the first statutes of descent were not in terms confined in their application to estates in fee simple, for they begin: "That the estates of both resident and non-resident proprietors * * * dying intestate shall descend." "Proprietors" is a word which might well have included holders of an estate tail. An examination, however, of some early cases in Massachusetts,[50] Pennsylvania,[51] and Maine,[52] will seem to indicate a strong tendency to hold that the modern statutes concerning descent, even when they are not in terms confined to estates in fee simple,[53] do not apply to estates tail

[49] 1 A. & D. R. E. S., 439; also L. 1819, p. 223 (1 A. & D. R. E. S. 446).

[50] Corbin *v.* Healy, 20 Pick. (Mass.) 514 (1838); Wight *v.* Thayer, 67 Mass. 284 (1854).

[51] Reinhart *v.* Lantz, 37 Pa. St. 488 (1860), overruling the earlier case of Price *v.* Taylor, 4 Casey (Pa.) 95, 106, 28 Pa. State 95, 106. Sauder *v.* Morningstar, 1 Yeates (Pa). 313, is no authority upon the point of the text because there the statute of descent (Act of 1705) only regulated the descent of lands where the father is seized thereof, and might dispose of them by deed or will.

[52] Riggs *v.* Sally, 15 Me. 408 (1839).

[53] In Corbin *v.* Healy, *supra*, the statute of descent involved (Mass. Laws of 1780-1791, p. 124, Act of March 9, 1784) read: "That when any person shall die seized of lands, tenements or heredita-

so that the descent there still continues to be to the eldest son, etc., according to the course of the common law.[54] But, from a careful examination of these cases, it will appear that the results reached were influenced by a long period of recognition of estates tail and their descent according to the common law[55] and a consequent disinclination to overrule, by implication merely, a settled rule of property.[56] It may fairly be assumed, however, that such considerations never could have influenced the courts of Illinois and would not now do so. We may, therefore, assume for the purpose of the present discussion that the supreme court of this state would hold that the statutes of descent in force prior to 1827 did apply to alter the course of descent of estates tail.[57]

Then we reach this question: Does the Act of 1827, in declaring that the remainder shall pass "to the person or persons, whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass, according to the

ments, not by him devised, the same shall descend in equal shares to and among his children," etc.

In Reinhart *v.* Lantz, *supra*, the statute involved (Session Laws of Pa., 1832-3, p. 315) applied to "the real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold or disposed of by will or limited by marriage settlement."

[54] In 1 Leading Cases in American Law of Real Property (note by Sharswood and Budd), 104.

[55] The existence and incidents of an estate tail, have always been recognized in this Commonwealth, and provision made for an easy mode of barring them; and common recoveries to bar them have been in frequent use." *Per* Shaw, C. J., in Corbin *v.* Healy, 20 Pick. (Mass). 514, 517 (1838). In Sauder *v.* Morningstar, 1 Yeates 313 (1793), counsel who were arguing that the estate tail descended to all the sons equally were stopped by the Court. "The Court observed that it was too late now to stir this point whatever reason there might have been for it in the first instance. The invariable opinion of lawyers since the Act of 1705 has been, that lands entailed descended according to the course of the common law, and it has been understood generally, that it has been so adjudged in early times. All the common recoveries which have been suffered by the heirs of donees in tail have been conformable to that principle; to unsettle so many titles at this late day would be productive of endless confusion."

[56] See language of the Court in Price *v.* Taylor, 28 Pa. St. 95 at 106, 4 Casey 95, 106.

[57] See the suggestion of Lowrie, J., in Price *v.* Taylor, 28 Pa. St. 95, 106, 4 Casey 95, 106.

course of the common law" mean the common law as altered by previous statutes then in force? It seems pretty hard to answer this question in the affirmative. The common law and the statutory rules concerning descent were radically different. The latter did away with the former and superseded them. When, therefore, a new act was passed which referred in terms to descent "according to the course of the common law," the common law course of descent would seem to have been unequivocally distinguished and pointed out, and not a wholly different statutory mode.[58] This was the position taken by the Missouri court in the recent case of *Frame v. Humphreys*.[59] There the court said: "Although the common law of descents was never in force in this jurisdiction (Terr. Laws of Louisiana, 1807 Cap. 39; Terr. Laws of Mo. 1815 Cap. 143; R. S. 1825, p. 326; R. S. 1835, p. 222) that law was, as we have seen, preserved in the statute of conveyances, not as a law of descent, but to the extent only and for the single purpose of affording a rule for the determination of an estate tail by grant or devise * * *."[60]

It is difficult to say that the statute of 1829[61] concerning descents, operated in any way to alter the language of the

[58] It might be urged that the Act of 1827 itself furnishes an example where a reference to the common law admittedly includes a statutory amendment of the common law, since, while referring to "cases where by the *common law* any person or persons might hereafter become seized, in fee tail," cases where by the statute *de donis* of Edward I. any person is seized in fee tail are meant. But a fair argument can hardly be drawn from this because the result was reached not because "common law" includes a subsequent statutory amendment of the common law, but because the statute in terms applied to estates tail and at common law there were none such at all.

[59] 164 Mo. 336.

[60] The Court adds that by the Revision of 1845 "this last vestige of the system of feudal tenures was swept from our statute book." That is true because the Act of 1845 referred to must have been Mo. R. S. 1845, p. 116, Sec. 5 (Act regulating conveyances), where it was provided that the remainder "shall go and be vested in the children of such grantee or devisee equally to be divided among them," etc. But by the Act of 1866 (*ante*, § 114, note 7), this "last vestige of the system of feudal tenures" was evidently restored by the reenactment of the Act of 1825 regarding entails. (Frame *v.* Humphreys, 164 Mo. 336).

[61] Laws 1829, p. 191; 1 A. & D. R. E. S., p. 464, Sec. 46.

Act of 1827 concerning entails. If it did so it must be by implication merely. But there is no ground for any such implication since the Act of 1827 deals completely with the subject of entails and the subsequent statute concerning descent does not in terms, nor, indeed, need it be regarded as in the slightest degree inconsistent with the Act of 1827. Subsequent events repel any inference that these two acts are at all inconsistent with each other, since they have been re-enacted in their original form in the subsequent revisions of 1845,[62] and 1874.[63]

§ 119. Assuming that lineal heirs under the modern statute take the remainder, can you restrict them to a special class in the case of an estate tail special? Suppose, however, the general view to obtain that lineal heirs of the donee, under modern statutes on descent, take the remainder in fee. Then take this case: To A and the heirs of his body by his present wife B. A has had a former wife and dies leaving children by both wives who are his heirs under the statute on descent. It is held, in Illinois at least, that in such a case only the lineal heirs of the donee by the particular wife will take.[64] And it seems to make no difference whether the court regards the remainder as contingent or as vested subject to be divested,[65] or vested and indefeasible.[66] So, if the limitation be to A and the heirs male of his body, it might be supposed that the remainder would be only to those of A's heirs under the statute on descent as are males.

This result ought to be questioned, if for no other reason, to show what liberties have been taken with this Statute on Entails. By the statute, the remainder is created in those to whom the estate tail would, on the death of the donee, "first pass according to the course of the common law." Now, if you construe this to mean "according to the course of the Statute on Descent," how can you support the remainder in the restricted class of the donee's lineal heirs by a particular wife? It is of no use to argue that the donor intended the class to be limited, for the statute completely frustrates the intention of the donor. It places statutory estates in place

[62] R. S. 1845, p. 534, Sec. 46.
[63] R. S. 1874, p. 417, Ch. 39, Sec. 1.
[64] Cooper *v.* Cooper, 76 Ill. 57; Welliver *v.* Jones, 166 Ill. 80.
[65] Cooper *v.* Cooper, *supra.*
[66] Welliver *v.* Jones, 166 Ill. 80.

of the estate limited, and, if the statute says that the remainder shall be in those who are the donee's lineal heirs at the time of his death according to the statute on descent, what is to be done but to allow all the donee's lineal heirs to take? An excellent example of this exact mode of handling the statute is to be found in some New Jersey cases. A New Jersey statute of 1820,[67] in terms created a remainder in the "children" of the donee.[68] It is clearly the law under this statute that if an estate tail be limited to A and the heirs of his body by a particular wife, B, and he have no children by B, but does have children by another and different wife, the issue of such different wife will take the remainder in fee, because the statute says "children" without distinguishing between special classes of children.[69] The Illinois cases which, while giving a remainder to those who may be heirs of the donee according to the statute on descent, restrict the class of such heirs as the donee has indicated, simply point out the extreme liberty which a court may take with the language of a statute.

§ 120. **Assuming that the Illinois statute has the same force as if it limited a remainder to the children of the life tenant, at what period of time does the class close?** This further point logically arises in considering in whom the statutory remainder vests. Its determination must, however, be left to a section in the chapter on limitations to classes.[70]

B. REVERSIONS.[1]

§ 121. **Existence of Reversions:** The simplest instance of a reversion occurs where a life estate and nothing more is conveyed.[2] Upon a limitation to A for life with a contingent remainder in fee to another and no further limitation, there is a reversion in fee to the grantor or the heirs of the testator.[3]

67 Rev., p. 299, Secs. 10 and 11.
68 Doty *v.* Teller, 54 N. J. L. 163.
69 Zabriskie *v.* Wood, 23 N. J. Eq. 541; Weart *v.* Cruser, 49 N. J. L. 475, 480.
70 *Post*, § 227.
1 *Ante*, § 68.
2 Allen *v.* McFarland, 150 Ill. 455; Sutton *v.* Read, 176 Ill. 69; Rose *v.* Hale, 185 Ill. 378; Lewis *v.* Harrower, 197 Ill. 315.
3 Bates *v.* Gillett, 132 Ill. 287, 295; Lewis *v.* Pleasants, 143 Ill. 271, 274; Dinwiddie *v.* Self, 145

In both cases the reversion is so far treated like a vested interest that it passes by the quit claim deed of the reversioner.[4]

§ 122. Transfer of reversions; attornment: A reversion is transferable as freely, it would seem, as a vested remainder.[5] The only stumbling block in the way of this free alienation is the possible survival of the requirement that the tenant in possession must attorn to the grantee of the reversioner.

Under the common law system of conveyancing, it was absolutely necessary to the validity of the conveyance of a reversion by grant that the tenant in possession attorn. Without attornment the grant was void; no title passed.[6] It would appear, however, that, upon the transfer of a reversion by will, by special custom, before the Statute of Wills of Hen. VIII, no attornment was necessary.[7] *A fortiori,* none was necessary when a reversion was conveyed by will operating under a statute.[8] So, also, in conveyances operating under the Statute of Uses of 27 Hen. VIII, attornment was no longer necessary. Thus, the bargain and sale of a reversion passed the title without attornment.[9] So zealous, too, were the courts to sustain conveyances, and dispense with the requirement of attornment than an instrument in form the grant of a reversion, would, if it contained the recital of a consideration, be construed a bargain and sale, so that the deed would operate to

Ill. 290, 300 (*semble*); Madison *v.* Larmon, 170 Ill. 65, 80; Harrison *v.* Weatherby, 180 Ill. 418; Peterson *v.* Jackson, 196 Ill. 40. This must have been true of Frazer *v.* Board of Supervisors, 74 Ill. 282; Chapin *v.* Nott, 203 Ill. 341, 351. Anything to the contrary in Madison *v.* Larmon, 170 Ill. 65, has been repudiated: Peterson *v.* Jackson, 196 Ill. 40, 50; Pinkney *v.* Weaver, 216 Ill. 185.

[4] Peterson *v.* Jackson, 196 Ill. 40. Observe that in Frazer *v.* Board of Supervisors, 74 Ill. 282, at page 290, the court speaks of the reversion in that case as a "contingent reversion."

[5] Its transfer by will has been expressly upheld: Biggerstaff *v.* Van Pelt, 207 Ill. 611. Also by quit claim deed: Peterson *v.* Jackson, 196 Ill. 40. By sale on execution: Hempstead *v.* Dickson, 20 Ill. 193.

[6] Lit. § 551, 1 Gray's Cases on Prop. p. 441. See also The Mystery of Seisin, by F. W. Maitland. 2 Law Quart. Rev. 481, 490 *et seq.*

[7] Lit. § 167, 586 (1 Gray's Cas. on Prop. p. 451).

[8] In Biggerstaff *v.* Van Pelt, 207 Ill. 611, there is no suggestion that upon a transfer of the reversion by will any attornment was necessary.

[9] Co. Lit. 309a, b, (1 Gray's Cas. on Prop. p. 441, 442); Edward Fox's Case, 8 Co. 93b (1 Gray's Cases on Prop. 489).

pass a legal title without attornment.[10] The common law requirement of attornment, however, still continued to exist. The statute of 32 Hen. VIII,[11] which enabled the grantee of a reversion to take advantage of covenants and conditions in a lease did not do away with it, and its total expurgation from the law of England did not occur till the statute of Anne.[12] In this country, many states have re-enacted the statute of Anne.[13] In at least one jurisdiction where there was no such statute, attornment has been held to be no longer necessary, because such a requirement was a rule of feudal land law unsuited to, and inconsistent with, our laws, customs and institutions.[14]

In this condition of the history of the law regarding attornment, the results reached by our supreme court have a special interest. We have the *dictum* of the court in *Fisher v. Deering*[15] that attornment was still necessary in this state in 1871. This was rested upon two grounds: *First,* that the statute of Anne which abolished attornment in England was not in force here; and *second,* that the statute of 32 Hen. VIII which enabled the grantee of a reversion to take advantage of covenants and conditions in a lease, and which was conceded to be in force here, did not abolish attornment. No notice was taken of the fact that a deed, in the common form in use in this state, reciting a consideration, might take effect as a bargain and sale,[16] thus dispensing with the necessity of attornment. The natural inference would be, therefore, that our supreme court regarded the conveyance of a reversion under the law as it stood in 1871 as absolutely void if there was no attornment.

If the two grounds for the *dictum* of *Fisher v. Deering* are sound (as indeed they seem to be), then sec. 14 of the Land-

[10] Edward Fox's Case, 8 Co. 93b. (1 Gray's Cas. on Prop. p. 489); *post,* § 150.

[11] 32 Hen. VIII. Ch. 34, sec. 1 (2 Gray's Cas. on Prop. p. 405, and 2 Starr *v.* Curtis, Ill. Stats. (1896) p. 2515).

[12] 4 Anne ch. 16, sec. 9 (1 Gray's Cas. on Prop. p. 443).

[13] 1 Stim. Amer. Stat. Law §§ 2008, 2009.

[14] Perrin *v.* Lepper, 34 Mich., 292 (1 Gray's Cas. on Prop., p. 448).

[15] 60 Ill. 114 (1 Gray's Cases on Prop. p. 446); also Scheidt *v.* Belz, 4 Ill. App. 431, 435-436; Hayes *v.* Lawver, 83 Ill. 182.

[16] *Post,* § 150.

lord and Tenant Act of 1873[17] could hardly operate to abolish attornment, because that section is practically a copy of the operative part of the statute of 32 Hen. VIII which, it was conceded in *Fisher v. Deering,* was insufficient to abolish attornment. The holding, however, that attornment was still necessary here was such an absurd survival of the principles of feudal land law that in *Barnes v. Northern Trust Co.*[18] our supreme court seized upon this sec. 14 of the Landlord and Tenant Act to hold that by it attornment had been abolished in this state.[19]

The most careful conveyancer, therefore, can hardly doubt that attornment is no longer required in Illinois. It would, however, lead to the better security of titles, and especially those depending upon the transfer of a reversion before 1873, if it should be held that attornment never had been necessary here[20] or, at least, that every deed reciting a consideration, so that it could take effect as a bargain and sale under the Statute of Uses, would operate as such and hence be valid to pass a title without attornment.

§ 123. A difficulty of construction: Suppose the grantor uses language making an ultimate gift to himself or his heirs. Is this to be regarded (1) as an attempted limitation of what would be a reversion and so take effect as a reversion, or (2) are the words to be taken as words of purchase creating alternate limitations to the grantor or his heirs?[21] The first view seems to be the one adopted in *Hobbie v. Ogden*[22] and *Akers v. Clark.*[23]

[17] R. S. 1874 ch. 80 sec. 14.

[18] 169 Ill. 112; followed by Bordereaux *v.* Walker, 85 Ill. App. 86. Same result reached in Howland *v.* White, 48 Ill. App. 236.

[19] As to how far attornment may be necessary in this state in case of the transfer of a remainder, see *ante,* § 71.

[20] If the broad meaning be given to sec. 1 of the Act of 1827 concerning conveyances (*ante,* § 76) that it applies to conveyances of any interest in law, whether such interest would have been transferable by livery of seizin or by grant at common law, why could it not be relied upon, as well as sec. 14 of the Landlord and Tenant Act of 1873, to effect the abolition of attornment?

[21] *Ante,* § 113.

[22] 178 Ill. 357.

[23] 184 Ill. 136.

For another problem of the same sort see Pickney *v.* Weaver, 216 Ill. 185.

C. POSSIBILITIES OF REVERTER.

§ 124. Possibilities of reverter described: An estate to A and his heirs until they ceased to be tenants of the Manor of Dale is the example of a determinable fee given by Professor Gray in his Rule against Perpetuities.[24] The learned author then proceeds: "On the happening of the contingency, the grantor was in of his old estate without entry. The estate was not cut short, as it would have been by entry for breach of condition, but expired by the terms of its original limitation. After a life estate of this kind a remainder could be limited. After a fee, there could be no remainder; but there was a so-called possibility of reverter to the feoffor and his heirs which was not alienable."[25]

§ 125. Distinguished from a conditional limitation: Our supreme court has been very fond of calling fee simple estates, which are subject to shifting limitations over, determinable fees.[26] It seems clear, however, that the determinable fee here spoken of is only the fee simple which is cut short to give place to the future limitation. The calling of it a determinable fee is not, it would seem, technically exact. "A qualified fee," writes Professor Gray,[27] "is one subject to a special limita-

[24] § 13.

[25] The inalienability of a possibility of reverter seems to have been clearly recognized in Presbyterian Church *v.* Venable, 159 Ill. 215. There the grantor devised, prior to the event (viz. the dissolution of the grantee, a charitable corporation) upon which the fee was to be determined, and the court clearly held that no interest of the grantor passed by the will.

Observe that in Mott *v.* Danville Seminary, 129 Ill. 403, no question of this sort was raised because the deed by the original grantor was made *after* the event upon which the fee was to determine. On the hypothesis, therefore, that the grantor had a possibility of reverter, the legal estate had reverted before the deed was made.

[26] Post *v.* Rohrbach, 142 Ill. 600, 606; Bradsby *v.* Wallace, 202 Ill. 239, 244; Becker *v.* Becker, 206 Ill. 53, 56; Gannon *v.* Peterson, 193 Ill. 372, 381; Koeffler *v.* Koeffler, 185 Ill. 261, 266; Knight *v.* Pottgieser, 176 Ill. 368, 375; Lombard *v.* Witbeck, 173 Ill. 396, 406; Summers *v.* Smith, 127 Ill. 645, 650; Orr *v.* Yates, 209 Ill. 222, 229. See also Determinable Fees, by John Maxcy Zane, 17 Harvard Law Review, 297.

[27] Rule against Perpetuities, § 32.

tion; that is, a limitation which marks the original bounds of the estate, and after which, in case of a fee, no other estate can be granted.[28] A conditional limitation, as the term is commonly used, cuts off the first estate and introduces another. An estate to A and his heirs, tenants of the Manor of Dale, is an instance of a qualified fee. An estate to A and his heirs, but if he dies unmarried, then to B and his heirs, is a fee simple subject to a conditional limitation. Qualified fees were good at common law, but were done away with by the Statute *Quia Emptores*.[29] Conditional limitations were not good at common law; they were first introduced by the Statutes of Uses and Wills."[30]

§ 126. **How far valid in Illinois**: A series of no less than three cases seems to have settled it as law, here, that, upon the dissolution of a charitable corporation having neither stockholders nor creditors, land, which had been conveyed to it by way of gift, reverts to the original grantor.[31] This result can hardly be explained upon the ground that the original grantor has a right of entry for the breach of a condition subsequent implied in law, for in *Mott v. Danville Seminary*,[32] it was held that a conveyance by the original donor, after the dissolution of the corporation but before he had made any entry or done any other act necessary to perfect a forfeiture, was valid to pass a fee simple. The court called the interest of the donor a possibility of reverter, and, after remarking that, upon the breach of a condition subsequent, an entry was necessary to re-vest title in the original grantor,[33] said: "But in the present case, upon the dissolution of the original corporation, we have already seen that the title reverted to the donor, Mrs. Lamon, *without any act on her part*."[34]

[28] See Wiggins Ferry Co. *v.* O. & M. Ry. Co., 94 Ill. 83, 93, 94.

[29] See *post*, § 126.

[30] *Post*, §§ 146, 164.

[31] Life Assn. *v.* Fassett, 102 Ill. 315, 323, *semble*; Mott *v.* Danville Seminary, 129 Ill. 403; Presbyterian Church *v.* Venable, 159 Ill. 215.

[32] 129 Ill. 403.

[33] *Ante*, § 30a.

[34] In Presbyterian Church *v.* Venable, 159 Ill. 215, the court clearly subscribes to the same doctrine.

As to the nature of the right of the dedicator upon vacation of a statutory dedication, see *ante*, §§ 2, 2a.

As to the nature of the interest of the mortgagor where the mortgage debt is barred by the statute of limitations, see *ante*, §§ 17-20.

For authority in support of this view our supreme court relies upon the *dictum* of an earlier case[35] and a number of text writers[36] whose statements are all founded on the language of Coke,[37] that, upon the dissolution of a corporation "the donor shall have again the land and not the lord by escheat." It is certainly a matter of interest that in 1886, three years before the filing of the opinion in the *Danville Seminary* case, Professor Gray, in his Rule against Perpetuities,[38] had elaborately pointed out that since the statute of *quia emptores* no possibilities of reverter could be created, and that Lord Coke's statement probably never was the law at all, and was directly repudiated as early as 1622, while Coke still lived. In the Law Quarterly Review for July, 1886,[39] the learned reviewer of Professor Gray's Rule against Perpetuities, while questioning the conclusion that since *quia emptores* possibilities of reverter could no longer be created after a fee simple,[40] is entirely agreed with Professor Gray that, upon the dissolution of a corporation, its land escheats, and that Coke's view was erroneous. It is a matter of surprise to the writer that the examination of these fundamental questions made by an eminent member of the bar and a master of the law of real property should have been overlooked by our supreme court at the time when the Danville Seminary case was argued and decided.

Doubtless the result reached by the court was thought to be a just one. They may well have said that it is better to have such a rule in this one case, than to have these lands escheating to the county or state. It would seem, however, that this sort of consideration was of doubtful propriety when the resort to it overturned sound legal reasoning to the contrary. It is believed, also, that it is a short sighted policy. If it had been held that the lands escheated, then, if any wrong was done, it would have been left to the legislature to act.

[35] Life Association *v.* Fassett, 102 Ill. 315, 323.

[36] 1 Bl. Com. 484; 2 Kent Com. 307; Angel & Ames on Corps., sec. 195 (10th ed.); 2 Morawetz on Corps., sec. 1031.

[37] Co. Lit. 13b, (4 Gray's Cases on Prop., p. 2).

[38] §§ 44-51.

[39] Vol. 2, p. 394.

[40] This question gave rise to a further discussion upon this point by Professor Gray and Mr. Challis: 3 Law Quart. Rev. 399, 403.

It is not unlikely that that body would have required such lands to be distributed *cy pres* for the purposes for which they were originally donated. Under the rule as at present announced the legislature's hands are tied for a long time to come, since no act would be constitutional which affected the rights of grantors of lands to such corporations as are now in existence.

CHAPTER III.

RULE IN SHELLEY'S CASE.

§ 127. In force in Illinois; statement of the rule: The rule in Shelley's case is certainly in force in this state.[1] This rule is not a modern rule founded upon the ancient one, but it is the ancient rule itself as adopted and developed by the English courts. Our supreme court has recognized the rule as given by Preston[2] and Jarman.[3] Hayes'[4] statement of it may well be added as being particularly accurate and complete: "The rule in Shelley's case says, in substance, that if an estate of *freehold* be limited to A, with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor."[5]

§ 128. Origin of the rule: In *Baker v. Scott*[6] our supreme court touched upon some of the suggestions which have been

[1] Baker *v.* Scott, 62 Ill. 86; Brislain *v.* Wilson, 63 Ill. 173; Riggin *v.* Love, 72 Ill. 552, 556, *semble;* Ryan *v.* Allen, 120 Ill. 648; Carpenter *v.* Van Olinder, 127 Ill. 42; Hageman *v.* Hageman, 129 Ill. 164; Fowler *v.* Black, 136 Ill. 363; Vangieson *v.* Henderson, 150 Ill. 319; Davis *v.* Sturgeon, 198 Ill. 520; Deemer *v.* Kessinger, 206 Ill. 57. In all the above cases the limitations were substantially, to A for life, remainder to A's heirs, and the rule was applied, the ultimate result being that A had a fee simple.

In Bigelow *v.* Cady, 171 Ill. 229, the heirs of the testator filed a bill for partition. A demurrer by the administrator with the will annexed (on the ground of insufficient parties, presumably) was overruled. This was affirmed upon the ground that the complainants had the whole interest. Professor Gray suggested to the writer that possibly this might be explained upon the ground that, by the application of the rule in Shelley's case, the complainants were the only persons interested. (See *post*, § 256, for ground upon which the court placed its decision.)

[2] Baker *v.* Scott, 62 Ill. 86 at p. 90, 91; Brislain *v.* Wilson, 63 Ill. 173, citing 1 Preston on Estates, 264.

[3] Lehndorf *v.* Cope, 122 Ill. 317 to 331; citing Jarman on Wills, 332, 5th ed.

[4] 1 Hayes' Conveyancing, 542.

[5] The scheme of this chapter and much of the substance of the different sections is founded upon the exposition in 1 Hayes' Conveyancing, pp. 542 *et seq.*

[6] 62 Ill. 86, 95-96.

thrown out as the reason for the rule in Shelley's case. To what is there said the following explanation may be added: The limitations to which the rule applies would, without the application of the rule, give a life estate to A and a contingent remainder to A's heirs.[7] Prior to 1430 this remainder would have been void because of the refusal of the feudal system to recognize the validity of contingent future interests of this sort on any terms.[8] Now, as the rule in Shelley's case dates back to 1324,[9] is it not most reasonable to suppose that it was invented to save a settlement which would otherwise fail except as to the life estate?[10] It certainly performed that beneficent function for over a century and even after 1430 the operation of the rule prevented the creation of a future interest easily destructible.

§ 129. Application of the rule:[11] "The rule," says Hayes,[12] "assumes and founds itself upon two pre-existing circumstances,—a freehold in the ancestor, and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it."

The fact that a *remainder* is required admits the application of the rule where the estates are all legal. It excludes its application in the case of limitations differing in quality, the one being legal and the other equitable.[13] It excludes its application, also, in the case of an executory limitation by way of devise or use. Thus, where a gift was made to trustees to settle property upon A for life, and then to the heirs of A's body, it was held that the intent of the settlor should be carried out, and that the trustees must settle so that the rule in Shelley's case would not apply, *i. e.*, to A for life with remainders to A's first and other sons successively in tail.[14] This

[7] Akers *v.* Clark, 184 Ill. 136, 137 (quoting from Washburn on Real Property, vol. 2, p. 242).

[8] *Ante*, § 87.

[9] 5 Gray's Cases on Prop., 91.

[10] This explanation was suggested by Professor Gray in his Course on Property at the Harvard Law School. The writer does not know of its having been made by any one else.

[11] Much of the substance of the text of this section is taken from 1 Hayes' Conveyancing, 542, 543.

[12] 1 Hayes' Conveyancing, 5th ed. 542.

[13] Baker *v.* Scott, 62 Ill. 86, 93-94 (*semble*); Ryan *v.* Allen, 120 Ill. 648, 653 (*semble*); Glover *v.* Condell, 163 Ill. 566, 588 (*semble*).

[14] Papillon *v.* Voice, 2 P. Wms. 471 (5 Gray's Cases on Prop. 95).

same principle was recognized by our supreme court in *Baker v. Scott*.[15] Curiously enough, however, it failed to apply the principle in just the case where it might have done so. In *Wicker v. Ray*,[16] there was a devise in fee to trustees in trust to secure a share to the testator's daughter, so that she should enjoy it during her life, and after her decease then to her right heirs forever. It would seem as if the court might well have held that the trustees must so settle as to carry out the intention of the testator that the daughter have only a life estate. This, it is submitted, could have been done by transferring to trustees to hold for the life of the daughter upon an active trust for the daughter for life, with a contingent legal remainder in fee to the heirs of the daughter. It was held, however (Mr. Justice Scott dissenting), that the daughter took a fee simple by the rule in Shelley's case, the ground suggested, upon which a different result might have been reached, not being noticed.

In spite of the fact that there are, strictly speaking, no remainders in equitable estates,[17] the rule in Shelley's case seems not to have been excluded where all the estates were equitable.[18] This is the more remarkable because, if the explanation of the origin of the rule as given in § 128 be correct, it is difficult to understand upon what ground it was ever applied where as in the case of equitable estates generally,[19] the contingent future interest to the heirs was indestructible.

The fact that a remainder to *heirs* is required excludes the application of the rule in the case where the limitation is, to quote again from Hayes,[20] "to *sons, children*, or other objects, to take, either as individuals or as a class, under what

[15] 62 Ill. 86, 102.

[16] 118 Ill. 472.

[17] Gray's Rule against Perpetuities, § 324, *ante*, § 87, note 24.

[18] This was clearly recognized in this state in Glover *v.* Condell, 163 Ill. 566, 588, where the gift was to trustees in trust for A. B. C. for life "and after his death the principal of his share or part to be paid to his heirs," and where it intimated that *since both interests were equitable* the rule in Shelley's case would have applied if the property so limited had been real estate. Observe also to the same effect the *dicta* of Baker *v.* Scott, 62 Ill. 86, 90, and Ryan *v.* Allen, 120 Ill. 648, 653.

[19] Astley *v.* Micklethwait, 15 Ch. Div. 59 (1880), (5 Gray's Cases on Prop. 78); Challis, Real Property, 2nd ed. p. 111; *ante*, § 84.

[20] 1 Hayes' Conveyancing, 543.

is termed a *descriptio personae,* as distinguished from a limitation embracing the line of inheritable succession." Whether or not the second limitation is a remainder to the "*heirs*" as distinguished from "sons or children" is purely a question of the construction of the instrument according to proper rules and principles of interpretation. Even the word "children" aided by the context may mean "heirs." It must, however, be an unusual case where this can happen. It is noticeable that, in cases where our supreme court has been urged to give such a construction to the word "children," it refused to do so.[21] On the other hand, the word "heirs," restrained by the context, may have only the force of the word "children," in which case, of course, the rule has no application.[22] This again is the unusual and exceptional result, where the word "heirs" is used. There must be something on the face of the instrument to indicate with a sufficient degree of plainness that "children" are meant.[23]

§ 130. Operation of the rule—In general: The rule, it should be observed, operates in no manner whatever upon the estate of freehold in A. It operates only upon the *remainder.* It denies to the remainder the effect of a gift to the heirs. It attributes to the remainder the effect of a gift to the ancestor himself.[24] Thus, in the usual case for the application of the rule Shelley's case, *i. e.,* where the gift is to A for life,

[21] Beacroft *v.* Strawn, 67 Ill. 28; Griswold *v.* Hicks, 132 Ill. 494; Schaefer *v.* Schaefer, 141 Ill. 337.

[22] Our supreme court, in Butler *v.* Huestis, 68 Ill. 594, goes very far in declaring that "heirs of the body" means "children"; the grounds being that the words were used in the exercise of a power and that the remainder was limited "at and after" the life tenant's decease.

Belslay *v.* Engel, 107 Ill. 182 is, according to the subsequent case of Carpenter *v.* Van Olinder, 127 Ill. 42, 51, to be explained on the ground that "heirs" must there have been construed "children."

[23] Cases where "heirs" is used and the court holds rigidly to its technical meaning: Fowler *v.* Black, 136 Ill. 363, 374-375; Davis *v.* Sturgeon, 198 Ill. 520, 522; Vangieson *v.* Henderson, 150 Ill. 119, 121; Hageman *v.* Hageman, 129 Ill. 164, 168; Carpenter *v.* Van Olinder, 127 Ill. 42, 53; Ryan *v.* Allen, 120 Ill. 648, 654; Deemer *v.* Kessinger, 206 Ill. 57. Observe also the expressions of the court in Wolfer *v.* Hemmer, 144 Ill. 554, 560; Ewing *v.* Barnes, 156 Ill. 61, 67; Silva *v.* Hopkinson, 158 Ill. 386, 389.

[24] 1 Hayes' Conveyancing, 543-544.

remainder to A's heirs, the rule operates in no degree upon A's life estate but simply changes the remainder to A's heirs into a remainder to A himself, so that, when the operation of the rule is complete, A has a life estate with a remainder in fee to himself.

This correct operation of the rule in Shelley's case has, it is believed, never been distinctly noted by our supreme court. That the rule operates only upon the remainder seems to have been recognized by the court because it has quoted from time to time definitions of the rule from the English writers which so describe its operation,[25] though not so clearly as does Hayes in his exposition. The general impression, nevertheless, to be derived from the handling of the usual case of a gift to A for life, with a remainder to A's heirs, is, that the rule operates to give A a fee simple directly.[26] Of course this is the ultimate result in the case put,[27] because the moment, by the rule, you have a life estate to A, with a remainder in fee to A, the two estates merge and A is in of a fee simple.

The real operation of the rule is at once perceived, if the estate be limited to A for life, with a remainder to B for life, remainder to A's heirs. By the rule A has a life estate, B a remainder for life, and A a remainder in fee, and, because of the intervening life estate there can be no merger.[28]

§ 131. Where the limitations are to A for life remainder to the heirs of the body of A: In such a case the rule would

[25] *Ante*, § 127, notes 2, 3.

[26] Muhlke *v.* Tiedemann, 177 Ill. 606, 615.

[27] Baker *v.* Scott, 62 Ill. 86; Brislain *v.* Wilson, 63 Ill. 173; Riggin *v.* Love, 72 Ill. 553, 556 (*semble*); Ryan *v.* Allen, 120 Ill. 648; Carpenter *v.* Van Olinder, 127 Ill. 42; Hageman *v.* Hageman, 129 Ill. 164; Fowler *v.* Black, 136 Ill. 363; Vangieson *v.* Henderson, 150 Ill. 119; Deemer *v.* Kessinger, 206 Ill. 57.

[28] Such a case has not yet come up in Illinois, but if the instructions, said to have been sent out by a local trust company to its clients as to the proper manner of avoiding the rule in Shelley's case, be followed, we may expect it any time. The pamphlet circulated by the trust company, after stating the usual effect of the rule, went on to say that, if one wished to leave property to A for life and afterwards to his heirs, to make sure of accomplishing this object "the will should interpose a brief estate of a day or a week between the life estate and the estate of the heirs." (Article in 28 Chicago Legal News, p. 258, by Lessing Rosenthal.)

operate to give a remainder in tail to A, and by merger, A would take an estate tail at once. Then sec. 6 of the conveyancing act concerning entails[29] would apply. If that section turns an estate tail into a life estate to A with a remainder to such as will be, at the death of A, his heirs according to the statute on descent, then it is apparent that we shall have the estate tail turned back into the very limitations which existed originally, before the rule in Shelley's case was applied.[30] Under these circumstances it would seem justifiable enough for the supreme court to declare, as it has done,[31] that, where the remainder was limited to the heirs of the body of A, the rule in Shelley's case had no application.

The difficult part of this solution is, that it by no means appears to be the settled doctrine of our supreme court that the remainder, raised by the statute in place of an estate tail, is a remainder to those who are the donee in tail's heirs by the statute on descent at the time of his death. If the adjudications and suggestions of our supreme court be taken together, the rule would seem to be that the remainder is really to the "children" of the donee in tail, so that, as soon as any child is born, it takes a vested and indefeasible interest.[32] If this be the final rule for this jurisdiction, then the application of the rule in Shelley's case, with the consequent results of the

[29] *Ante*, § 114.

[30] In Lehndorf *v.* Cope, 122 Ill. 317, 331, the court seems to have followed the matter out in this manner. There the deed ran to "M. A. L. and her heirs by her present husband, H. L." This was held to give M. A. L. a fee tail special at common law, which the Statute on Entails turned into a life estate to M. A. L., and a remainder in fee to the bodily heirs of herself and her husband. The court then said that even proceeding upon the supposition that M. A. L. took a life estate by the original limitation the result would be the same, since M. A. L., by the rule in Shelley's case, "would at common law be seized of an estate in fee tail and brought directly within the terms of section 6 of the Conveyancing Act."

[31] Butler *v.* Huestis, 68 Ill. 594, 599-600; Voris *v.* Sloan, 68 Ill. 588, 592; Griswold *v.* Hicks, 132 Ill. 494, 500. In three recent cases where the limitations were substantially to A for life with remainder to the heirs of the body of A, it was assumed by the court that the limitations stood as expressed, the rule in Shelley's case not even being mentioned: Henderson *v.* Harness, 176 Ill. 302; Welch *v.* Welch, 183 Ill. 237; Lancaster *v.* Lancaster, 187 Ill. 540.

[32] *Ante*, §§ 116-120.

Statute on Entails, should be followed out, and there can be no ground for saying that the rule in Shelley's case does not apply.

§ 132. In case of the statutory remainder raised upon the creation of an estate tail: If the Statute on Entails[33] be held to create, in effect, a remainder to the "children" of the donee which vests in each child indefeasibly as soon as born,[34] then, of course, the rule in Shelley's case can have no application.[35] If the statute turns the estate tail into a life estate in A with a remainder in fee to those who at A's death would be his heirs at law, either according to the statute on descent, or according to the course of the common law,[36] and if the remainder under such circumstances be regarded as one to which the rule in Shelley's case applies, yet by the operation of that rule and the doctrine of merger A would have an estate tail again. The effect then of applying the rule in Shelley's case would be to nullify the effect of the statute. It is properly enough held, therefore, upon this ground, if on no other, that the statutory limitations resulting from the creation of an estate tail cannot be subject to the operation of the rule in Shelley's case.[37]

§ 133. Character of the rule: On principle the rule is not one of construction but an absolute rule of law which operates to defeat the intent of the testator or settlor.[38] It is obviously impossible that a rule, which not only refuses to give effect to the remainder to the heirs but actually turns it into a remainder to the ancestor himself, should be a rule of construction.[39] *Perrin v. Blake*[40] and the later English au-

[33] *Ante*, § 114.

[34] *Ante*, §§ 116-120.

[35] *Ante*, § 129.

[36] *Ante*, § 118.

[37] In the following cases the court said that the rule had no application in case of an estate tail: Baker *v.* Scott, 62 Ill. 86, 98; Griswold *v.* Hicks, 132 Ill. 494, 501; Schaefer *v.* Schaefer, 141 Ill. 337, 343. In the following cases the same thing was assumed without mention of the point: Blair *v.* Van Blarcum, 71 Ill. 290; Welliver *v.* Jones, 166 Ill. 80; Young *v.* Harkleroad, 166 Ill. 318; Atherton *v.* Roche, 192 Ill. 252.

[38] 1 Hayes' Conveyancing, 5th ed. pp. 545-547.

[39] 1 Hayes' Conveyancing, 5th ed., p. 543.

[40] 1 W. Bl. 672 (5 Gray's Cases on Prop. 98).

thorities[41] have clearly declared it not a rule of construction by holding that, even where the testator or grantor declared he did not intend the rule to govern, nevertheless it did govern just the same.

All this seems to have been recognized in *Baker v. Scott*,[42] the first and leading case in this state on the rule in Shelley's case. In *Butler v. Huestis*,[43] however, there is some language of Mr. Justice Scott, in giving the opinion of the court, which obscured the fact that the rule in Shelley's case is not a rule of construction,[44] and in *Belslay v. Engel*[45] the majority of the court, speaking by the same learned judge, went very far toward cutting down the application of the rule as an absolute rule of law defeating the intent of the testator or settlor. By the 6th clause of the will involved in that case, C. B., the testator's grandchild, got a life estate. The 13th clause provided: "It is my will that no title in fee to any of said land shall vest in my said grandchildren, and I declare it my will that they shall only have a life estate therein, and that the fee simple shall vest in their legal heirs." The court doubted if the 13th clause referred at all to the land specifically devised by the 6th clause, but even if it did, they said, the rule in Shelley's case did not apply because it was clearly the intent of the testator that his grandchildren should have only a life estate, and the rule was only a technical rule of construction which always gave way to the clear intention of the testator or donor, expressed in the instrument of conveyance.

A reaction against this and a return to the correct rule was shortly after noticeable. In *Ryan v. Allen*[46] Mr. Justice Scott dissented and the majority of the court, speaking by Mr. Justice Shope, laid stress upon the fact that the rule in Shelley's case was an absolute rule of law defeating the intent of the transferor. In *Carpenter v. Van Olinder*,[47] Mr. Justice

[41] Roe d. Thong *v.* Bedford, 4 M. & S. 362 (5 Gray's Cases on Prop. 99). See also opinion of Cockburn, C. J., in Jordan *v.* Adams, 9 C. B. N. S. 483 (5 Gray's Cas. on Prop. 107).

[42] 62 Ill. 86.

[43] 68 Ill. 594.

[44] See *dictum* of Mr. Justice Mulkey in Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 199.

[45] 107 Ill. 182.

[46] 120 Ill. 648.

[47] 127 Ill. 42, (quoting at page 48 from Hayes' Principles, 7 Law Lib. 52).

Scholfield stated, still more emphatically, that the rule was an absolute one, and that the emphasized expression of an intent on the part of the testator to give the ancestor only a life estate, would not defeat its operation. He expressly repudiated, on behalf of the whole court, the language of Mr. Justice Scott in *Belslay v. Engel.* Finally, *Fowler v. Black*[48] may almost be regarded as setting the point at rest. The deed in that case ran to A for life "and upon his death then unto his heirs and their assigns forever, it being the true intent and meaning of this indenture * * * to convey * * * to said party of the second part [A]to have and to hold only during his natural life, and upon the death of said party of the second part, said premises to be held in fee simple by his heirs and assigns forever." The court declared the rule in Shelley's case to be "a rule of property which overrides even the express intent of the testator or grantor that it shall not operate," and consequently held the rule applicable to the limitations quoted.[49]

§ 134. **Peculiar application of the rule:** Our supreme court has not always kept clearly in mind the proper statement of the rule and its application and operation. This appears from its attempt to invoke the rule for the purpose of giving A a fee simple where there is a conveyance to "A and his heirs."[50] Of course, in such a case, A has a fee simple because of the use of the words of limitation most appropriate for conveying that estate. The rule in Shelley's case can have nothing to do with the result. For one thing, there simply is no remainder upon which the rule can operate.[51]

In several cases[52] of this sort, resort to the rule in Shelley's case may be explained upon the ground that the contention was being put forward that A had a life estate. To this

[48] 136 Ill. 363.

[49] All the *dicta* of our Supreme Court since Carpenter *v.* Van Olinder, 127 Ill. 42, have repeated that the rule is an absolute rule of law overriding the express intention of the testator or grantor: Hageman *v.* Hageman, 129 Ill. 164; Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386; Wolfer *v.* Hemmer, 144 Ill. 554, 559; Strain *v.* Sweeney, 163 Ill. 603, 610; Deemer *v.* Kessinger, 206 Ill. 57.

[50] See cases cited in notes 52, 53 *infra.*

[51] *Ante,* § 129.

[52] Baker *v.* Scott, 62 Ill. 86; Lehndorf *v.* Cope, 122 Ill. 317; Wolfer *v.* Hemmer, 144 Ill. 554, 559.

the court replied, in substance, that, even so, the rule in Shelley's case will give A the fee simple. In at least three cases,[53] however, the language of the court in applying the rule in Shelley's case to give A the fee simple, where the conveyance ran to A and his heirs, is quite inexplicable.[54]

§ 135. Application of the rule in cases of limitations of personalty: It has been conceded by our supreme court that the rule in Shelley's case does not, in strictness, apply to limitations of personal property.[55] The court has, however, clearly recognized the rule that a gift of personal property to A for life, and then to his executors or administrators, or to his personal representatives, gives to A the absolute property at once.[56] This, clearly enough, rests upon the ground that it is the expressed intent of the testator or settlor that A should have the absolute interest. That intent is only expressed in a somewhat "roundabout way."[57] Now, if the rule in Shelley's case were a rule of construction which declared that upon the limitation of real estate to A for life, with remainder to A's heirs, a fee simple was expressed to be limited to A, then it might fairly be said that the rule regarding personal property was analogous to the rule in Shelley's case. But it must be perfectly clear from the foregoing exposition of the rule in Shelley's case[58] that there is absolutely no point which can serve as a connection between it and the above rule of construction regarding limitations of personalty. The suggestion of our supreme court,[59] repeating what was said in Williams on Personal Property,[60] and perhaps repeated by judges from time to time,[61] that the rule in Shelley's case applies by way of analogy to limitations of personalty should receive no encouragement.

[53] Ewing *v.* Banes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386; Davis *v.* Sturgeon, 198 Ill. 520.

[54] See the comments of Lessing Rosenthal, Esq., in 28 Chicago Legal News, p. 258.

[55] Glover *v.* Condell, 163 Ill. 566, 587.

[56] Glover *v.* Condell, 163 Ill. 566, 587.

[57] Alger *v.* Parrott, L. R. 3 Eq. Cas. 328.

[58] *Ante*, §§ 127-133.

[59] Glover *v.* Condell, 163 Ill. 566, 587.

[60] 3d Am. ed. side page 244.

[61] Avern *v.* Lloyd, L. R. 5 Eq. Cas. 383, 388.

CHAPTER IV.

FUTURE USES.

§ 136. Scope of the chapter: When the destructibility of contingent remainders was dealt with,[1] full consideration was given to the character and validity of contingent future interests which, if the actual intent of the settlor be carried out, may take effect by way of succession or by way of interruption, according as the contingency, upon which they are limited, happens before or at the time of, or after the termination of a preceding estate of freehold. The present chapter, therefore, will be devoted to considering how far future interests in land, taking effect, if at all, *only by way of interruption, i. e.*, springing and shifting future interests,[2] are valid in Illinois when attempted to be created by a conveyance *inter vivos*.

So far as equitable springing. and shifting future interests are concerned, their general validity, apart from the question of remoteness,[3] and the rules restricting the creation of gifts over by way of forfeiture on alienation,[4] may be entirely relied upon. In no decided case, however, in the supreme court of this state, has the validity of legal future springing interests by deed, as such, been unequivocally sustained.[5] As to the ordinary legal shifting future interest by deed, there is much in the reports of the court to lead the careful conveyancer to regard any attempt to create one, by an instrument operating *inter vivos*, with suspicion.[6] Nevertheless, the writer will endeavour to maintain the validity of both.

[1] *Ante*, §§ 81-92a.

[2] For more detailed description of these future interests, see *ante*, § 67.

[3] Gray's Rule against Perpetuities, § 69. In Wilson *v.* Galt, 18 Ill. 431, a springing trust by deed was fully sustained.

[4] *Post*, §§ 168-176.

[5] *Post*, §§ 157-159. In Conkling *v.* City of Springfield, 39 Ill. 98, and Thomas *v.* Eckard, 88 Ill. 593, the conveyance was conditioned not to take effect till a certain condition precedent had been performed. In both cases it was held that the condition had not been fulfilled and so the title never took effect. The validity of the springing interest was, therefore, not involved.

[6] *Post*, § 139.

PART 1.

SHIFTING INTERESTS BY DEED ARE VALID IN ILLINOIS AS A GENERAL RULE.

§ 137. I. Introduction[7]—Interest in the question: If an intelligent layman desiring to make a settlement *inter vivos* were told that his deed limiting a legal estate in fee to his daughter, with a gift over to B if the daughter died without issue her surviving, would be absolutely void to pass anything to B, he would, doubtless, be surprised. If it were explained to him that it was impossible by deed to create any shifting future interests in lands in this state perhaps he would be indignant. He might argue that the land was his and, provided he complied with the legal formalities for transfer, he ought to be able to do with it what he pleased. No doubt he would admit the good sense in the rule which made invalid shifting interests, whether created by deed or will, violating the Rule against Perpetuities.[8] He might concede the propriety of the rule that all gifts over in deeds or wills by way of forfeiture on an attempted alienation by deed or will should be, as they clearly are, invalid.[9] He would object, but he would be obliged to submit, to the rule that a gift over on the intestacy of the first taker, whether created by deed or will, is void.[10] But what reason could possibly be given him for the rule that all shifting interests by deed are void in this state? And how would you explain to him that he could do this thing by will[11] but not by deed?

§ 138. Origin of the question lies in the fact that the Illinois authorities are divided—Cases in support of the validity of shifting interests by deed: It seems pretty clearly settled here that a power, created by deed, to appoint a new

[7] This introduction is constructed upon lines suggested by H. L. Prescott, Esq., in a leaflet entitled "Skeleton of Fundamental Form of Introduction for an Argument," used by him in his Course on Argumentation at the Northwestern University Law School in 1904-1905.

[8] *Post*, §§ 254 *et seq.*

[9] *Post*, §§ 168, 168a.

[10] *Post*, §§ 169-176.

[11] *Post*, §§ 164-167.

trustee is valid.[12] The donee of the power may be the *cestui que trust*,[13] or an utter stranger to the transaction, as the court of chancery of a judicial circuit.[14] Furthermore, upon the appointment being made under the power the new trustee becomes *ipso facto* vested with the legal title to the trust premises, and no conveyance need be made to him by the former trustee,[15] or the former trustee's heirs, if he be dead. Nor are the cases to this effect to be put upon any narrow ground that the power occurs in a trust deed by way of mortgage, for in *Morrison v. Kelly*[16] the trust was an active one for the benefit of the settlor's wife.[17] The same object is, in the present day Cook County Trust Deed by way of mortgage, more often accomplished directly without the exercise of any power by this provision: "In case of the death, absence, inability or refusal to act, of said party of the second part, then [here insert name of successor in trust], of the said city of Chicago, shall be, and he is hereby appointed and made successor in trust to said party of the second part under this deed, with like powers and authority, and said premises shall thereupon become vested in said successor in trust, for the uses and purposes aforesaid." Here the clause is, so to say, self-acting, for at once

[12] Morrison *v.* Kelly, 22 Ill. 610; Lake *v.* Brown, 116 Ill. 83; Craft *v.* I. D. & W. Ry. Co., 166 Ill. 580; West *v.* Fitz, 109 Ill. 425, 442 (*semble*).

[13] Lake *v.* Brown, 116 Ill. 83; Craft *v.* I. D. & W. Ry. Co., 166 580.

[14] Morrison *v.* Kelly, 22 Ill. 610; See also Leman *v.* Sherman, 117 Ill. 657, 668.

[15] Morrison *v.* Kelly, 22 Ill. 610; Craft *v.* I. D. & W. Ry. Co., 166 Ill. 580. In the latter case the court passed upon this point specifically: (saying at page 586) "We also think the position that no title to the property or power to execute the trusts vested in them as successors for want of a written conveyance to them, untenable. By the terms of the deed the same title and power which were conferred upon the original trustees vested in their successors, when lawfully appointed." See also to the same effect: 2 Lewin on Trusts, 1st Am. from 8th Engl. ed. pp. 650-651; 2 Chance on Powers, 400 *et seq.*

[16] 22 Ill. 610.

[17] Observe also the English practice of inserting such powers in settlements *inter vivos* where trustees have active duties. 2 Hayes's Conveyancing, pp. 71-72. For the law generally relating to power to appoint new trustees see Sugden on Powers 8th ed. pp. 883-890; 2 Chance on Powers, pp. 393-411; 2 Lewin on Trusts (1st Am. from 8th Engl. ed. pp. 645-673.

upon the happening of the event the successor in trust becomes invested with the legal title.[18]

These results can be sustained only upon the ground that shifting interests by deed are valid. The operation of the power is to divest the legal title from the first trustee or, if he be dead, from his heirs, and to give the same legal title to the new trustee,—in short, to shift a legal title in fee from one person to another. Exactly the same thing occurs where a successor in trust is specifically named—upon the happening of the contingency the legal fee shifts from the first trustee to the successor.[19] We have, also, the direct *dictum* of *Abbott v. Abbott*[20] that shifting interests by deed may be valid[21] in this state.

§ 139. Cases against the validity of shifting future interests by deed: If the validity of future shifting interests by deed in this state had rested upon the authorities mentioned in § 138, and on them alone, it might well have been thought that the point was beyond the reach of doubt. From time to time, however, there have occurred certain expressions by our supreme court and at least one decision, which must cause a careful conveyancer to hesitate about accepting, in general, the validity of a shifting future interest created by deed.

The court has frequently referred to the rule that, while

[18] Equitable Trust Co. *v.* Fisher, 106 Ill. 189 (*semble*); Irish *v.* Antioch College, 126 Ill. 474.

[19] Observe that the holding in Boatman *v.* Boatman, 198 Ill. 414, and Chapin *v.* Nott, 203 Ill. 341, logically leads to the sustaining of shifting future interest by deed. In both cases we have created by deed a life estate with a contingent future interest to unborn persons, and a further gift upon failure of issue to living persons. The last was held to be a vested remainder in fee. Clearly, however, upon the birth of the unborn persons who are to take first, the fee held to be vested would be divested. *Ante*, § 105.

[20] 189 Ill. 488, 498.

[21] In Glover *v.* Condell, 163 Ill. 566, 592, Mr. Justice Magruder quotes, apparently with approval, Mr. Gray's summary of his chapter on Future Interests from the Rule against Perpetuities, § 98, as follows: " 'The result of the investigation pursued in the present chapter is this: Orignally the creation of future interests at law was greatly restricted, but now, either by the Statutes of Uses and Wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away'."

there cannot be a remainder after a remainder in fee, you may have two contingent remainders in fee in double aspect.[22] This is a perfectly sound proposition as regards *remainders*, or common law future interests by way of succession,[23] and no confusion need have arisen out of the expression of it, had not the court, on at least three occasions,[24] where such a principle was announced, strained mightily to construe future interests created by deed as contingent remainders in double aspect rather than a vested remainder in fee, with a gift over upon a contingency cutting it short,—thereby leaving the impression that the latter sort of limitation by deed would have been held void. In some cases the court has apparently gone further in its *dicta* and declared that a fee on a fee by deed was void, as if all shifting interests by deed were invalid.[25] In two instances where the validity of a shifting future interest by deed was actually involved, it appears, at first glance, to have been held invalid upon the sweeping ground that all limitations of a fee on a fee by deed are void.[26] The decisions in both these cases may, however, be sustained upon the ground that the gift over was to take effect, in one case,[27] upon the first taker's intestacy, and in the other,[28] upon an attempted alienation by will by the first taker.

Passing from *dicta* to actual decisions: In two cases[29] our supreme court has held that, upon a conveyance to the children of A "born and to be born," only those children in existence when the conveyance is executed can take, thus denying to the deed the power of creating, in the then existing

[22] City of Peoria *v.* Darst, 101 Ill. 609, *ante*, § 96; McCampbell *v.* Mason, 151 Ill. 500, *ante*, § 97; Seymour *v.* Bowles, 172 Ill. 521, *ante*, § 99. See also Summers *v.* Smith, 127 Ill. 645, 650; Smith *v.* Kimbell, 153 Ill. 368, 372.

[23] *Ante*, § 70.

[24] City of Peoria *v.* Darst, 101 Ill. 609, *ante*, § 96; McCampbell *v.* Mason, 151 Ill. 500, *ante*, § 97; Seymour *v.* Bowles, 172 Ill. 521, *ante*, § 99.

[25] Siegwald *v.* Siegwald, 37 Ill. 430, 438; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeney, 163 Ill. 603, 605; Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[26] Kron *v.* Kron, 195 Ill. 181; Stewart *v.* Stewart, 186 Ill. 60.

[27] Kron *v.* Kron, 195 Ill. 181, *post*, §§ 169 *et seq.*

[28] Stewart *v.* Stewart, 186 Ill. 60, *post*, §§ 168, 168a.

[29] Morris *v.* Caudle, 178 Ill. 9; Miller *v.* McAlister, 197 Ill. 72; *post*, §§ 160, 161.

children, a vested fee simple which may be divested or shifted *pro tanto* to let in after-born children. In *Palmer v. Cook*,[30] —an ordinary shifting interest was held invalid on grounds which would make void all shifting interests whatsoever. There, the conveyance by deed was in the usual form to M. A. S. and E. C. S. in fee, and "in case either of the grantees dies without a heir, her interest to revert to the survivor." The surviving husband of E. C. S. filed a bill for dower and partition against M. A. S., who survived E. C. S. It was decreed accordingly. This was affirmed upon the ground that the future limitation to the survivor was void. It could not have been void for remoteness for the gift over could not, by any proper construction, be upon an indefinite failure of issue.[31] Nor does the court put the case upon any such ground, but declares briefly as follows: "It is an established principle of construction of contingent remainders, that an estate cannot, by deed, be limited over to another after a fee already granted. The term 'remainder' necessarily implies what is left,[32] and if the entire estate is granted there can be no remainder. This deed effected 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."[33]

§ 140. Contentions—Of the cases which seem to hold shifting interests invalid—Stated: In the cases, the *dicta* or actual decision of which seem to deny the validity of any shifting interest by deed, we find two forms of bare assertion and one reason. It is most often said that "a fee cannot be limited after a fee by deed."[34] Sometimes it is said

[30] 159 Ill. 300.

[31] *Post*, § 201.

[32] But see Remainders after Conditional Fees, by F. W. Maitland, 6 Law Quart. Rev., 22, 25.

[33] In Ackless *v.* Seekright, 1 Breese 76, 78, the court quotes from Blackstone's Com. Book II, p. 174, as follows: "When a devisor devises his whole estate, in fee, but limits a remainder thereon to commence on a future contingency, as if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs, his remainder, *though void in a deed*, is good by way of executory devise." See, however, as to this passage, *post*, § 142 note 52, and § 143, note 55.

[34] Siegwald *v.* Siegwald, 37 Ill. 430, 438; Summers *v.* Smith, 127 Ill. 645, 650; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeny,

that by deed a fee cannot be limited upon a fee by way of remainder, or that there can be no remainder after a vested remainder in fee.[35] The only reason ever suggested for this is, that the shifting future interest is *repugnant* to the grant and void.[36]

§ **141. Repugnancy**: It is worth observing that only two cases put forward this reason of repugnancy.[37] In both of them, the holding of the gift over void, was sound, because the shifting interest was, in one case,[38] to take effect if the first taker died without having aliened in his lifetime,[39] and, in the other,[40] if the first taker died intestate.[41] Now the reason of repugnancy has always been confined to just such cases, and is particularly invoked in support of the latter.[42] In fact, it was the original ground for holding gifts over on intestacy void. The reason of repugnancy, as thus advanced, meant only that the proviso, that an absolute interest shall be forfeited if alienation in a particular manner (*viz:* by descent) is attempted, is void, and hence the gift over cannot take effect.[43] In this view, the only repugnancy that exists is between the first absolute interest and the proviso for its forfeiture. Down to 156 Ill., our supreme court always carefully recognized the very special and limited application of the reason of repugnancy to this particular sort of case. In two cases, one in 156 Ill.,[44] the other in 158 Ill.,[45] the court did, in fact, so far misconceive the scope of this doctrine of repugnancy as to hold shifting executory devises in general void. But in 163 Ill.,[46] these two cases were overruled. The error into which they fell was fully recognized and corrected, and, since then, the court has been very ac-

163 Ill. 603, 605; Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron 195 Ill. 181.

[35] Peoria *v.* Darst, 101 Ill. 609, 616, 619; McCampbell *v.* Mason, 151 Ill. 500, 509; Smith *v.* Kimbell, 153 Ill. 368, 372; Palmer *v.* Cook, 159 Ill. 300.

[36] Stewart *v.* Stewart, 186 Ill 60; Kron *v.* Kron, 195 Ill. 181.

[37] Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[38] Stewart *v.* Stewart, 186 Ill. 60.

[39] *Post*, § 168, 168a.

[40] Kron *v.* Kron, 195 Ill. 181.

[41] *Post*, §§ 169 *et seq.*

[42] *Post*, § 172.

[43] *Post*, § 172.

[44] Ewing *v.* Barnes, 156 Ill. 61, *post*, § 166.

[45] Silva *v.* Hopkinson, 158 Ill. 386, *post*, § 166.

[46] Glover *v.* Condell, 163 Ill. 566, *post*, § 167.

curate in limiting the application of the idea of repugnancy to the case where a gift over on intestacy is held void. When, therefore, the court, in holding gifts over upon the intestacy of the first taker, or upon his attempted alienation by will, refers to repugnancy as a ground of decision, it would seem to be entirely proper to regard the court as referring to the conventional reason which is given for such results, and not as declaring that repugnancy is a general ground upon which all shifting interests by deed are to be held invalid. This method of calculating the scope of the reason of repugnancy receives much encouragement from the fact that such a reason cannot refer to any rational impossibility in recognizing the validity of shifting future interests in general, since no difficulty is found in their recognition and enforcement when limited by will.[47]

§ 142. The common law rule that a fee cannot be limited after a fee: In a very considerable proportion of the cases where our supreme court has said that a fee cannot be limited upon a fee by deed, it clearly appears that reference was being made to a rule of the common law, *i. e.*, a rule of the feudal system of land law. In one case, the court said that an attempt to limit a fee on a fee was void "by the rule of the ancient common law, which did not permit any limitation of an estate over after the grant of a previous fee."[48] In another, the court says: "at common law a fee could not be limited upon a fee."[49] In other cases, the court has been very careful to express the rule as a part of the law of remainders, *i. e.*, future interests in land allowed by the feudal system of land law.[50] Thus, it has said that "a remainder limited after a remainder in fee would be void;"[51] and that "it is one of the rules governing contingent remainders that an estate cannot be limited over to another after a fee already granted. A remainder implies something left, and there can be nothing left after the whole has once been disposed of. It is for this reason that a fee already

[47] *Post*, §§ 164-167.

[48] Peoria *v.* Darst, 101 Ill. 609, 616.

[49] Summers *v.* Smith, 127 Ill. 645, 650.

[50] *Ante*, § 68, *post*, § 145.

[51] Peoria *v.* Darst, 101 Ill. 609, 619; McCampbell *v.* Mason, 151 Ill. 500, 509.

granted, cannot be defeated and transferred to another by way of remainder."[52] Practically, then, the basis put forward to sustain our court's decisions and *dicta* to the effect that shifting interests by deed are void, is a restriction of the feudal system of conveyancing upon the creation of future interests in land.[53]

§ 143. Of cases which hold the shifting interest by deed valid: In all but one of the cases which sustain the shifting interest by deed, the validity of the future interest is assumed. The *dictum* of the court in *Abbott v. Abbott*,[54] however, gives us the hint of a reason for reaching such a result. That *dictum* is as follows: "Counsel for the appellants, * * * * have argued with ability, and, we think, successfully, in support of the proposition, 'that where the fee in the first taker created by a deed, is made determinable as upon the happening of a valid condition subsequent, followed by a limitation over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, where the deed is a conveyance under the Statute of Uses, as all of our American deeds are, and is a clear case of shifting use.'"[55]

§ 144. Reasoning of both lines of cases valid so far as it goes—General view: The usual result of contrasting the reasoning upon which two opposite results are supported is to reach the question—which reasoning is correct? One position must be wrong and the other right. Thus, we reach a specific issue for argument. In this instance, however, such

[52] Smith *v.* Kimbell, 153 Ill. 368, 372. See also Palmer *v.* Cook, 159 Ill. 300, 303. Doubtless Blackstone in the passage quoted *ante*, § 139, note 33, meant no more than that a shifting future interest though void as a *remainder*, was good as an executory devise. See *post*, § 143, note 55.

[53] This analysis of the court's meaning finds additional support in the court's constant admission that shifting interests by will were valid, for, at common law, there was no power to devise lands, and the power of testators to create future interests by will is derived wholly from the Statute of Wills of Hen. VIII and modern wills acts following it, that is, by statute as distinguished from the common law. *Post*, §§ 145, 146.

[54] 189 Ill. 488, 498.

[55] In spite of the language quoted from Blackstone, *ante*, § 139 note 33, that learned writer clearly recognized the validity of shifting future interests created by way of use. Com. Book II, p. 334.

a course does not lead to this result because it must be conceded that both lines of reasoning are, so far as they go, unassailable. It is literally true that, at common law, a fee could not be limited upon a fee,—that all shifting interests were void. It is equally true that, by conveyances operating under the statute of uses, such future interests might be limited. It is true, also, that both of these principles are preserved in our law today. This will appear more clearly from a brief survey; *first*, of the common law system of conveyancing; *second*, the development under the statute of uses; and *third*, the demonstration that the principles of both systems are a part of our law, today, in Illinois.

§ **145. The common law system of conveyancing:** In considering the common law system of land law, it should first be observed that we are dealing with a system founded upon the social and political organization of the middle ages, and developed consistently with the requirements of feudalism. In this system of land law one of the essential features was tenure—the relation of the lord to the vassal—which carried with it the feudal incidents and dues from the vassal to the lord.[1] Another important conception was that of seizin, or the feudal possession of a freehold interest. So much turned on the existence of this fact of seizin that one writer, at least, has said of the law of land of this period that it "was not a law of ownership, but a law of seizin."[2]

The feudal system required a conveyance of the present freehold interest to be by livery of seizin,[3]—a mode of conveyance which would be found extremely inconvenient today, since it required the presence of the parties upon the land or in sight of it, and the actual physical transfer of possession

[1] 1 Pollock & Maitland, History of English Law, pp. 207-332.

[2] Future Interests in Land, by Edward Jenks, 20 Law Quart. Rev. 280, 282.

[3] Co. Lit. 48 a, b, (1 Gray's Cases on Prop. 437); 2 Pollock & Maitland, Hist. of English Law, 82; Thoroughgood's Case, 9 Co. 136, (1 Gray's Cases on Prop. 437); Digby, History of the Law of Real Property, p. 146 *et seq*: Williams on Real Property, 17th ed. 174-176; Pollock, Land Laws, pp. 75, 76; Challis, Real Property, pp. 363-374. For form of deed of feoffment with form for endorsement of livery of seisin, see 2 Hayes' Conveyancing, (5th ed.) 3.

at the time of the conveyance.[4] Freehold interests which could not pass by livery of seizin, as reversions or remainders, must have been conveyed by grant with an attornment by the tenant in possession. Attornment was the means by which actual seizin was given the transferee,[5] and without it, therefore, the grant was void.[6] The requirement of attornment at the present day would, it is believed, be about as inconvenient as livery itself. The alienation of real estate by way of devise was unknown to the common law.[7]

With regard to the creation of future interests, the limitations of the common law were particularly rigid and unyielding. To strangers only those future interests by act of the parties were allowed which were bound, by express provision or by operation of law, to take effect, if at all, by way of succession,[8] *i. e.*, whenever and however the preceding interest determined. That reduced the possible future interests of this sort to those which are properly called remainders.[9]

If a future interest to a stranger, when carried out according to the settlor's intent, was certain to take effect by way of interruption of a preceding interest, either expressly limited, or resulting to the settlor by way of reversion, it was void.[10] If it cut short or interrupted a preceding freehold estate expressly limited, it was a shifting interest.[11] It was inconsistent with the feudal system of land law because the existence of such interests "would have positively encouraged dissensions, or violent interruptions of feudal possession—an evil which it was one of the chief objects of the King's courts to suppress."[12] If the future interest was certain, in case it took effect at all, to cut short a reversionary in-

[4] 2 Pollock & Maitland, History of English Law, 82 *et seq.*

[5] The Mystery of Seisin, F. W. Maitland, 2 Law Quart. Rev. 481, 490.

[6] *Ante*, § 122.

[7] Digby, Hist. Law Real Prop., pp. 28, 377; 1 Gray's Cases on Prop., 451, 452, note.

[8] *Ante*, § 67.

[9] *Ante*, § 68.

[10] Leake, Digest of Land Law, 46-48, (1 Gray's Cases on Prop. 433-435); Digby, History of Law of Real Property, 262; Sugden on Powers (8th ed.) p. 26; 1 Hayes' Conveyancing (5th ed.) 111, 112; Challis' Real Property, 2d ed. p 90, 93 *et seq.* *Per* Baker, P. J. in Vinson *v.* Vinson, 4 Ill. App. 138, 140, *post*, § 158.

[11] *Ante*, § 67.

[12] Future Interests in Land by Edward Jenks, 20 Law Quart. Rev. 280, 281. See also treatises referred to *supra*, note 10, except

terest in the settlor, it was a springing estate.[13] Its invalidity at common law followed logically from the nature of the essential act of conveyance by livery of seizin and grant with attornment, and "because any interval between the expiry of the particular estate and the vesting of the remainder would have involved an abeyance or suspension of the seizin, *i. e.*, of that feudal possession upon which the state levied its dues, and to which it looked for the maintenance of order."[14] Under these common law rules governing the creation of future interests, a present conveyance to A's children, A not having any child at the time, was entirely ineffective.[15] So, if A had a child at the time of the transfer, that child alone took, though the feoffment was expressed to be to the "children of A born and to be born."[16] Thus, did the common law system of conveyancing refuse to countenance the giving, by act of the parties or by operation of law, an estate to one and afterwards divesting it to any extent in favor of another.

The future interest after a particular estate of freehold could be limited on such a contingency that, until the event happened, there would be an uncertainty as to whether it would take effect by way of succession or interruption. This was the case where the future interest was limited after a particular estate of freehold upon a contingency which might happen either before, or at the time of, or after, the termination (whenever and in whatever manner) of the preceding estate.[17] In that case the future interest would take effect by way of succession or interruption, according as the event upon which it depended, happened before or at the time of, or after, the termination (whenever and however) of the preceding estate.[18] In short, there would, from

that for the invalidity of shifting interests at common law see Challis' Real Property, 2d ed. pp. 71-73.

[13] *Ante*, § 67.

[14] Future Interests in Land, by Edward Jenks, 20 Law Quart. Rev. 280, 281. "The King's Courts," says the same writer, "regarded an abeyance of the seisin as only less perilous than an interruption of the seisin."

[15] 1 Hayes' Conveyancing (5th ed.) 119.

[16] 1 Hayes' Conveyancing, (5th ed.) 119.

[17] *Ante*, §§ 82, 84-92a.

[18] *Ante*, §§ 67, 84.

the start, be a chance that the future interest would take effect by way of succession. At first such future interests were held entirely void. By 1430, however, the rules of the common law system of conveyancing were so far relaxed that the future interest of this sort was allowed to take effect, provided it did so by way of succession, *i. e.*, if the event happened before or at the time of the termination (whenever and however) of the preceding estate of freehold. Otherwise it was void.[19]

§ 146. Development under the statute of uses: The enforcement of uses by the chancery before the Statute of Uses of Hen. VIII, and the turning, by the statute, of those uses into legal estates, worked important and striking changes in the feudal or common law system of conveyancing.

Before the Statute of Uses, land was conveyed to such uses as the feoffor should appoint by will, and, when the chancery enforced the use so appointed, the right to devise lands was to a certain extent accomplished.[20] The effect of the Statute of Uses was, it has been said, to interrupt this practice,[21] but the Statute of Wills of Henry VIII[22] directly established, to a limited extent, the validity of testamentary conveyances.

The Statute of Uses, among other things, did away with all the inconvenience of livery of seizin resulting from the requirement that the parties go upon the land, or within sight of it, at the time of the transfer, and actually, then and there, deliver possession. By a covenant to stand seized to uses, or by a bargain and sale (enrolled), or by a lease operating as a bargain and sale without entry, and a subsequent release, operating at common law, the legal title might at all times be transferred by acts done in a solicitor's office.[23] By similar modes of conveyance the trans-

[19] *Ante*, § 87.

[20] Gray's Rule against Perpetuities, § 53; Pollock Land Laws, pp. 95, 96.

[21] Sugden on Powers, 8th ed. p. 20; Pollock, Land Laws, p. 102; Gray's Rule against Perpetuities § 53.

[22] 32 Hen. VIII, C. I. (1540); (4 Gray's Cases on Prop. p. 122).

[23] Pollock, Land Laws, pp. 104-107; Digby, History of the Law of Real Property, 357; Williams, Real Property, 17th ed. 233; 1 Hayes' Conveyancing, (5th ed.) 118; 1 Gray's Cas. on Prop. 497.

fer of a remainder or reversion might be affected without attornment.[24]

The most marked change in the development of the law of conveyancing which occurred under the statute of uses was the new liberty allowed in the creation of future interests. Before the statute the chancery carried out springing and shifting uses as trusts,[25] and after the statute these springing and shifting interests by way of use were turned into springing and shifting legal estates.[26] Thus, it becames possible, by the creation and exercise of powers of appointment, to limit a legal future interest, taking effect by way of interruption long after the execution of the original conveyance under which the legal title was transferred.[27] In the same way, it became possible to provide, in a manner before unknown, for the substitution of new trustees in place of old ones by means of a simple shifting use, or a use which shifted upon appointment by some designated person. This practice, as we have seen,[28] has continued down to the present day. The new freedom in conveying the title to real estate under the Statute of Uses was strikingly exhibited in the case of gifts to a class of persons. "Thus," says Hayes,[29] "if A conveyed, at the common law, to the 'children' of B, who had no child then in being, the conveyance was simply void. If A conveyed, at the common law, to the 'children born and to be born' of B, who had a child or children then in being, the estate vested in such child or children to the exclusion of after-born children. But if A conveyed to B, to the *use* of the 'children' of B, who had no child at the time of the conveyance, the use was a valid disposition in favour of all his future children. If A conveyed to B, to the use of 'chil-

[24] *Ante*, § 122.

[25] Challis' Real Property, 157-158; Digby, History of Law of Real Property, 332; Gray's Rule against Perpetuities, §§ 52, 135, 136, 138.

[26] 1 Hayes' Conveyancing (5th ed.) 113-115; Pollock, Land Laws, pp. 124-125; Leake, Digest of Land Law, 112-113, (1 Gray's Cases on Property, p. 504); Digby, History of Law of Real Property, pp. 357-360; Challis' Real Property, 157-159, 161-164; Fearne, C. R. 372; Sugden, Powers, 8th ed. pp. 26-28 32-34; Gray's Rule against Perpetuities, § 52.

[27] Leake, Digest of Land Laws, p. 114; Sugden, Powers, 8th ed. pp. 17-18; 1 Hayes' Conveyancing (5th ed.), 70 *et seq.*

[28] *Ante*, § 138.

[29] 1 Hayes' Conveyancing (5th ed.), p. 119.

dren born and to be born' of B, who had a child or children then in being, the use was executed in such child or children, not finally, but with a capacity of enlarging to admit the after-born children."

By a curious historical development one very great restriction upon the creation of executory interests by way of use was retained from the common law.

Within a few years after the Statute of Uses it had been held that springing and shifting uses were valid and operated to confer springing and shifting legal estate.[30] Logically, it should have followed that the future interests were indestructible.[31] Until 1599, however, the impression seems to have obtained that they were destructible upon some analogy to the rule of the common law, which caused certain contingent future interests to fail entirely unless they took effect as remainders, by way of succession.[32] That analogy was entirely superficial and improper in all cases of contingent future interests except one.[33] If to be applied at all, it was oppropriate only to the case of future uses, limited after a particular estate of freehold upon a contingency which might occur, either before or after, or at or after, the termination (whenever and in whatever manner) of the preceding estate. Here, since the future interest *might possibly* take effect as a remainder by way of succession, there was presented exactly the case where the common law required it to do so, or to fail entirely. It was held in the 1590s that this restriction of the common law upon the creation of future interests applied to contingent future uses of the same description.[34] It was in the course of upholding the decisions of this decade that the rule came to be stated that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise or a springing use. Such continued to be the law down to the time of the English contingent remainders acts of the 19th century.[35]

It is believed that this rule of law represents the extreme limit to which the validity of future uses were controlled

[30] *Ante*, § 88.
[31] *Ante*, § 88.
[32] *Ante*, § 88.
[33] *Ante*, § 88.
[34] *Ante*, §§ 88, 89.
[35] *Ante*, § 81.

by the restrictions of the common law.[36] Its only effect was to place a limitation upon the creation of such contingent uses as might possibly take effect by way of succession. *Pells v. Brown*,[37] in 1620, however, settled it that future interests which were absolutely incapable of taking effect in possession by way of succession, *i. e.*, what have been called springing and shifting future interests, were indestructible. These were wholly void at common law because they could not possibly take effect as remainders. When recognized at all, in conveyances by way of use, they were, therefore, entirely valid.

§ 147. The principles of the common law and of the system of conveyancing which developed under the statute of uses exist side by side as part of the law of Illinois today: Observe, now, that, of these two systems,—the feudal or common law, and uses under the statute of uses,—the older was never directly abolished by that which came after. The second, for the time being at least, left the first standing in full force and use. The statute of uses, while it furnished the basis for a freer and more flexible system of conveyancing, which eventually superseded the feudal or common law system, never by legislative enactment, abolished the latter.[38] The rules of both these systems, existing as they did side by side, have come down to us in Illinois. Even if this be not so because of our connection with England through the Virginian colonial government, the Northwest Territory and the teritorial government of Illinois, it is clearly established by an early act of our state legislature.[39]

[36] It is true that in Adams *v.* Savage, 2 Ld. Raym., 854, 2 Salk, 679, (5 Gray's Cases on Prop. 119) and Rawley *v.* Holland, 22 Vin. Ab. 189, 2 Eq. Cas. ab. 753, it was held that a contingent future interest after a term for years was wholly void. In view, however, of the criticisms to which these cases have been subjected, it may well be doubted whether they stand as law. (Gray's Rule against Perpetuities, §§ 58-60; A Point in the Law of Executory Limitations by Henry W. Challis, 1 L. Q. R 412; and Sugden on Powers (8th ed.) pp. 35 *et seq.*)

[37] Cro. Jac. 590, (5 Gray's Cas. on Prop. 163); *ante*, § 88.

[38] Livery of seisin for example, continued to be used in England as a mode of conveyance into the 19th century. (Seisin by Charles Sweet, 12 Law Quart. Rev. 239).

[39] In force Feb. 4, 1819. Revised Laws 1833 p. 425; R. S. 1845, Ch.

Are not, therefore, the common law modes of conveyance theoretically, at least, in force in this state? In *Fisher v. Deering*,[40] our supreme court, as we have seen,[41] went very far toward saying that the common law conveyance by grant and attornment, was the only mode by which a reversion or remainder could be transferred. It is clear that since 1873, at least, no attornment is necessary. The *dictum*, however, of *Fisher v. Deering* must stand for this at least,—that you can use such a form of conveyance if you want to. Why, then, may you not transfer a present freehold interest by livery of seizin if you care to take the trouble of it? There certainly is no statutory abolition of livery of seizin. Sec. 1 of the Act concerning Conveyances[42] is very particular not to abolish it. That act reads: "Livery of seizin, shall in no case be necessary for the conveyance of real property." The hint is, indeed, thrown out in several cases that livery of seizin has been abolished.[43] Strictly, this is not so. Livery of seizin, it is true, is quite unnecessary, even without the statutory enactment, because of the statutory forms now in use,[44] and because the Statute of Uses is in force,[45] by which validity is practically given to all deeds of conveyance as bargains and sales. Furthermore, livery of seizin in actual use is unknown.[46] There is nothing, however, which declares that it shall not be used.

It would seem, also, on the same reasoning, that the feudal

62, sec. 1; R. S. 1874, ch. 28. See also, Baker *v.* Scott, 62 Ill. 86, 94 *et seq.*

[40] 60 Ill. 114.

[41] *Ante*, § 122.

[42] R. L. 1827 p. 95 sec. 1; R. S. 1845 Ch. 24, sec. 1 (p. 102); R. S. 1874, Ch. 30, sec 1; 1 A. & D. R. E. S. pp. 75, 100.

[43] Wall *v.* Goodenough, 16 Ill. 415, 418; Witham *v.* Brooner, 63 Ill. 344, 346; Shackelton *v.* Sebree, 86 Ill. 616, 621; Latimer *v.* Latimer, 174 Ill. 418, 429; Vinson *v.* Vinson, 4 Ill. App. 138, 140-141.

[44] R. S. 1874, ch. 30 secs. 9, 10, 11.

[45] R. L. 1827, p. 96 sec. 3; R. S. 1845, ch. 24, sec. 3; R. S. 1874 ch. 30, sec. 3. (1 A. & D. R. E. S. pp. 75, 103). See also Witham *v.* Brooner, 63 Ill. 344. It must be clear also that, by the incorporation of the Statute of Uses into our law, we have adopted the general principles of the interpretation of that act by the English courts: Requa *v.* Graham, 187 Ill. 67; Glaubensklee *v.* Low, 29 Ill. App. 408; Cole *v.* Bentley, 26 Ill. App. 260.

[46] Shackelton *v.* Sebree, 86 Ill. 616, 621.

rules concerning the creation of future interests are very properly recognized by our supreme court[47] as in force in this state. It is, then, perfectly accurate for the court to reiterate, as it has done, that, by the ancient common law, a fee cannot be mounted upon a fee.[48] If, therefore, a shifting interest were attempted to be created in a conveyance by livery of seizin, which could not possibly take effect in any other way, it would be void. So, if, a conveyance, which can only take effect as a transfer by livery of seizin, be made to the children of A, "born and to be born," it is wholly void to confer any rights upon those children who are not *in esse* at the time of the conveyance. These rules may now, however, be avoided in this state exactly as they were in England since the time of Hen. VIII, by a conveyance operating under the statute of uses.

§ 148. The special issue: From this point the solution of our problem as to the validity of shifting interests by deed in Illinois becomes very simple. Having found it to be literally true that, under the common law system of land laws, the limitation of a fee upon a fee was impossible, that, by a conveyance operating under the Statute of Uses, such a limitation was perfectly valid, and that the common law rules and the Statute of Uses are both in force in this state today, the real question becomes this: Are shifting limitations in a deed, in the usual form adopted in this state, dependent for their validity upon the application of the common law rules regarding remainders or upon the law of future interests as developed under the Statute of Uses? This is to be settled in favor of the application of the common law rules if a conveyance in the ordinary form in use in this state operates *solely* as a common law conveyance. If it operates under the Statute of Uses, then the future shifting interest must be valid. If it operates under any modern conveyancing act it may be valid.

§ 149. II. Argument proper—Shifting limitations by deed may be supported here by force of the Statute of Uses—Conveyances by deed in Illinois have never operated under the common law: The first argument in support of the proposi-

[47] *Ante*, § 142.

[48] *Ante*, § 142.

tion that shifting limitations by deed may be sustained under the Statute of Uses is, that the usual deed in this state, conveying a freehold interest has practically never acquired its force from the common law at all. At common law, a present freehold interest must have been conveyed by livery of seizin; a reversion or remainder by grant with attornment. It is a matter of common knowledge that livery of seizin has never been used. Attornments may have been made upon grants of reversions or remainders, but it is believed that, except in case of the transfer of reversions after terms for years where the tenants paid rent, formal attornment was not usually demanded.[49] The application of the feudal rule of remainders, that you cannot limit a fee on a fee, survives at the present day only as an academic possibility, since the case for the application of such a rule would only arise if, a conveyance attempting to limit a fee on a fee, were made in such form that it could not possibly take effect otherwise than at common law. This would narrow the possibility practically to the case of a conveyance by livery of seizin of a present freehold interest.

§ 150. Conveyances by deed in Illinois have always taken effect under the Statute of Uses: As soon as there came to be in force in England two modes of transferring the title to real estate *inter vivos*, each quite distinct in character, one at common law and the other under the Statute of Uses, under one of which the conveyance might be void and under the other valid, it became necessary to announce a rule for the construction of conveyances so that it might be ascertained whether any given transfer operated under one system or the other. The principle was early promulgated, and ever since maintained, that an instrument of conveyance may be sustained upon whichever system it is necessary to invoke in order to carry out the intention of the parties. This was so when the question was whether a conveyance of a present interest was effective. The mode of transfer might be, in form, a grant at common law without attornment, or a deed of foeffment without livery, and so, in either case, ineffective under the common law system of conveyancing. Yet, if it

[49] See cases of transfer of remainders after a life estate. *Ante*, § 71, note 25.

were for a consideration of blood or for a valuable consideration, or if a consideration of money were even mentioned, the conveyance was valid under the Statute of Uses.[1] The same rule applied with regard to future interests. Springing and shifting future interests which could not take effect by a common law conveyance, were perfectly valid if the conveyance, by which they were attempted to be created, could take effect as a covenant to stand seized or a bargain and sale.[2]

The law was equally liberal as to what amounted to a bargain and sale or covenant to stand seized. For the former it was only necessary to have any language showing an intent to transfer title and a consideration, however insignificent, actually given.[3] If the instrument be under seal the recital of the giving of some consideration could not be denied by the parties, so that the mention of the giving of a consideration was as effective to make a bargain and sale as the act itself would have been.[4] If so much of the Statute of Enrollments[5] as requires a bargain and sale of a freehold to be created by an instrument under seal, is not in force here, then a bargain and sale does not require a seal.[6] For a covenant to stand seized, only an instrument under seal was necessary, purporting to convey title to the blood relation of the transferor.[7]

It must be apparent, then, that the form of deed of conveyance, which has been used as far back as our records go, and which is now in use in this state, is perfectly capable of

[1] Edward Fox's Case, 8 Co. 93 b. (1 Gray's Cases on Property, 489).

[2] Roe *v.* Tranmer, 2 Wils. 75 (1 Gray's Cases on Property, 494); Frazer's note to Edward Fox's Case, 8 Co. 93 b (1 Gray's Cases on Property, 490).

See also H. Clay Horner's contribution on this subject, dealing with the Illinois cases; Chicago Legal News of July 12, 1902, page 375.

[3] Barker *v.* Keete, Freem. 249, (1 Gray's Cases on Property, 491)

[4] 3 Gray's Cases on Property, 280, note on recital of consideration; also Vinson *v.* Vinson, 4 Ill. App. 138; Ill. Cent. Ins. Co. *v.* Wolf, 37 Ill. 354.

[5] 27 Henry VIII, c. 16 (1535), (1 Gray's Cases on Property, 484).

[6] Tiedeman on Real Property, 2nd ed. § 783. See, however, Jackson d. Gouch *v.* Wood, 12 Johns. (N. Y.) 73, (3 Gray's Cases on Property, 233).

[7] Callard *v.* Callard, Moore 687, (1 Gray's Cases on Property, 487); Roe *v.* Tranmer, 2 Wils. 75, (1 Gray's Cases on Property, 494).

taking effect as a bargain and sale.[8] It always purports to be a transfer of title. It always contains the recital of a consideration paid. It is always under seal. If it is made to the transferor's blood relation, it may also clearly take effect as a covenant to stand seized. The well settled rule, then, applies. If it be necessary in order to support the validity of a shifting interest, the conveyance will take effect as a bargain and sale or a covenant to stand seized under the Statute of Uses.

§ 151. The fact that our deeds in Illinois may operate under the acts of 1827 and 1872 cannot interfere with the validity of shifting interests created by them: It is believed that not a few conveyancers in Illinois, if asked to put their finger upon the authority which gives force to our deeds to pass a title, would refer to the act of 1872 providing for the statutory forms of conveyance.[9] If the transfer occurred before 1872, they would fall back upon section 1 of the Act of 1827 concerning Conveyances.[10] It would at once occur to these lawyers that, while all that has been said about conveyances under the Statute of Uses may be true, yet our deeds do not operate under such a statute, and therefore it may well be held that the common law rules apply and that shifting interests cannot be created by conveyances operating under our modern statutes. This position may seem to some too fallacious to require answering, and yet it is the experience of the writer that there is nothing connected with the problem under discussion that does not require patient examination.

Even if it be admitted, for the sake of argument, that our modern statutes giving effect to conveyances by deed in the usual forms, do not authorize the creation, by such deeds, of shifting future interests, yet such modern statutes do not in any way preclude the operation of such deeds under the Statute of Uses if they are in proper form. They simply give a cumulative ground for sustaining the conveyance by deed. The situation is not essentially different from that which existed when one might convey either under the Statute of Uses or

[8] Shackelton *v.* Sebree, 86 Ill. 616, 621.

[9] Laws 1871-2, p. 282. Secs. 2, 9, 10, 11.

[10] R. L. 1827, p. 95, sec. 1; R. S. 1845 ch. 24 sec. 1 (p. 102); R. S. 1874 ch. 30, sec. 1; (1 A. & D. R. E. S. pp. 75, 100).

at common law by livery of seizin or grant and attornment. Then, it was the rule founded upon the desire of the courts to support conveyances, that if the mode of transfer failed as a conveyance at common law, it might nevertheless take effect under the Statute of Uses. It is submitted, therefore, that if, at the present time, there be any difference in the extent to which a future interest may be created by a deed operating under the Statute of Uses and under modern statutes, and the deed may operate under either, it will, in order to give effect to the intent of the parties, operate as that mode of conveyance by which the future interest in question may be created.

§ 152. Shifting interests by deed may be supported in Illinois under the acts of 1827 and 1872: In reality, however, there is not the slightest ground for saying that, under our Illinois statutes giving effect to conveyances, shifting future interests cannot be created.

The reasons why such future interests could not be created under the common law system had reference only to the exegencies of tenure and the necessities of seizin and of conveyance by livery. Neither the Statutes of Uses or Wills in terms gave any power to create shifting future interests. The reasons in support of their validity under those statutes seems to have been as follows:[11] It was argued that, as such interests were valid by way of use before the statute, and, as the statute turned uses into legal estates, shifting uses became shifting legal estates. Before the Statute of Uses upon a foeffment to the use of the foeffee's will, shifting uses might be created by will.[12] So, after the Statute of Wills direct shifting devises of legal interests were permitted.[13] The result in both instances was doubtless aided by the fact that conveyances to uses and devises after the Statutes of Uses and Wills were modes of transferring title without the common law formality of livery of seizin or grant and attornment.[14] Finally, it is believed that the feudal organization of society was, in the reign of Hen. VIII. so far giving way to the more modern or commercial order of things, that

[11] See *ante*, § 88.
[12] Pollock, Land Laws, 91.
[13] Id. 98.
[14] Digby, History of Law of Real Property, 332.

the reasons for the feudal prohibition upon such springing interests no longer existed.

At least two of those reasons are distinctly applicable to our modern conveyancing acts, with this difference, however, that the lapse of time has intensified almost beyond calculation in words, their compelling force. An odd relic here and there of the feudal system of land law may remain, but the system as such and the social and political conditions which gave it birth, have not existed for at least two or three centuries in England, and never did exist on this side of the Atlantic. There can, therefore, be no reason for attaching to conveyances, under our modern statutes, the restrictions of the feudal system. They should be handled in accordance with the modern effort to give the greatest liberty to land owners in the disposition of their own. The reason in favor of springing and shifting uses and executory devises, that, in conveyances under the Statutes of Uses and Wills, no feudal formality was required, certainly applies with peculiar force when urged in support of similar interests created under our modern conveyancing acts.

Our supreme court has actually approved and acted in accordance with this reasoning in holding that, under the act of 1827, a grantor may by deed limit a life estate to himself.[15] This, it is conceded, was impossible at common law.[16] But it was argued that the rule of the common law depended upon the principles of feudal land law and the requirements of conveyances by livery of seizin and that these influences had no place in Illinois today. The statute of 1827, therefore, allowed the grantor to carry out his intention. Exactly this same reasoning will apply to warrant the inference that shifting interests by deed operating under the acts of 1827 and 1872 alone, are valid. Such is the actual effect given to similar statutes in other states.[17] This view is strictly in accord with the way uses were treated after they had received

[15] Shackelton *v.* Sebree, 86 Ill. 616; *post*, § 158.

[16] *Post*, § 158.

[17] Gray's Rule against Perpetuities, §§ 67, 68, citing Abbott *v.* Holway, 72 Me. 298; Gorham *v.* Daniels, 23 Vt. 600; Ferguson *v.* Mason, 60 Wis. 377; Kuuku *v.* Kawainui, 4 Hawaiian 515.

recognition, and in direct analogy to the results reached under the Statute of Wills.

§ 153. The tendency to hold shifting future interests by deed invalid is reactionary—Character of the changes in the law of conveyances: It was doubtless consistent with the system of feudalism that the transfer of land should have been permitted only with the formality of livery of seizin and that testamentary dispositions should be unknown. It was, doubtless, equally proper that no springing or shifting interests should have been permitted. It may even have been necessary to the retention of the feudal system that the intent of individuals in dealing with their lands should be thwarted in this manner. When, however, the feudal system, as a real condition of society, fell into decay, when feudal England was becoming commercial England, the new social organization demanded new freedom from the restraints of the common law. The history of uses before the Statute of Uses reveals a struggle to break free from the burdens of tenure and to deal with interests in land according to the will and pleasure of the owner.[18] The Statute of Uses was reactionary[19] in purpose. It was passed to stop the rising tide against the burdens of tenure and the feudal system of conveyancing. But the operation of the Statute of Uses was not only not permitted to prove reactionary, but under the favor of the judges, means were quickly found to give it an operation and found a practice upon it which did away with the inconvenience of livery of seizin or entry upon the land, and gave land owners new freedom in the creation of legal springing and shifting future interests, limited by the only rules of public policy which had any application to the new non-feudal order of society—the rules of public policy embodied in the Rule against Perpetuities and the prohibition of gifts over by way of forfeiture on alienation.

The modern wave of reform in real property law in England has accomplished among other things, the further simplicity in the form of conveyances,[20] the decreased cost of transfer[21] and the abolition of particular survivals of the feudal

[18] Sugden on Powers (8th ed.), p. 3.

[19] Pollock's Land Laws, pp. 102-104. Observe, however, Sugden on Powers (8th ed.), p. 8.

[20] Pollock, Land Laws, 165-171.

[21] Ib. 171-178.

law which operated to defeat the expressed intention of testators and settlors. All of these currents of reform have been felt in Illinois. Sec. 1 of our Act concerning Conveyances and the statutory forms have simplified our modes of conveyance. The registry system, and recently the enactment of the Torrens law for the registration of land titles,[22] even to making it compulsory,[23] are all efforts toward decreasing the cost of land transfers.[24] Our supreme court, in two instances, at least, which we have had occasion to notice,[25] has, by judicial decision, effected the elimination of a particular rule of the feudal land law, which operated senselessly at the present day to defeat the expressed intention of the settlor or transferor.

The whole progress, then, has been from the restrictions of feudalism to the freedom demanded by modern commercialism. The evolution has been from a system in which it was necessary to frustrate the will of the land owner, to one, the whole object of which is to carry it out.[26]

§ 154. **The attitude of our Supreme Court:** How, then, must a doctrine, which casts doubt upon the validity of springing and shifting interests created by deeds operating as bargains and sales or as covenants to stand seized under the Statute of Uses, be regarded? It would be entirely consistent with a condition of things which flourished in the time of Henry II and Edward I, which was becoming obsolete in the time of Henry VIII and was buried, as long since dead, by legislative enactment in the time of Charles II.[27] It would be opposed to that fundamental endeavor of modern times to give effect to the expressed intention of the land owner when-

[22] Laws 1897, p. 141.

[23] Laws 1903, p. 121.

[24] "But as commerce and trade advanced, and the necessities of the people changed, most, if not all of the rigid rules of the feudal system have entirely disappeared." Shackelton *v.* Sebree, 86 Ill. 616, 620.

[25] *Ante*, §§ 81-92a: Contingent remainders may be no longer destructible. *Ante*, §§ 122, attornment is no longer necessary.

[26] "Where parties have clearly expressed their intention by their written contract, and it is based upon a sufficient consideration, and no rule of public policy has been contravened, such agreement should be enforced, unless some stern and inflexible rule of law prevents." Shackelton *v.* Sebree, 86 Ill. 616, 621.

[27] 12 Car. II. (1660), c. 24; 1 Gray's Cas. on Prop. 404.

ever possible—an endeavor which was accomplished by the chancery before the Statute of Uses and under the very fist of feudalism, which not only survived the blow aimed at it by the Statute of Uses, but, by the astuteness of the times, turned that statute to its permanent advancement, and has continued to hold the advantage then gained as one of the heritages of freedom.

§ 155. The weight of authority in this state is in favor of the validity of shifting interests by deed: It is impossible for the writer to believe that, under the cases as they stand, it ever was the law of this state that shifting future interests by deed were void. We have only one case,[28] actually holding the ordinary shifting interest by deed void, and two cases holding gifts to classes by deed inoperative to transfer any title to the additional members of the class.[29] Everything else is *dicta*, being wholly *obiter*,[30] or else consisting of expressions in cases where the gifts over are void on settled principles, because to take effect on the intestacy of the first taker,[31] or by way of forfeiture on alienation by will.[32] Furthermore, these *dicta* are, in a way, perfectly explainable as the statement of the feudal rule of remainders which is to be found in all the books and which, as a common law rule of remainders, is still, academically speaking, the law. These *dicta*, then, are not misstatements. They simply fail to observe the later history of the creation of future interests under the Statute of Uses. In consequence, they do not tell the whole story. *Palmer v. Cook*,[33] the one case holding an ordinary shifting interest by deed void, was decided at exactly the time when our supreme court had just held similar shifting interests by devise void in two cases.[34] It was decided, then, at a time when a real misconception had gained momentary lodgment in the court. Almost immediately, however, the cases holding shifting executory devises void were overruled,[35] and it is submitted that if the validity of shifting interests by deed came up today and were properly presented

[28] Palmer *v.* Cook, 159 Ill. 300.
[29] Morris *v.* Caudle, 178 Ill. 9; Miller *v.* McAlister, 197 Ill. 72.
[30] *Ante*, § 139, notes 22, 25, 26.
[31] Kron *v.* Kron, 195 Ill. 181.
[32] Stewart *v.* Stewart, 186 Ill. 60.
[33] 159 Ill. 300.
[34] Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386.
[35] Glover *v.* Condell, 163 Ill. 566. *Post*, § 167.

to the court in the arguments of counsel, *Palmer v. Cook* could not stand. In the two cases involving gifts by deed to a class the court does not seem to have in the least perceived the real scope of its decision.[36] On the other side we have the actual result of at least two lines of cases[37] which cannot be sustained without recognizing the validity of shifting interests by deed. We have, also, the assurance from *Abbott v. Abbott*[38] that, whenever the effect of the Statute of Uses to support the future interest is clearly pointed out to the court, it will recognize the soundness of that position.

§ 156. Conclusion: Unfortunately, however, there is enough uncertainty in the Illinois law so that the careful conveyancer must be warned that a shifting interest, created in a deed in the ordinary form in use in this state, may possibly be held void by our supreme court.[39] Lawyers who are of counsel before the supreme court are just as emphatically warned that it is a reflection upon the profession that these same shifting interests cannot there be sustained.

PART 2.

SPRINGING FUTURE INTERESTS BY DEED.

§ 157. Designation of the matter to be considered: Springing future interests are those which are bound to take effect, if at all, by way of interruption by cutting short the re-

[36] *Post*, § 161.

[37] *Ante*, § 138, notes 12, 18.

[38] 189 Ill. 489, 498.

[39] If the conveyancer must create legal future shifting interests by deed the safest way to proceed would, it is conceived, be as follows: Let the deed in the statutory form or valid under sec. 1 of the Act on Conveyances run to some indifferent person "for the *use* of the (real grantee) and his heirs, but if the said (real grantee) die without leaving issue him surviving, then to the use of B and his heirs." (See H. Clay Horner's article entitled "The Statute of Uses," in Chicago Legal News for July 12, 1902, p. 375).

This is simply a shifting use, raised on transmutation of possession, as distinguished from such a use raised by bargain and sale or covenant to stand seized, without any transmutation of possession. On principle and authority, a shifting use may arise as well in one of these ways as another. It is conceived, however, that to a court unfamiliar with assurances, under the Statute of Uses, the form suggested would present the case in favor of the future shifting interest as a more elementary problem.

sulting absolute interest in the transferor. The consideration of the general validity in Illinois of such interests practically narrows our inquiry to whether conveyances to take effect at the grantor's death are valid and whether, if so, the holding proceeds upon grounds which will support the validity, in general, of all springing future interests by deed.

§ 158. Conveyances to take effect at the grantor's death valid: Conveyances by deed to a person *in esse* expressed to take effect at the grantor's death, but not in terms reserving to the grantor a life estate, have frequently, in this state, been held to create a valid future interest.[1]

§ 158a. Future interest, void at common law, sustained on two theories: Our supreme court has fully recognized that a future interest limited to take effect at the grantor's death was void at common law.[2] This, however, is only an academic conclusion, for at common law the conveyance would ordinarily have been by livery of seizin and that, with other common law forms appropriate for transfer by one having a freehold interest in possession, probably never were used here, or, if they were, have long since become unnecessary and obsolete.[3]

The principal ground for sustaining such a future interest, as set out in the leading case of *Shackelton v. Sebree*,[4] is, that, by the operation of the conveyance, the grantor becomes seized of a life estate and the future interest then takes effect by way of succession regularly as a remainder.[5] The power of the grantor to convey to himself a life estate might have been rested upon the fact that the deed operated as a bargain and sale or a covenant to stand seized under the Statute of Uses.[6] As such it is read as if the grantor was expressed to

[1] Shackelton *v.* Sebree, 86 Ill. 616; Harshbarger *v.* Carroll, 163 Ill. 636; Latimer *v.* Latimer, 174 Ill. 418; Vinson *v.* Vinson, 4 Ill. App. 138; Calef *v.* Parsons, 48 Ill. App. 253, 257 *semble*.

[2] Latimer *v.* Latimer, 174 Ill. 418, 429, 430; Shackelton *v.* Sebree, 86 Ill. 616; Vinson *v.* Vinson, 4 Ill. App. 138, 140; Calef *v.* Parsons, 48 Ill. App. 253, 257.

[3] Shackelton *v.* Sebree, 86 Ill. 616, 621. See also cases cited *ante*, § 147.

[4] 86 Ill. 616.

[5] This is the only ground relied upon in Harshbarger *v.* Carroll, 163 Ill. 636, and Latimer *v.* Latimer, 174 Ill. 418.

[6] *Ante*, § 150.

stand seized for the use of himself for life and then to the use of the grantee in fee. The statute executes the uses and the grantor becomes seized of a life estate and the grantee of the remainder in fee.[7] In fact, however, the court held that the deed was effective to carry out the grantor's intention by virtue of sec. 1 of the Act on Conveyances.[8] They agreed that the inability of the feoffor upon making a transfer, to reserve to himself a life estate,[9] arose from the character and formalities of the conveyance by livery of seizin, which required an actual change of possession.[10] When, therefore, the deed took effect under the statute, by the force of which an instrument signed and sealed without livery of seizin was all that was necessary to convey title to real estate, there was no obstacle to the intent of the grantor being carried out.[11]

The future interest might have been sustained as a springing estate, that is, a future interest cutting short a resulting reversion in fee in the grantor. The deed might with propriety be regarded as operative under the Statute of Uses as a covenant to stand seized or as a bargain and sale.[12] So construed it would be entirely capable of creating a springing future interest. This view was convincingly maintained by Mr. Justice Baker in the Appellate Court in *Vinson v. Vinson*.[13] It was somewhat vaguely suggested in *Shackelton v. Sebree*.[14] The future springing interest might as well have been regarded as validly created on the ground that the deed

[7] Gilb. Uses (Sugden's ed. 150-152 note), quoted in 1 Gray's Cases on Property, 505; Sugden on Powers, 8th ed. page 2526; Challis on Real Property, 2nd ed. page 384, note; see also opening paragraph in the opinion of Lyon, J., in Ferguson *v.* Mason, 60 Wis. 377; also 2 Hayes on Conveyancing, 5th ed. page 90. The *dictum* of Callard *v.* Callard, Moore, 687, (1 Gray's Cases on Property, 487) *contra*, is not sound.

[8] R. L. 1827, page 95, sec. 1; R. S. 1845, chapter 24, sec. 1 (p. 102); R. S. 1874, chapter 30, sec. 1; 1 A. & D. R. E. S. pp. 75, 100.

[9] Callard *v.* Callard, Moore, 687, (1 Gray's Cases on Property, 487).

[10] *Ante*, § 145.

[11] Shackelton *v.* Sebree, 86 Ill. 616; Vinson *v.* Vinson, 4 Ill. App. 138. See also to the same effect: Kuuku *v.* Kawainui, 4 Hawaiian 515; Gorham *v.* Daniels, 23 Vt. 600.

[12] *Ante*, § 150.

[13] 4 Ill. App. 138. See also for the same view: Leake, Digest of Land Laws, 112, 113; Roe *r.* Tranmer, 2 Wils. 75, (1 Gray's Cases on Property, 494).

[14] 86 Ill. 616.

operated under sec. 1 of the Act on Conveyances. This would be the logical result of the reasoning used by the court to justify the grantor's right to limit a life estate to himself. If that can be done because our statute provides a mode of transfer free from the feudal requirements of livery of seizin, then, equally, may a springing future interest which was prohibited only by the requirements of feudal conveyancing and policy, be created by a deed in the ordinary form operating under it.[15]

§ 158b. Which of these two views is correct? Does the grantor have a life estate (whether under the Statute of Uses or by sec. 1 of the Act on Conveyances is immaterial), with a remainder in fee to the grantee, or does the grantor have a fee resulting to him by operation of law with a springing interest in the grantee cutting it short?

In a number of cases a different result may be reached according as one or the other of these two lines of reasoning be accepted. Thus, in case the grantor retains only a life estate, the woman becoming his wife, subsequent to the conveyance, will have no dower. If, however, he has a fee, even though it be subject to be defeated, she will have dower out of it after the grantor's death under an extreme application of the rule of *Buckworth v. Thirkell*.[16] So, if the grantor have a life estate, the remainder-man may clearly have an action of waste. If the grantor have a fee resulting to him by operation of law, it seems probable that any remedy to prevent legal waste may be denied him.[17] Again, if A stood seized to the use of his heirs after his death, then, if

[15] Vinson *v.* Vinson, 4 Ill. App. 138.

[16] 1 Coll. Juris. 322, 3 Bos. & Pul. 652, note, Butler's Co. Lit. 241 A note, (6 Gray's Cas. on Prop., 690), 1 Scribner on Dower, 2nd ed. page 302, 10 Am. & Eng. Enc. 161, 2nd ed., which held that the executory devisee does not take free from dower of the first taker's wife, in the absolute interest which the first taker may have had. Observe, however, that the executory devise over in this case was upon the contingency that the first taker died without issue him surviving and the decision is supported upon the ground that the children of the marriage, if there had been any, would have taken. If the extent of the case be limited by this reasoning, then the rule of Buckworth *v.* Thirkell would have no application where the executory interest was to take effect with absolute certainty after the grantor's death.

[17] Abbott *v.* Holway, 72 Me. 298;

there be a resulting use to A in fee in his lifetime, the rule in Shelley's case[18] would not apply, and there would be a valid springing interest in the heirs of A. If, on the other hand, A took an estate for life by implication, the rule in Shelley's case would apply, and A would have a fee simple—his standing seized being thus entirely nugatory.[19]

It is believed that the view which supports the future interest as a remainder after a life estate where there is no expressed reservation to the grantor of a life estate,[20] cannot be sustained.[21] There can be no resulting estate for life, since resulting estates by operation of law are always in fee.[22] Nor is it possible, when one observes how strong a necessity must exist before a life estate will be implied,[23] to imagine upon what ground there can be any implication of a life estate in the grantor. No doubt, there was a time when the English courts were willing to imply a life estate in such a case as the one under discussion.[24] That, however, was before the general principles upon which life estates are regularly implied, had been fully developed, and when, under the influence of a rule which found expression in *Adams v. Savage*,[25] it was thought that a contingent future use, unsupported by a freehold, was bad because of the application of the common law or feudal rule of contingent remainders, that there must be a freehold to support the future interest. Under these circumstances the English judges seem to have been quick to

Gannon *v.* Peterson, 193 Ill. 372; Turner *v.* Wright, 2 De G. F. & J. 234, (1 Ames' Cases on Equity Jurisdiction, 476).

[18] *Ante*, §§ 127 *et seq.*

[19] Fearne C. R. 41, 42.

[20] Of course where there is an expressed reservation of the life estate in the grantor it is perfectly proper to sustain the future interest as a remainder: Fowler *v.* Black, 136 Ill. 363; Palmer *v.* Cook, 159 Ill. 300; Bowler *v.* Bowler, 176 Ill. 541; Valter *v.* Blavka, 195 Ill. 610; Calef *v.* Persons, 48 Ill. App. 253.

[21] Abbott *v.* Holway. 72 Me. 298.

[22] 2 Hayes on Conveyancing, 5th ed. 464, 465; Leake Digest of Land Laws, 112, 113.

[23] 1 Jarman on Wills, 6th ed. (Bigelow) star pages 498 *et seq.*

[24] Pibus *v.* Mitford, 1 Vent. 372; Fearne C. R. 42; Elphinstone on Interpretation of Deeds, page 288; and even so careful a modern writer as Challis in an article entitled "On a Point in the Law of Executory Limitations," 1 Law Q. Rev. 412, 414.

[25] 2 Ld. Raym. 854, 2 Salk, 679, (1703), (5 Gray's Cases on Property, 119).

imply a life estate limited to the covenantor himself.[26] *Adams v. Savage,* however, is bad on principle and should not be regarded as law in a jurisdiction where it has not already been adopted.[27] There would appear, therefore, to be no ground to-day for implying any life estate.

§ 159. **Conclusion:** It would seem best to sustain gifts after the grantor's death, when no life estate is expressly reserved,[28] as a springing interest, cutting short a resulting estate in fee in the grantor, and valid either under the Statute of Uses or under sec. 1 of the Act on Conveyances. If a life estate be expressly reserved to the grantor,[29] a legal limitation for life to the grantor, with a valid remainder in fee to the grantee, may be sustained under the Statute of Uses or sec. 1 of the Act on Conveyances.

PART 3.

CONVEYANCE BY DEED TO A CLASS.

§ 160. **Suppose a conveyance by deed to the "children of A, born and to be born"—Suppose also A has, at the time of the conveyance, no children:** In such a case can any afterborn child of A take? This is purely a question of whether, or how far, a springing interest to persons not *in esse* may arise by bargain and sale or covenant to stand seized, for a deed in the usual form can always take effect as one or the other, if necessary in order to sustain its validity.[30] As to a covenant to stand seized to the use of a person not *in esse* there should not be the slightest doubt about its effectiveness so long as the *cestui que use* comes within the consideration of blood. Professor Gray, in his Rule against Perpetuities,[31] has set out the reasoning upon which a bargain and

[26] Sugden on Powers, 8th ed., 36, 37.

[27] Gray's Rule against Perpetuities, §§ 58-60; Challis "On a Point in the Law of Executory Limitations," 1 L. Q. R. 412; Sugden on Powers, 8th ed. p. 35 *et seq.*

[28] Shackelton *v.* Sebree, 86 Ill. 616; Harshbarger *v.* Carroll, 163 Ill. 636; Latimer *v.* Latimer, 174 Ill. 418; Vinson *v.* Vinson, 4 Ill. App. 138.

[29] Fowler *v.* Black, 136 Ill. 363; Palmer *v.* Cook, 159 Ill. 300; Bowler *v.* Bowler, 176 Ill. 541; Calef *v.* Parsons, 48 Ill. App. 253.

[30] *Ante,* § 150.

[31] §§ 61-65.

sale to a person not *in esse* is to be sustained. The question has not yet arisen in this form in this state, but owing to the turn which the authorities here have taken in regard to the problem discussed in the next section, the proper rule must be regarded as in a precarious condition.

§ 161. Suppose A has, at the time of the conveyance, a child in esse: It is well settled that if the conveyance be merely to the "children of A," and A have existing children, they alone will take, and afterborn children of A are excluded.[32] This goes upon the ground that, by the proper construction of the deed, the grantor intended that only existing children should take.[33] How, then, shall we deal with the case where the grantor, by using the words "born and to be born," has expressed his intent that all the children which A may have shall take? Can such an intent be given effect? This is a question of the validity of shifting interests. Will the children in existence at the time the deed is executed take the fee subject to open and let in after-born children?

Two very recent Illinois cases have answered this question in the negative.[34] In *Morris v. Caudle*,[35] the conveyance ran to a child *in esse* and his "own brothers and sisters." He had no brothers and sisters at the time the deed was signed, but one was afterwards born and lived two months. The deed was held to have taken effect as to the one in existence when it was signed but not as to the child afterwards born. This was supported upon the hypothesis that the deed was delivered either before or after the death of the subsequently born child. Upon the latter assumption the case is clearly correct. If, however, the deed was delivered before the birth of the after-born child, then, since the grantee *in esse* had no brothers and sisters at that time, the deed must, by its proper construction, have included all the brothers and sisters of the grantee *in esse* and to be born.[36] We have, then, a holding that such an intent cannot be given effect in a deed in the

[32] Faloon *v.* Simshauser, 130 Ill. 649; Elphinstone on Interpretation of Deeds, p. 358.

[33] *Post*, § 226.

[34] See also Cooper *v.* Cooper, 76 Ill. 57, 65, 66.

[35] 178 Ill. 9.

[36] See, for instance, Weld *v.* Bradbury, 2 Vern. 705, (5 Gray's Cases on Prop. 304), where upon a devise to children of A, A having no children at the time the will

ordinary form in use in this state. *Miller v. McAlister*,[37] is more palpably to the same effect. The deed there involved conveyed to M. E. McA. "and her children born and to be born." It was held that only the children born when the deed was delivered could take. One born afterwards was, the court held, properly excluded.

So serious and direct an interference with the expressed will of the grantor deserves some explanation. For authority the supreme court cites only its own case of *Faloon v. Simshauser*.[38] This, however, does not touch the point at all, since there the conveyance was to A "and her children" and by the proper construction of the deed only children in existence at the time the deed was executed were designated. So far as the matter was considered upon principle, the court says in *Miller v. McAlister*:[39] "A grantee must be *in esse* at the time the deed is executed, otherwise no title will pass by the deed." In short, you cannot by deed have an immediate vested gift to one person which will afterwards be divested *pro tanto* in favor of an after-born child. You cannot do by deed what you can do by will.[40] Of course, such a rule is inconceivably reactionary. It is the harkening back to a principle which got its life from the feudal system of conveyancing,[41] and which, at the present day, is without reason and technical to the last degree. It ignores the fact that every modern deed containing the recital of a consideration may, if desired, operate as a bargain and sale under the Statute of Uses,[42] and that, whatever supposed difficulties there may be with regard to a bargain and sale to persons none of whom are *in esse*,[43] there could be no doubt about the validity of the limitations where there was one grantee *in esse* who might have paid the consideration and taken the whole legal title at once.[44] It ignores, too, the freedom which such modern legislation as sec. 1 of our

was made or at the death of the testator, it was held that all the children of A born at any time were included.

[37] 197 Ill. 72.

[38] *Supra*, note 32.

[39] 197 Ill. 72, at p. 77.

[40] *Post*, § 164.

[41] *Ante*, § 145.

[42] *Ante*, § 150.

[43] *Ante*, § 160.

[44] 1 Hayes' Conveyancing, 5th ed. p. 119; *ante*, § 146.

Act on Conveyances[45] might have been held to have introduced.[46]

[45] R. L. 1827, p. 95, sec. 1; R. S. 1845, ch. 24, sec. 1 (p. 102); R. S. 1874, ch. 30, sec. 1; 1 A. & D. R. E. S. pp. 75, 100.

[46] *Ante*, § 152.

Note: As to whether shifting or springing future interests by deed are vested or contingent, see *post*, § 178. As to how far such interests are alienable, see *post*, §§ 179-181.

CHAPTER V.

EXECUTORY DEVISES.

§ 162. Executory devises defined and scope of the chapter: Executory devises have been defined as future interests created by will which are bound to take effect, if at all, by way of interruption, *i. e.*, springing and shifting interests.[1] It should be observed, however, that contingent future interests after a particular estate of freehold, which take effect in possession by way of succession or interruption, according as the event upon which they are expressly limited, happens before or at the time of, or after, the termination of the preceding interest are, if the testator's intent be fully carried out, in reality executory interests.[2] So long as the rule of the feudal land law, that they must take effect by way of succession or fail entirely, was applied, they were properly classified as remainders and called contingent remainders.[3] The moment, however, that this rule, either by the action of the legislature or of the courts, ceases to be effective,[4] the future interest becomes, in its inception, executory.[5] If created by will, it should be called an executory devise. The character and validity of these future interests has been heretofore fully dealt with.[5a] In this chapter, therefore, executory devises, as springing and shifting future interests, created by will, and taking effect, if at all, only by way of interruption, will be considered.

PART 1.

VALIDITY OF EXECUTORY DEVISES IN ILLINOIS.[6]

§ 163. Introductory: From the analysis, in a recent number of the Harvard Law Review,[7] of the Illinois authorities on executory devises by my learned colleague, Professor Greeley,

[1] *Ante*, §§ 67-82.
[2] *Ante*, §§ 68, 85, 91 note 13.
[3] *Ante*, §§ 68, 69.
[4] *Ante*, §§ 81-92a.
[5] *Ante*, § 91 note 13.
[5a] *Ante*, §§ 82, 84-92a.
[6] This deals only with the validity of such springing and shifting future interests as are legal estates. There is no question about
[7] Vol. 14, p. 595.

one might well be led to think that the cases were in such hopeless confusion [8] as to leave in doubt the validity of executory devises in general. A careful examination, however, of the cases cited in that article together with such others, decided by our supreme court both before and since it was written as the present writer has been able to collect, has induced these conclusions: There is, in this state, no confusion in the cases which is unusual to the subject of executory devises generally. A number of the cases, which have been thought to cast doubt upon their validity, are, so far as they have not been in terms overruled, explainable upon principles clearly defined and well established upon authority. Finally, at the point where the cases are, in fact, in some conflict and confusion, the problem involved is really difficult and cases both ways are to be found among the English authorities.

§ 164. I. Executory devises in general valid—The authorities: It is not believed that there is now, or that there ever has been, any serious question in this state concerning the validity in general of springing and shifting future interests in real and personal property created by will. That our supreme court should, in the face of the establishment of such executory limitations under the Statute of Wills of Hen. VIII,[9] and their continued use in England for three centuries and a half and in this country since its settlement, have, in

the validity of springing and shifting interests by will where, by the intervention of a trustee, such interests are equitable.

Observe the following examples of springing equitable interests of this sort: Rhoads *v.* Rhoads, 43 Ill. 239; Blatchford *v.* Newberry, 99 Ill. 11; Gilman *v.* Bell, 99 Ill. Ill. 144; Blanchard *v.* Maynard, 103 Ill. 60; McCartney *v.* Osburn, 118 Ill. 403; Hale *v.* Hale, 125 Ill. 399. See also Caruthers *v.* McNeill, 97 Ill. 256; Young *v.* Harkleroad, 166 Ill. 318, and Giles *v.* Anslow, 128 Ill. 187.

In the following cases there was a shifting equitable interest by way of trust: Glover *v.* Condell, 163 Ill. 566. See also Banta *v.* Boyd, 118 Ill. 186; Young *v.* Harkleroad, 166 Ill. 318; Arnold *v.* Alden, 173 Ill. 229.

As to who is entitled to the income or rents and profits of the estate during the gap before the springing estate takes effect in possession, see *post*, § 223, note on Intermediate Income.

[8] Observe, also, that H. Clay Horner (Chicago Legal News, June 17, 1905, p. 354, and June 24, 1905, p. 362) seems to regard the cases cited, *post*, §§ 169-176, as in hopeless confusion.

[9] *Ante*, § 88.

blind ignorance, judicially legislated the executory devise out of existence is so monstrous and absurd a conclusion, that it cannot be seriously suggested.[10] Furthermore, a thorough examination of all the authorities in the supreme court of this state which touch the subject will find the validity of executory devises in general unimpeached.

In at least two instances[11] wills have been before the supreme court containing a springing executory limitation, and, while in none was the main pressure brought to bear to impeach the validity of this interest, yet in not one of these cases was it suggested that the future limitation was invalid. In fact, the contrary seems to have been assumed. Instances of shifting executory limitations are more common. In a considerable number of cases the validity of a shifting executory devise has been directly involved and sustained,[12] often with a fullness of reasoning which leaves the validity of executory devises in general beyond all doubt.

[10] For a view of the modern policy of the law which is at the bottom of the validity of all springing and shifting interests, whether created by deed or will, see *ante*, § 153.

[11] Lambert *v.* Harvey, 100 Ill. 338; Cassem *v.* Kennedy, 147 Ill. 660. For some observations on the disposition of the intermediate income, or legal title, see *post*, § 223, note on Intermediate Income.

[12] Ackless *v.* Seekright, Breese (1 Ill.) 76; Friedman *v.* Steiner, 107 Ill. 125; Summers *v.* Smith, 127 Ill. 645; Ducker *v.* Burnham, 146 Ill. 9; Smith *v.* Kimbell, 153 Ill. 368; Strain *v.* Sweeny, 163 Ill. 603; Koeffler *v.* Koeffler, 185 Ill. 261; Harrison *v.* Weatherby, 180 Ill. 418 (*semble*); Frail *v.* Carstairs, 187 Ill. 310; Gannon *v.* Peterson, 193 Ill. 372; Thompson *v.* Becker, 194 Ill. 119, 122; Becker *v.* Becker, 206 Ill. 53; Bradsby *v.* Wallace, 202 Ill. 239; Harris *v.* Ferguy, 207 Ill. 534; Orr *v.* Yates, 209 Ill. 222.

In all but three of the above cases the gift over was upon a definite failure of issue in the first absolute taker.

Observe the *dicta* of the following cases sustaining the general validity of shifting limitations by way of executory devise: Siegwald *v.* Siegwald, 37 Ill. 430; Illinois Land Co. *v.* Bonner, 75 Ill. 315. In Post *v.* Rohrbach, 142 Ill. 600 the gift over was void because it was too remote. Apart from remoteness it was a perfectly valid executory devise.

In the following cases the validity of a shifting executory limitation seems to have been assumed: Ridgeway *v.* Underwood, 67 Ill. 419; McFarland *v.* McFarland, 177 Ill. 208; McConnell *v.* Stewart, 169 Ill. 374; Hinrichsen *v.* Hinrichsen, 172 Ill. 462.

Springing[13] and shifting[14] limitations by way of executory devise, arising by the exercise of a power, have been repeatedly upheld.

§ 165. Three cases contra—Andrews v. Andrews:[15] In that case the testator left his property, after certain life estates, to charity, devising specifically to the First Presbyterian Church of Chester upon certain charitable trusts. By his will the testator directed the manner of the election of a trustee after the death of the life tenants, in whom the title should vest. On a bill filed by the heirs at law to have the gift to charity declared void, it was urged that "the testator could not vest a fee in the church and by the same instrument divest it after it was thus vested, and vest it in another." Not only does our supreme court seem to have countenanced this proposition, but it even went the length of adding: "Nor could he [the testator] limit a fee upon a fee, unless the first fee limited failed for the want of the happening of a specified contingency, which was not the case in this devise." This discus-

[13] (a) Cases where the exercise of a power by an executor cuts short the interest which has descended to an heir at law: (But these cases may rest upon a statute in force since 1829. See *post*, § 234, note 2). Rankin *v.* Rankin, 36 Ill. 293; Purser *v.* Short, 58 Ill. 477; Hughes *v.* Washington, 72 Ill. 84; Funk *v.* Eggleston, 92 Ill. 515; Starr *v.* Moulton, 97 Ill. 525; Lambert *v.* Harvey, 100 Ill. 338, *semble*.

(b) Cases where the exercise of a power by a life tenant cuts short the interest which has descended to the testator's heirs: Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59, 19 Ill. 331; Markillie *v.* Ragland, 77 Ill. 98; Crozier *v.* Hoyt, 97 Ill. 23; Lomax *v.* Shinn, 162 Ill. 124.

[14] (a) Cases where the exercise of a power by an executor cuts short the interest of the devisee under the will: (But these cases may rest upon a statute in force since 1829. See *post*, § 234, note 2). Pahlman *v.* Smith, 23 Ill. 448; Hamilton *v.* Hamilton, 98 Ill. 254; Railsback *v.* Lovejoy, 116 Ill. 442, (*semble*); Ducker *v.* Burnham, 146 Ill. 9 (*semble*); Hawkins *v.* Bohling, 168 Ill. 214, 220, (*semble*); Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144 (*semble*). Also Gilman *v.* Bell, 99 Ill. 144 (*semble*). Also Ely *v.* Dix, 118 Ill. 477.

(b) Cases where the exercise of a power by a life tenant cuts short the interest of the devisees in remainder: Kaufman *v.* Breckinridge, 117 Ill. 305; Walker *v.* Pritchard, 121 Ill. 221; Gaffeld *v.* Plumber, 175 Ill. 521; Goff *v.* Pensenhafer, 190 Ill. 200; Kurtz *v.* Graybill, 192 Ill. 445. See also the *dicta* of cases where the power was held not to have been properly exercised: Griffin *v.* Griffin, 141 Ill. 373; Clark *v.* Clark, 172 Ill. 355.

[15] 110 Ill. 223.

sion was doubtless irrelevant in the case, for even if the shifting gift to the new trustee had failed the trust would not necessarily have failed for that reason. Even if relevant it was answered by the court's holding that by statute the fee was in the church corporation so that the new trustee provided for by the will could only have a right of management. It is submitted that, so far as the testator expressed an intent that upon the death of the life tenants the fee was to be shifted from the Presbyterian Church as trustee to a new trustee selected in a certain way, there was no more difficulty, apart from the statute mentioned, in its being given effect, than in the common case where provision is made as in a deed or will for the substitution of a successor in trust. The *obiter* of *Andrews v. Andrews* must then remain subject to most emphatic doubts.

§ 166. Ewing v. Barnes[16] **and Silva v. Hopkinson:**[17] In both these cases there was a devise in fee to the first taker, with a gift over upon the first taker's dying without issue. In both the gift over was held invalid, apparently upon the ground that a fee could not be limited upon a fee by will. Soon after these cases were decided they were subjected to a very acute scrutiny by a learned member of the Chicago bar,[18] who attempted, not it must be admitted, without a full realization of the difficulties of so doing, to point out that the actual decision in each case might be sustained. It was suggested that in the first case the gift over was to take effect upon an indefinite failure of issue and was, therefore, too remote. It might be objected to this explanation that a devise of real estate was involved and that by a very ancient rule of construction,[19] the first taker would have an estate tail, with a vested remainder in fee to the ultimate devisee, which could not be too remote.[20] By our statute,[21] however, the estate tail would be turned into a life estate to the first taker, with a remainder in fee to the heirs of his body, so that the ultimate gift would have to take effect as an executory devise upon an

[16] 156 Ill. 61.

[17] 158 Ill. 386.

[18] Mr. Lessing Rosenthal in 28 Chicago Legal News, 257 (April 4, 1896).

[19] *Post*, § 204.

[20] Gray's Rule against Perpetuities § 443 *et seq.*

[21] *Ante*, §§ 114 *et seq.*

indefinite failure of issue,[22] and so would be void for remoteness, unless the rule making contingent remainders destructible be in force.[23] So far, then, as *Ewing v. Barnes* held the ultimate gift over void for remoteness,[24] it may only possibly be sustained. In regard to *Silva v. Hopkinson,* it was observed that, while the gift over must have been regarded as taking effect upon a definite failure of issue, yet there was some ground for saying that the executory devise over only took effect upon the death of the first taker without ever having had issue.[25] The difficulty here is that it did not appear from the bill filed that any children had ever been born to the two devisees who took a fee simple subject to the attempted gift over.[26] The present writer would suggest that, if both cases are to be supported in any event, it must be upon the ground that there was no gift over at all, but that the death of the first taker, without issue, or without leaving issue him surviving, meant the death of the first taker *in the lifetime of the testator* without issue. This is a very forced, if not unjustifiable, construction[27] in both cases.[28]

§ 167. Ewing v. Barnes and Silva v. Hopkinson now overruled: The attempts to sustain *Ewing v. Barnes* and *Silva v. Hopkinson* may now, however, be dispensed with, for our supreme court shortly after the criticism above referred to, in sustaining the validity of an equitable shifting interest created

[22] *Post,* 203.

[23] *Post,* §§ 271, 272.

[24] Observe, however, that if this view had been carried out in Ewing *v.* Barnes, the first taker would have got only a life estate with a remainder fee to the heirs of his body, whereas, under the opinion of the court, he undoubtedly took a fee simple discharged of any divesting condition.

[25] *Post,* § 199.

[26] See 28 Chicago Legal News, 260.

[27] *Post,* § 199.

[28] It is significant of a certain lack of facility in our supreme court with the executory devise that, upon several occasions, it has strained to construe limitations as a life estate with contingent remainders in double aspect rather than as a vested remainder in fee simple after the life estate and an executory devise over. In each case, this course seems to have proceeded upon the assumption that in no other way could the future interests be given effect: Furnish *v.* Rogers, 154 Ill. 569, *ante,* § 98; Phayer *v.* Kennedy, 169 Ill. 360, *ante,* § 96 note 20. See also Johnson *v.* Johnson, 98 Ill. 564; Schafer *v.* Schafer, 141 Ill. 337.

by will and arising upon a definite failure of issue,[29] took occasion to say: "This court has held in a number of cases that although a fee cannot be limited upon a fee by deed, yet it can be so limited by will by way of executory devise. [Citing several cases, including *Siegwald v. Siegwald,* 37 Ill. 430.] The case of *Ewing v. Barnes,* 156 Ill. 61, so far as it holds to the contrary is overruled. The language used in *Silva v. Hopkinson,* 158 Ill. 386, should be construed as applicable only to the facts of that case and not as contravening the doctrine of *Siegwald v. Siegwald supra,* and the other cases of a like character above referred to."

§ 168. **II. Gifts over by way of forfeiture on alienation and upon intestacy—Introduction:** The validity in general of springing and shifting interests by way of executory devise being then clearly established, it remains only to place on some ground consistent with such a rule the cases, admittedly law, which have been thought to cast doubt upon it. The power of testators to create springing and shifting future interests is subject to some limitations. Professor Gray, in his Rule against Perpetuities,[1] states that they are limited only by the rule against perpetuities. Certainly that is the most striking limitation. Considering, however, what the same learned author has written upon Restraints on the Alienation of Property it is apparent that he recognizes the rule which makes invalid gifts over by way of forfeiture on alienation[2] and—however bad on principle it may be—the rule that gifts over on intestacy are void.[3]

§ 168a. **Gifts over by way of forfeiture upon alienation generally:** A gift over cutting short an absolute interest in real or personal property, which takes effect by way of forfeiture upon attempted alienation of any sort, is clearly void.[4] It seems equally clear that a gift over by way of forfeiture upon alienation in a particular manner, as for instance, by will or by deed, is void.[5]

[29] Glover *v.* Condell, 163 Ill. 566.

[1] § 98.

[2] Restraints on Alienation (2d ed.) § 13 *et seq.*

[3] Id. §§ 57-74g.

[4] Gray's Restraints on the Alienation of Property, 2d ed. §§ 13-30.

[5] Gray's Restraints on the Alienation of Property, 2d ed. §§ 55-56g. *Life interests with power of disposition or appointment:* Observe that if the first taker is given only

It is worth observing that gifts over by way of forfeiture on alienation in a particular manner may be expressed in several different ways. Thus, suppose the gift over be expressed to take effect if the first taker does not dispose of

a life estate, with power to dispose of the entire interest by will alone, or by deed alone, or by deed or will, the testator's intent may be fully carried out; that is, the gift after the life estate is valid. Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, (real estate); Ducker *v.* Burnham, 146 Ill. 9 *semble*, (real estate); Walker *v.* Pritchard, 121 Ill. 221 (real and personal estate); Henderson *v.* Blackburn, 104 Ill. 227 (real estate); Whittaker *v.* Gutheridge, 52 Ill. App. 460, 466; Bowerman *v.* Sessel, 191 Ill. 651, (real and personal estate); Healy *v.* Eastlake, 152 Ill. 424, (real estate); Turner *v.* Wilson, 55 Ill. App. 543 (164 Ill. 398) (real and personal estate); Griffiths *v.* Griffiths, 198 Ill. 632, (real estate); Lambe *v.* Drayton, 182 Ill. 110, 117-118 (*semble*) (real estate); Mann *v.* Martin, 172 Ill. 18 (real and personal property); Skinner *v.* McDowell, 169 Ill. 365 (real estate); Hamlin *v.* U. S. Express Co., 107 Ill. 443 (real estate); Bergan *v.* Cahill, 55 Ill. 160 (real estate); *In re* estate of Cashman, 134 Ill. 88 *semble*, (personal property); Welsch *v.* Belleville Savings Bank, 94 Ill. 191 (personal property); Metzen *v.* Schopp, 202 Ill. 275 (*semble*); Randolph *v.* Hamilton, 84 Ill. App. 399, (personal property); Kaufman *v.* Breckenridge, 117 Ill. 305; Griffin *v.* Griffin, 141 Ill. 373; Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350; Craw *v.* Craw, 210 Ill. 246; Saeger *v.* Bode, 181 Ill. 514, 518; Cooper *v.* Cooper, 76 Ill. 57, 62.

Our supreme court has never apparently considered it of any consequence, in the determination of the validity of the gift after the life interest, whether the property involved were real or personal property, or whether the life tenant had only a power to dispose by will alone, or by deed alone, or by both deed or will. It is a difficult matter, therefore, to say finally what the extent of the power given to the life tenant may have been in the above cited cases. (a) In the following cases it seemed pretty plain that the power was to dispose of by deed or will: Hamlin *v.* U. S. Express Co., 107 Ill. 443; Skinner *v.* McDowell, 169 Ill. 365; Turner *v.* Wilson, 55 Ill. App. 543. (See 164 Ill. 398). (b) In the following cases it seemed quite plain that the power was limited to disposition by conveyance in the life time of the life tenant: Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Ducker *v.* Burnham, 146 Ill. 9; Walker *v.* Pritchard, 121 Ill. 221; Henderson *v.* Blackburn, 104 Ill. 227; Whittaker *v.* Gutheridge, 52 Ill. App. 460, 466. (c) In the following cases it looks as if the power were one to dispose by will only: Bowerman *v.* Sessel, 191 Ill. 651; Healy *v.* Eastlake, 152 Ill. 424; Turner *v.* Wilson, 55 Ill. App. 543, (164 Ill. 398). (For other questions of construction arising in connection with the power in the life tenant see *post*, §§ 251, 253).

The distinction taken between the validity of interests preceded by an absolute title and taking ef-

the property in his life time. This is a case of forfeiture upon an attempted alienation by will. The case is the same if the first taker be given expressly a right to dispose of the property during his life time with a gift over of all that remains undisposed of in that manner.[6] The case is still the same if there be simply a gift over of all that remains undisposed of by the first taker during his life time,[7] for where the

fect upon a failure to alienate in a particular manner, and those preceded by a life estate with power of disposition in the life tenant has given rise to much contention as to when the first taker has an absolute interest and when only a life estate. The following are some of the striking cases of this sort: Bowerman *v.* Sessel, 191 Ill. 651; Lambe *v.* Drayton, 182 Ill. 110; Wilson *v.* Turner, 164 Ill. 398, 55 Ill. App. 543; Healy *v.* Eastlake, 152 Ill. 424; Walker *v.* Pritchard, 121 Ill. 22; Hamlin *v.* U. S. Express Co., 107 Ill. 443; Bergan *v.* Cahill, 55 Ill. 160.

[6] This was the form of the gift in Sheets *v.* Wetsel, 39 Ill. App. 600, but the validity of the future interest was not there passed upon.

It should be observed that the more you qualify the power conferred upon the first taker the more surely is the gift over, if the first taker does not exercise that power, a case of forfeiture upon alienation in the manner not specified. In this view the following language of our Supreme Court in Dalrymple v. Leach, 192 Ill. 51, 57 is very difficult to support: "Of course, if the power of disposition of the first taker is a qualified or limited power, there is not necessarily a repugnancy, and this we think, will generally explain any seeming conflict in the authorities."

[7] The difficult case is where the testator has simply made a gift over of "all that remains at the death of the first taker" or "remains undisposed of at the death of the first taker," without saying explicitly whether he means undisposed of by the first taker during his life time, or undisposed of in any manner, including failure to dispose by will. It would seem as if, in such a case, the primary meaning of "undisposed of" was undisposed of in any manner, which is accomplished by the act of the devisee,—*i. e.*, by conveyance in the first taker's life time or by will at his death, so that the gift over is really on an intestacy. This is the view taken by the writer of the limitations over involved in Wilson *v.* Turner, 164 Ill. 398, where the gift over was of all "which at her [the first taker's] death shall remain undisposed of," and Lambe *v.* Drayton, 182 Ill. 110, where the gift over was of "what is left at my wife's death." These cases, then, find their proper place in connection with gifts over on intestacy, *post*, §§ 169 *et seq.* On the other hand, Dalrymple *v.* Leach, 192 Ill. 51, 57, where the gift over was to take effect "if at my wife's death there is any property *then in her possession or control*," may well proceed upon the ground that the gift over is to take effect as to all the first taker does

first taker is given an absolute interest the express power to transfer by deed is pure surplusage. The absolute interest gives the first taker the power to convey and the substance of the condition, viz., that the property is to go over if he does not dispose of it by deed, makes it certain that the interest which he has transferred can never be cut short. So, a gift over, if the first taker does not dispose of the property by will, is a forfeiture upon an attempted alienation in the lifetime of the first taker. The case is the same if the first taker be given expressly a right to dispose of the property by will with a gift over of all that is not so disposed of. Again, the case is still the same if there is simply a gift over of all that remains undisposed of by the will of the first taker, since the express power of alienation by will is immaterial. Having the absolute interest, the first taker may dispose of it by will and the condition upon which the gift over was to take effect can then never happen.

not dispose of by conveyance in his life time, and so was void as an attempted forfeiture upon a conveyance by will. So, in Mills *v.* Newberry, 112 Ill. 123, where the gift was to the testator's mother upon the express condition that she devise so much "as shall remain undisposed of or unspent at the time of her decease" to a charity for women, the power to devise generally was clearly taken away and the gift over, then, was an attempt to impose a forfeiture in case of an attempted devise in any other manner.

It should be noted that the cases where the question has arisen as to whether a power of disposition in a life tenant can be inferred from the gift of "all that remains," (*post*, §§ 251, 253), do not help here. In those cases the only question discussed was whether the life tenant had any power of disposition by implication. If there was any power of disposal at all it was a power in the life tenant to alienate during his life, and the question as to whether the life tenant had a power to dispose by will was not involved. In Henderson *v.* Blackburn, 104 Ill. 227, 233, it was hinted that the life tenant could not dispose of the fee by will, but the instrument in that case creating the power in terms provided that the life tenant might "dispose of so much of the same as she may need or wish to use during her life time." The words, "If there is anything left" must, then, have meant, "anything not disposed of by the life tenant in her life time." No power, therefore, to convey by will was given.

Observe, also, that the express power given to the absolute owner may aid materially in construing the phrase, "What remains," at the first taker's death: Bergan *v.* Cahill, 55 Ill. 160; Henderson *v.* Blackburn, 104 Ill. 227.

§ 169. Gifts over on intestacy—Defined and result of authorities stated: In § 168a the gifts over dealt with were by way of forfeiture, *first*, upon any alienation at all, and, *second*, upon some particular form of alienation, as a conveyance by deed or a gift by will. Gifts over on intestacy are similarly gifts over by way of forfeiture upon alienation in a particular manner. The only difference is that, with gifts over on intestacy, the sort of alienation which, if attempted, is to produce the forfeiture, is limited to alienation by descent. In short, the gift over is only to take effect if the first taker attempts to permit the property to descend.

Observe, now, that a gift over on intestacy may result from several different forms of expression. There may be a direct declaration that the absolute gift to A shall be cut short if he die intestate and the property, in that event, go over to B. The case is the same if the devise be to A in fee, with full power to dispose of it for his own benefit by conveyance in his lifetime or by will at his death, but if he die without having so disposed of the property then over to B. The case is the same if the devise be to A absolutely, but if he die without having disposed of the property by conveyance in his lifetime or by will at his death, then over to B, for the express power to A to dispose by conveyance in his lifetime or by will at his death is really immaterial. A, having the fee, has the power to dispose by deed or will and the substance of the condition, upon which the gift over takes effect, is such that upon a conveyance by deed or will the gift over could not possibly come into possession.

It may be difficult to tell whether there is a gift over on intestacy or a gift over by way of forfeiture for alienation by will. Thus, suppose the gift over be of "all that remains" or "of all that remains undisposed of" by the first taker at his death. The gift over here is to take effect if the first taker does not dispose of the property in his lifetime. Is it, however, to take effect if the first taker does not dispose of the property by will? This difficulty was pretty squarely presented in *Wilson v. Turner*,[8] and *Lambe v. Drayton*.[9] It has seemed

[8] 164 Ill. 398, (55 Ill. App. 543), *ante*, § 168a note 7.

[9] 182 Ill. 110, *ante*, § 168a note 7. See also Orr *v.* Yates, 209 Ill. 222.

to the present writer that such language as "what remains" or "what remains undisposed of" should properly refer to what remains undisposed of by any manner of conveyance by act of the transferor as distinguished from a transfer by operation of law. *Wilson v. Turner* and *Lambe v. Drayton* have, therefore, been classed as cases of gifts over on intestacy.[10] There is much to support this in the fact that our supreme court regarded them as falling within the rule of *Wolfer v. Hemmer*,[11] where the gift over was clearly upon intestacy.

In whatever form it may appear, however, the legal effect of the gift over on intestacy is the same. By the authority of the English cases,[12] by the authority in this country of Chancellor Kent[13] especially, and of many state jurisdictions[14] including Illinois,[15] the gift over is absolutely void. This is the rule, also, whether the gift be of real[16] or personal[17] property.

§ 170. Excuse for reconsidering the authorities upon principle: The several decisions in this state holding invalid gifts over on intestacy seem to have proceeded rather upon authority than upon any principle. In fact our supreme court

[10] On the other hand in Dalrymple *v.* Leach, 192 Ill. 51, 57, where the gift over was expressed to take effect "if at my wife's death there is any property then in her possession and control," there would seem to be much ground for saying that the gift over was to take effect not upon an intestacy but on an attempted alienation by will. *Ante*, § 168a note 7.

[11] 144 Ill. 554.

[12] Gray's Restraints on Alienation (2d ed.), §§ 57-64.

[13] Jackson *v.* Robins, 16 Johns. (N. Y.) 537, (6 Gray's Cas. on Prop. 77); 4 Kent Com. 270.

[14] Gray's Restraints on Alienation (2d ed.) §§ 65-74g.

[15] Ackless *v.* Seekright, Breese 76 (*semble*); Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 203, (*semble*); Hamlin *v.* U. S. Express Co., 107 Ill. 443, 448 (*semble*); Mills *v.* Newberry, 112 Ill. 123, 138; Wolfer *v.* Hemmer, 144 Ill. 554 (the leading case); Wilson *v.* Turner, 164 Ill. 398 (55 Ill. App. 543) (*semble*); Lambe *v.* Drayton, 182 Ill. 110 (*semble*); Saeger v. Bode, 181 Ill. 514, 518; Dalrymple *v.* Leach, 192 Ill. 51, 57 (*semble*); Metzen *v.* Schopp, 202 Ill. 275 (*semble*); Orr *v.* Yates, 209 Ill. 222 (*semble*); Randolph *v.* Hamilton, 84 Ill. App. 399 (*semble*); Whittaker *v.* Gutheridge, 52 Ill. App. 460 (*semble*); Sheets *v.* Wetsel, 39 Ill. App. 600 (*semble*).

[16] Ackless *v.* Seekright, *supra*; Hamlin *v.* U. S. Express Co., *supra*; Mills *v.* Newberry, *supra*; Wolfer *v.* Hemmer, *supra*; Lambe *v.* Drayton, *supra*; Dalrymple *v.* Leach, *supra*; Orr *v.* Yates, *supra*.

[17] Welsch *v.* Belleville Savings Bank, *supra*; Mills *v.* Newberry, *supra*; Wilson *v.* Turner, *supra*; Orr *v.* Yates, *supra*.

has never seemed to think it necessary to go farther than to refer to the doctrine of "repugnancy." This is somewhat remarkable because, when *Wolfer v. Hemmer*,[18] which established the invalidity of gifts over on intestacy, was decided, Professor Gray's first edition of Restraints on the Alienation of Property had been in print for three years. In that book the idea of repugnancy as well as the whole doctrine that gifts over upon intestacy were void, was disposed of as an unsound and irrational innovation. Yet *Wolfer v. Hemmer* took no notice of what was there said. Four years after the appearance of the 2nd edition of the same work, containing a further emphasis upon the authorities and reason against holding the gift over void, we find our supreme court speaking of the rule of *Wolfer v. Hemmer* as if there were no respectable authority for any other position.[19] Is it possible that the principle upon which a rule that breaks testators' wills rests, is of so little importance that it cannot be dealt with? It would seem as if in a book which will, it is hoped, come to the notice of members of the profession in Illinois, there were some excuse for restating the reasoning of Professor Gray in respect to the validity of gifts over on intestacy.

There is another reason why the holding invalid of gifts over on intestacy should be examined in detail here. Repugnancy on the part of the future interest to the absolute interest in the first taker was originally assigned as the ground for the rule that the gift over was void. This notion has been used by our supreme court in such a way as to momentarily cast doubt upon the validity of all shifting interests by deed or will. A re-examination on principle, then, of the real nature of the rule, will, it is believed, do much to aid in permanently removing this doubt.

[18] 144 Ill. 554.

[19] In Burton *v.* Gagnon, 180 Ill. 345 at 352, Mr. Justice Craig said: "Our attention has been called to no well considered case in which an executory devise was held to exist, where such power of alienation was conferred on the first taker as exists in this case." Professor Gray in his Restraints on the Alienation of Property (§ 74) cites several cases which hold the gift over valid. If it be urged that these can hardly be called "well considered" it may be replied that Professor Gray has furnished the well considered basis upon which they rest and that his opinion is quite as valuable and fully as binding in this state as that of the judges of the courts of other jurisdictions.

§ 171. Reasons for holding void gifts over on intestacy—Of personal property: Gifts over on intestacy of personal property are, it has been suggested, properly held void because the gift over is too uncertain.[20] While this is not the reason generally given in the American cases,[21] and though in this state our supreme court has apparently gone far in holding valid a future interest in personal property after a life estate with full power of disposition in the life tenant,[22] yet in *Mills v. Newberry*[23] we have a strong authority for resting the invalidity of the gift over on intestacy of personal property[24] upon the ground of its uncertainty.

§ 172. Of real estate: The ground for the rule that gifts over on intestacy, of real estate are void has been phrased in several different ways.[25]

It was first said that the condition, which prevented heirs or next of kin of the first taker in fee from inheriting, was repugnant to the estate in fee given to the first taker and so was void.[26] Taken literally this reason was absurd since it would make all shifting interests by deed or will invalid.

[20] Gray's Restraints on the Alienation of Property (2d ed.) § 58.

[21] Gray's Restraints on the Alienation of Property (2d ed.) § 65.

[22] Walker *v.* Pirtchard, 121 Ill. 221, pp. 228-230; Mann *v.* Martin, 172 Ill. 18. In Gaffield *v.* Plumber, 175 Ill. 521, it could hardly be said that the gift over was uncertain because the principal was placed in the hands of trustees and the *cestui* for life was obliged to petition the court of chancery for leave to use the principal. In Welsch *v.* Belleville Savings Bank, 94 Ill. 191, after giving his wife a life estate in all of the residue, the testator provided that his grandchild Arthur should "receive from the estate she [the wife] may leave at her death the sum of $4,000." It was held that even if the wife had a complete right of disposal during her life time, yet Arthur's interest was valid. In Turner *v.* Wilson, 55 Ill. App. 543 (164 Ill. 398) there was a gift of personalty for life with power in the life tenant to dispose by deed or will, and yet the future interest was held valid. See also Randolph *v.* Hamilton, 84 Ill. App. 399. In Bowerman *v.* Sessel, 191 Ill. 651, the power was merely to dispose by will so there was no uncertainty.

[23] 112 Ill. 123, citing Ross *v.* Ross, 1 Jac. & W. 154, (6 Gray's Cas. on Prop. 40).

[24] Observe that in Mills *v.* Newberry, 112 Ill. 123, some real estate was also involved.

[25] See H. Clay Horner's Article, Chicago Legal News, June 17, 1905, p. 354.

[26] Gulliver *v.* Vaux, 8 DeG. M. & G. 167, (6 Gray's Cases on Property, 51).

The idea evidently contained in this reasoning of repugnancy was later developed in expression, so that it became this: It is a necessary incident to the estate in fee that it descend to the owner's heirs upon his death intestate, so that the gift over upon the death of the first taker intestate is in reality a forfeiture upon alienation by descent.[27] In this view the invalidity of gifts over on intestacy is merely an extension of the rule that gifts over by way of forfeiture upon alienation in a particular manner, viz., by deed or will, are void.[28]

The difficulty with this is that it is not every gift over by way of forfeiture on alienation that is invalid. Those only are condemned where some principle of public policy is violated. Thus, gifts over by way of forfeiture on alienation to a particular person have been sustained.[29] Curiously enough it has never been contended that any principle of public policy was violated by a gift over on intestacy. Quite the contrary in fact appears, for it always has been held that upon a gift to A for life, with full power of disposal by deed or will, a remainder, in case he does not so alienate, is valid.[30] The lower courts in New York have seized upon a section of the New York Revised Statutes,[31] evidently designed to abolish the common law rule by which certain contingent future interests after a particular estate of freehold were destructible, to justify a decision that a gift over on intestacy is valid.[32] In one case[33] at least, so holding, the court, by Peckham, J., speaks with contempt of the rule which makes the gift over void. The learned judge calls it, "a wholly artificial and technical rule founded, as I think, neither upon any policy or sound reasoning."

The supporters of the rule which makes the gift over on intestacy void, are thus driven to the assertion that the gift over is in reality by way of forfeiture on alienation by will, as well as by descent, because one cannot devise to those who

[27] *Per* Fry, J. in Shaw *v.* Ford, 7 Ch. Div. 669, (6 Gray's Cases on Property, 58).

[28] *Ante*, § 168a.

[29] Gray's Restraints on Alienation, (2d ed.) § 31-44.

[30] *Ante*, 168a, note on life interests with power of disposition or appointment.

[31] Part 2, sec. 1, Tit. 2, Art. 1, par. 32, page 725.

[32] Gray's Restraints on Alienation, (2d ed.) § 56g and 70.

[33] Greyston *v.* Clark, 41 Hun. (N. Y.) 125, 130.

take by descent.[34] Conceding this rule to be applicable, the class, upon alienation to which the forfeiture occurs, is very small and the sort of alienations aimed at are of a very restricted sort. Is it possible, however, that the technical rule that one cannot devise to an heir will prevail in such a case to support the argument? Professor Gray says:[35] "This reasoning would hardly find acceptance at the present day." Why not? The learned author does not explain precisely. May it not be this: The rule that you could not devise to an heir rested upon the principle that if a conveyance could operate at common law it must do so rather than under a statute.[36] Thus, upon a feoffment or release to A and his heirs to the use of A and his heirs, A was in by the common law, *i. e.*, by the feoffment or release.[37] But if for any reason A could not be in by the common law mode of conveyance, as where there was a grant for a valuable consideration to A and his heirs to the use of A and his heirs, and there were no attornment, then he was at once in by the Statute of Uses. The rule was that if the conveyance could not take effect in the mode intended, it took effect as it might.[38] Why then, when the transfer cannot take effect according to the common law by descent because of the gift over, may it not do so in the mode the testator intends—that is by will?

The second phrasing of the reasoning of the rule that gifts over on intestacy were void is this: "That any executory devise defeating or abridging an estate in fee by altering the course of its devolution and at no other time, is bad."[39] This suggestion is out of the question since it exactly applies to the case of a gift over on the first taker's dying without leaving issue him surviving. If literally carried out, it would, like the reasoning of repugnancy, destroy the most common and unobjectionable sort of executory devises.

[34] Akers *v.* Clark, 184 Ill. 136, 137; Biggerstaff *v.* Van Pelt, 207 Ill. 611, 618.

[35] Gray's Restraints on Alienation, (2d ed.) § 59.

[36] In Akers *v.* Clark, 184 Ill. 136, 137, the same idea was expressed when the court gave as the reason "that a title by descent is regarded as a worthier or better title than by devise or purchase."

[37] Orme's Case, L. R. 8 C. P. 281, (1 Gray's Cas on Prop., 524).

[38] *Ante*, § 150.

[39] Fry., J. in Shaw *v.* Ford, 7 Ch. Div. 669, (6 Gray's Cases on Property, 58, 61).

Finally, the reason given by Chancellor Kent,[40] in favor of holding the gift over on intestacy void, was that the executory devise was contingent upon a circumstance which it was in the power of the first taker to prevent happening. But in what manner this becomes a reason for the result has never been made to appear. It is in reality only a statement of a conclusion that such gifts are void.

What then, is the general status of the rule that gifts over on intestacy are void? The rule is founded on no sound reasoning. It does not, like the Rule against Perpetuities, carry out any sound principle of public policy. It is, like the rule in Shelley's case,[41] a technical and arbitrary frustration of that thing so sacred to modern courts, the direct expressed intention of the testator. The rule in Shelley's case has at least the merit of being founded upon very ancient authority,[42] and of having been originally designed to prevent the total defeat of the settlor's intent.[43] But what shall be said of a comparatively modern rule, purely technical and arbitrary, not founded upon any rule of policy, and thwarting the intention of the testator? It is not even what Professor Gray calls it[44] —"a reversion to a primitive type."

§ 173. Extension of the idea of repugnancy to make void all shifting interests by deed or will: In the first volume of the Illinois Reports our supreme court suggested with approval[45] Chancellor Kent's view that the gift over on intestacy was void. Since then nothing seems to have been ventured except that the gift over is repugnant to the devise to the first taker.[46] If it had always been perceived that this doctrine of repugnancy meant only that a gift could not be limited

[40] Jackson *v.* Robins, 16 Johns. (N. Y.) 537, (6 Gray's Cases on Property, 77, 84); 4 Kent's Commentaries, 270.

[41] Ante, §§ 127 *et seq.* Observe that in Welsch *v.* Belleville Savings Bank, 94 Ill. 191 at 199, Mr. Justice Mulkey describes at some length the character of the rule in Shelley's case as defeating the testator's or settlor's intention.

[42] *Ante*, § 128.

[43] *Ante*, § 128.

[44] Gray's Restraints on Alienation, (2d ed.) § 74b.

[45] Ackless *v.* Seekright, Breese (1 Ill.) 76.

[46] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 203; Wilson *v.* Turner, 164 Ill. 398, 405-410; Lambe *v.* Drayton, 182 Ill. 110, 116; Dalrymple *v.* Leach, 192 Ill. 51, 56; Wolfer *v.* Hemmer, 144 Ill. 554.

to take effect upon the intestacy of the first absolute taker, no further harm would have been done. It is clear, however, that the phrase that gifts over on intestacy were void because repugnant, came, in the minds of some judges, to mean that the gift over was void because it was an attempt to cut short a prior absolute bequest or devise in fee, or, in other words, to create a shifting future interest. Thus, all shifting future interests were void because repugnant.[47]

That the supreme court actually fell into this error cannot be doubted after examining *Ewing v. Barnes*[48] and *Silva v. Hopkinson*,[49] where ordinary gifts over by way of executory devise on a definite failure of issue (as the court looked at it), were held void. In both cases the gift over was void for "repugnance" or "inconsistency." In *Ewing v. Barnes* the court most explicitly rested its decision on the doctrine of repugnancy as referred to in the cases of gifts over on intestacy. "This is clearly an attempt," said Mr. Justice Bailey,[50] "to create a limitation in the nature of a contingent remainder or of an executory devise. Such limitation being clearly inconsistent with the devise in fee, cannot be sustained. This result clearly follows from the doctrine laid down by Chancellor Kent (4 Com. 270) and adopted by this court in *Wolfer v. Hemmer*." So, in *Silva v. Hopkinson*,[51] the court said, by Mr. Justice Wilkin: "The contention that by the clause of the will in question an executory devise was made, is untenable. Both daughters surviving the testator and his wife, they take an unconditional fee, and no executory devise can, in such case, exist."

But the evil results lurking in the doctrine of repug-

[47] This even appears from the examination of the language of the Court in cases where the gift was in fact a gift over on intestacy or on alienation by will. Thus in Wilson *v.* Turner, 164 Ill. 398, 409, the Court, per Craig, J. said: "By the limitation over the testator undertook to take away the absolute property in the rents which had been conferred on the wife by a preceding clause in the will. That could not be done. Upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred."

[48] 156 Ill. 61. *Ante*, § 166.

[49] 158 Ill. 386. *Ante*, § 166.

[50] Ewing *v.* Barnes, 156 Ill. 61, 69.

[51] 158 Ill. 386, 389.

nancy did not stop here. There had always been a distinct inclination in the court to repeat, in regard to limitations by deed, as if it had some modern application, the old feudal rule that a fee could not be mounted upon a fee by way of remainder,[52] and this was easily translated into the phrase that you could not limit a fee on a fee by deed.[53] Unluckily enough, *Palmer v. Cook*,[54] the only case which really raised the question of the validity of the ordinary shifting interest by deed arose at the very time *Ewing v. Barnes* and *Silva v. Hopkinson* were decided. The result naturally was that it was squarely held that a simple shifting interest by deed was void for repugnancy.

By recognizing the error of *Ewing v. Barnes* and *Silva v Hopkinson*, our supreme court has to a certain extent cleared up the situation in regard to executory devises.[55] But shifting interests by deed still stand in our reports as wholly void. That result is, it is submitted, due to the failure to recognize that any talk of repugnancy which has any place under the modern practice of creating future interests, was connected only with one specific case, that is, shifting limitations over on intestacy.

Attention, then is called to the true nature of the rule that gifts over on intestacy are void and the inadequate ground upon which it rests, not so much for the purpose of impeaching what seems to have become established in this state, as to impair its capacity for further harm. The fact that gifts over on intestacy are invalid should no longer be used to cast doubt upon executory devises and shifting interests by deed in general. Nor should it be available to defeat the intention of testators and settlors in other cases which may possibly be distinguished from the ordinary case of a gift over on intestacy.

§ 174. III. Gifts over upon a definite failure of issue and intestacy[56]**—Introductory:** It has sufficiently appeared up to this point that there is no real conflict or confusion in the Illinois cases concerning the validity of springing and shifting

[52] *Ante*, § 142.
[53] *Ante*, § 142.
[54] 159 Ill. 300.
[55] Glover *v.* Condell, 163 Ill. 566. *Ante*, § 167.
[56] See Mr. H. Clay Horner's Article in Chicago Legal News, June 24, 1905, p. 362.

interests by way of executory devise. The usual executory devise over upon a definite failure of issue in the first taker is clearly valid, while an executory devise over upon an intestacy by the first taker is equally clearly void. We have now to approach a line of cases where there is real confusion. But our supreme court is not alone in having conflicting decisions upon the case about to be discussed. The same confusion is to be found among the English authorities. In truth, the subject is really difficult.

Suppose we have a case where the gift over is upon the happening of two events—the death of the first taker intestate and without leaving issue him surviving. The same case may appear in a little different form. Thus, the devise may be to A absolutely with full power to alienate by deed or will, but if A dies without having exercised this power and *without leaving issue him surviving* then over to B absolutely. If the gift over were simply upon intestacy it would under the authorities be invalid. If it were simply a gift over upon a definite failure of issue it would be good. How is it, then, where both contingencies are expressed?

§ 175. **State of the authorities:** The English courts have answered the question of the preceding paragraph both ways.[1] The decisions in this state have been surprisingly numerous and the results reached in hopeless conflict.

In *Friedman v. Steiner*[2] a testator devised to his wife absolutely, but in case after his decease she "shall die intestate and without leaving her surviving lawful issue" then over to Friedman and others. Upon partition proceedings by a coowner of the testator the decree found that the wife had an estate in fee simple, with no limitation upon her right to sell and convey the fee, and that the gift over would operate upon whatever property remained in her at the time of her death.

[1] In Gulliver *v.* Vaux, 8 DeG. M. & G. 167, (1746) (6 Gray's Cases on Property, 51), it was held that a gift over upon the death of the testator's children (to whom the estate was given) without leaving issue and without appointing the disposal of the same was bad. On the other hand in Doe d. Stevenson *v.* Glover, 1 C. B. 448, (6 Gray's Cas. on Prop. 43), where the case was stronger against the gift over because it was to take effect if the first taker died without issue then living, and should not have disposed of his interest *in his life time*, the gift over was sustained.

[2] 107 Ill. 125.

The executory devisee appealed and the decree, so far as it found that the widow had full right to alienate in her lifetime by deed or by will at her death, was held valid. So far, however, as the decree found that the widow had a fee simple it was reversed, because it should have found that the widow had a fee simple determinable.[3] This was equivalent to holding the gift over valid, since the fee was determinable only upon the happening of the contingencies upon which the gift over took effect.

In *Burton v. Gagnon*,[4] we find, after an absolute gift to children, a gift over in case "all of my children die intestate and without lawful issue and not survive my wife." Upon a bill filed to have the executory devise over declared void, a decree was entered for the complainants. This was affirmed on two grounds: *first*, that the executory devisees were by a former decree estopped from claiming; *second*, that the executory devise was void on the doctrine of *Wolfer v. Hemmer* because it was a gift over on intestacy.[5] *Friedman v. Steiner* was not mentioned. This was the opinion of only three judges out of seven. Three judges dissented not giving any opinion. Mr. Justice Wilkin concurred in the result only and dissented from the reasoning of the court in some particulars.[6]

[3] See *ante*, § 125.

[4] 180 Ill. 345.

[5] A third possible ground for holding the gift over void was that it was upon an indefinite failure of issue. *Post*, § 199.

[6] It is difficult to determine what portion of the reasoning he dissented from. The report states that he does not concur in the construction of the will taken by the opinion. The only serious question of construction discussed by the opinion of the court was whether the executory devisees took a vested interest so as to be barred by a prior decree, and this it resolved in favor of a *vested* interest in the executory devisees. (*Ante*, § 100, note 18; *post*, § 178). If Mr. Justice Wilkin dissented as to that then he may have believed the case right upon the ground that the executory devisees were bound though they had no vested interest or because the gift over was void as a gift over on intestacy. In Orr *v.* Yates, 209 Ill. 222, (see *infra*), Mr. Justice Wilkin gave the opinion of the court, indicating clearly at the same time his own position.

On the whole Burton *v.* Gagnon had rather a peculiar history in the supreme court: "On the first hearing of the case the court reversed the lower court, in an unpublished opinion by Cartwright, J. [now published in Chicago Legal News for June 24th, 1905.] A petition for a rehearing was filed and was denied. Subsequently

In *Koeffler v. Koeffler*,[7] decided less than a year after *Burton v. Gagnon*, the gift over was sustained upon the authority of *Friedman v. Steiner*. The testator, in the *Koeffler* case, gave to his natural son, Gustav, absolutely, and provided that "should my son die later,—that is after his twenty-fifth year of age,—without issue him surviving," then over to the testator's brother Carl. "But it shall not be possible," the will continued, "in any manner to hinder my son Gustav in the free disposition of his estate after his twenty-fifth year of age." Gustav filed a bill to obtain a construction of the will and it was decreed that he had a fee simple determinable[8] upon his death without issue him surviving, with full power and authority to convey a good indefeasible title in fee simple. It was urged in the supreme court, on the part of Gustav, that he had a fee simple absolute and that the gift over was void. The decree below that Gustav had only a fee simple *determinable* was, however, affirmed. The court was unanimous and went so far as to say that "the rule of interpretation in the case of *Friedman v. Steiner*"——that in a will like the one involved the first gift was only a fee simple determinable ——" had "become a rule of property in this state." *Burton v. Gagnon* was passed by unnoticed.

Now, in *Orr v. Yates*[9] our supreme court seems to have settled it that the gift over is valid in this class of cases. As the court construed the limitations there involved they were as follows: To the testator's wife for life with a vested remainder[10] in fee to his daughter, subject, however, to be divested in favor of executory devisees over if the daughter died before the wife and left no issue surviving the wife and "should not have disposed of the property." The contingency embodied in this last clause is substantially dying intestate.[11] On a bill to construe the will it was decreed that the gift over was void. This was reversed. The court was very sensitive of the fact that to hold the gift over void would be to defeat

the court, of its own motion, set aside the order denying the rehearing, allowed the rehearing and affirmed the lower court." H. Clay Horner in Chicago Legal News, June 24, 1905, p. 362 *et seq.*

[7] 185 Ill. 261.
[8] *Ante*, § 125.
[9] 209 Ill. 222.
[10] *Ante*, § 101 note 5.
[11] *Ante*, § 168a.

the intent of the testator—a thing which the court industriously sought to avoid. Then it relied upon *Friedman v. Steiner* and *Koeffler v. Koeffler,* and remarked, regarding *Burton v. Gagnon,* that "the construction of the will under consideration [there] was not concurred in by a majority of the court."

There is hardly any ground for distinguishing these cases upon the language of the several wills. The wording in *Friedman v. Steiner* and *Burton v. Gagnon* is practically the same. In *Koeffler v. Koeffler* and *Orr v. Yates* the language used makes a case, in legal effect, identical with the other two.

§ 176. **Upon principle the gift over is valid:** It is submitted that the result obtained in *Friedman v. Steiner,*[12] *Koeffler v. Koeffler,*[13] and *Orr v. Yates,*[14] should be sustained. The short ground for upholding these cases is that shifting interests by way of executory devise are valid in general. By applying this general rule to the cases in question the expressed intention of the testator is carried out and there is no reason of law or public policy why such expressed intention should not be given effect.

It will be urged, however, that gifts over on intestacy are bad, and that there can be no sound distinction between such gifts over and a gift over upon the same contingency and another one added.[15]

The obvious reply to this is that the rule making gifts over on intestacy void is bad on principle, defeating, like technical rules with no ground of public policy behind them, the expressed intent of the testator or settlor. Why, then, should not the court seize upon the obvious circumstance of an additional and legitimate contingency to prevent the extension of a rule which never should have had any existence at all?

There is, it is submitted, another reason for drawing a distinction between the case of a gift over upon the death of the first absolute taker intestate, and the case of a gift over if the first taker dies intestate and without issue him surviving. In each case, it is true, the gift over is limited upon an event, which, if standing alone, would make a valid executory devise,

[12] *Ante,* § 175.
[13] *Ante,* § 175.
[14] *Ante,* § 175.
[15] This was the position taken in Burton *v.* Gagnon, *ante,* § 175.

together with a condition that the first taker must die intestate. In the first case the gift over on intestacy in fact includes a gift over upon the happening of two events—the death of the first taker, and intestacy. The only difference between the two cases set out, is that, in the first, the event other than intestacy, upon which the gift over is to take effect, is sure to happen, while in the second case it is doubtful whether it will or not. In the first case we have in substance a forfeiture of the first taker's interest upon alienation by descent. The forfeiture hangs entirely upon the happening of that one event. In the second case the forfeiture upon alienation by descent is of doubtful occurrence, depending upon the happening of a doubtful event—the death of the first taker without issue him surviving.[16] Here the forfeiture on alienation, attenuated enough in the first case, is still further circumscribed and made doubtful by the requirement of the happening of an uncertain event. Is it not fair, then, to say that the gift over cannot possibly offend any rule of public policy against forfeiture upon alienation?

§ 177. **IV. Summary:** The results of the Illinois cases upon executory devises may, then, be summed up as follows:

1. Apart from the rule against perpetuities, all springing and shifting executory limitations by way of executory devise are valid.[17]

2. An exception must be made of gifts over by way of forfeiture for alienation in a particular manner, viz., by deed alone,[18] or by will alone[19] or by descent,[20]—these last being known as gifts over on intestacy.

3. Gifts over upon intestacy and a definite failure of issue are valid.[21]

[16] In Orr *v.* Yates 209 Ill. 222, *ante*, § 175, it will be remembered the gift over was upon intestacy and two other contingencies, viz., the first taker's dying before the testator's wife and leaving no issue surviving the wife.

[17] *Ante*, §§ 164-167.

[18] *Ante*, § 168a.

[19] *Ante*, § 168a.

[20] *Ante*, §§ 169-173.

[21] *Ante*, §§ 174-176.

PART 2.

WHEN AN EXECUTORY DEVISE BECOMES A VESTED INTEREST.

§ 178. General principles: An executory devise never becomes a vested interest until it takes effect in possession or is turned into a vested remainder.[22] It does not follow, however, that an executory devise is always contingent until it vests. It may be an interest which is neither vested nor contingent,[23] but merely what is known as a "certain executory interest."[24] Such is a gift to take effect at a certain time in the future, which is sure to arrive—as a gift to come into possession after ten years,[25] or after a certain life.[26]

In *Blanchard v. Maynard*,[27] it was pretty clearly recognized that the certain executory interest could not be vested. There the testator devised real estate and personal property to trustees to hold and manage for ten years. At the end of the said ten years all the estate and income was to be distributed and vest in the testator's three sons, with a gift over to the survivors in case any son died leaving no issue before the ten years had elapsed. One of the sons did die before the ten years had elapsed and his wife claimed dower and a share by descent. Her bill was, however, dismissed and this was affirmed. Assuming the rule of *Buckworth v. Thirkell*,[28] to be the law of this state, it is clear that the

[22] Gray's Rule against Perpetuities, § 114; Glover *v.* Condell, 163 Ill. 566, 593: "By an executory devise no estate vests upon the death of the testator, but only on some future contingency." Thompson *v.* Becker, 194 Ill. 119, 122; Friedman *v.* Steiner, 107 Ill. 125, 132, 133. Any expression to the contrary in Hempstead *v.* Dickson, 20 Ill. 193, 196 must be regarded as a slip.

[23] Gray's Rule against Perpetuities, § 114; 1 Fearne, Contingent Remainders, p. 1; Butler's note.

[24] Smith on Executory Devises, § 85, 90, 117, 301.

[25] Gray's Rule against Perpetuities, § 114; Blanchard *v.* Maynard, 103 Ill. 60; Rhoads *v.* Rhoads, 43 Ill. 239, *post*, § 288; see also *post*, § 223.

[26] In Young *v.* Harkleroad, 166 Ill. 318 there was a not uncommon gift to take effect after the death of the testator's wife, without apparently disposing of any interest to the wife in the meantime. No question, however, arose on the nature of the gift in question.

[27] 103 Ill. 60.

[28] 1 Coll. Juris., 322; 3 Bos. & Pul. 652, note; Butler's Co. Lit. 241 A note; 6 Gray's Cases on Property 690; 1 Scribner on Dower 2nd ed. page 302; 10 Am. & Eng. Enc. 161, 2nd ed. This case held

ground that the son had no vested interest in the lands involved till the ten years had expired was sufficient.[29]

In *Burton v. Gagnon*,[30] however we have an instance where the opinion published as that of the court takes the position that a shifting executory devise is a vested interest. The will involved in that case, after making a gift to children, which the court recognized as an absolute one, provided for a gift over in case "all of my children die intestate and without lawful issue and not survive my wife." A decree for the complainants that the gift over was ineffective as against the first takers was affirmed. One of the grounds for this holding was that the executory devisees were precluded by a former decree in partition to which they were parties. To this the executory devisees answered that their interest was contingent and so it could not have been the subject of adjudication in the partition suit. The court replied that the interest of the executory devisees was vested—apparently upon some such view of what interests are vested as afterwards obtained in *Boatman v. Boatman*[31] and *Chapin v. Nott*.[32] The court said:[33] "Here the persons to take were in being and ascertained, and by the language of the limitation it was to take effect when the contingency indicated might happen. That was sufficient. The fact that the event was uncertain upon which the limitation over might become effectual was immaterial."

This view is remarkable enough,[34] but it is more extraordinary that it should be announced in the opinion of the court since, on examination, it appears to be only the opinion of a minority. Three judges dissented entirely, and Mr. Justice

that the executory devisee does not take free from dower of the first taker's wife in the absolute interest which the first taker may have had.

[29] It seems, however, that it is also law that where the owner of a reversion dies before the termination of the life estate, his widow is not entitled to dower: Kellett *v.* Shepard, 139 Ill. 433, 449.

[30] 180 Ill. 345.

[31] 198 Ill. 414; *ante*, § 100.

[32] 203 Ill. 341; *ante*, § 101.

[33] p. 356.

[34] It is not perceived, however, that it is any less absurd than the application of the rule of the Boatman case, (*supra*, note 31,) to a contingent future interest after a life estate where such future interests are no longer destructible. See *ante*, § 105.

Wilkin, while agreeing in the result, did "not consent to the construction placed upon the will," that is, he dissented from the view that the future interest was vested.[35]

Part 3.

Alienation of Executory Devises.

§ 179. By descent, devise, release, and sale on execution: As an executory devise before coming into possession is never vested the problem of how far such an interest is alienable may be referred to the more general question of how far future interests not vested are alienable. It would seem safe to argue that there was as much freedom in the alienation of executory devises as in the alienation of contingent remainders.[36] If so the executory devise may pass by descent[37] or devise, provided always of course, the death of the executory devisee be not itself such an event as prevents the executory devise from ever coming into possession. So, the executory devisee's interest may be released to the holder of the preceding interest[38] just as a contingent remainder-man may release to the holder of the particular estate. It seems, however, that an executory devisee's legal interest is not subject to sale on execution.[39]

§ 180. By a conveyance to a stranger inter vivos—Validity at law: The difficult question is this: Can the executory devisee convey *inter vivos* by an instrument sufficient to pass his future interest if it had been vested?

If the deed contain covenants of title doubtless the doctrine of estoppel may be invoked to pass any interest subsequently becoming vested.[40] But suppose no grounds for estoppel exist. In such a case a contingent remainder will not pass to the grantee in the absence of statute providing specifically for

[35] *Ante*, § 175.

[36] *Ante*, §§ 71-80.

[37] Ackless *v.* Seekright, 1 Breese, 76.

[38] Williams *v.* Esten, 179 Ill. 267.

[39] Ridgeway *v.* Underwood, 67 Ill. 419, 430. See *ante*, § 80 for criticism of same holding in regard to contingent remainders.

[40] *Ante*, § 74. As to how far an executory devise may pass by estoppel upon a lease and release, see Ridgeway *v.* Underwood, 67 Ill. 419, 428.

such a result. Whatever statutes are sufficient in this state to give a deed the effect of transferring a contingent remainder,[41] should be sufficient to effect the transfer of an executory devise. It is believed that at least since the act of 1872 describing the effect of the statutory quit claim deed,[42] it might well have been held that legal executory devises were transferable by such deeds even though the future interest was not expressly described or mentioned in the conveyance.[43]

In the absence of any statute or ground of estoppel it seems to be the rule of the English cases that an executory devise, like a contingent remainder, is not transferable by deed of grant to a stranger.[44] Why is this? A contingent remainder was not transferable in this manner because, *first,* feudally it was nothing until it was vested, and, *second,* a feudal public policy forbade such conveyances, as being champertous.[45] Until *Pells v. Brown,*[46] in 1620—that is for nearly a century after executory devises came to be recognized as valid under the Statute of Wills of Henry VIII—there were indications that they were to be put on the same footing as contingent remainders.[47] Perhaps it was during that time that the rules applicable to the transfer of contingent remainders came to control the conveyance of an executory devise. Then, by the time the conveyance of such interests ceased to be champertous, and executory devises, by becoming indestructible under *Pells v. Brown,* became *something,*[48] even before vesting, it was too late to change the rules concerning their transferability.

§ 181. In equity: In equity at least the future interest by way of executory devise is assignable. Such is the rule of the English courts,[49] and it may fairly be assumed that the

[41] *Ante,* §§ 76-79.

[42] *Ante,* § 77.

[43] *A fortiori,* if it be expressly indicated in the quit claim deed that the executory devise shall pass, it may do so at law. Whether or not, in a given case, an express intent to transfer the future interest exists, is dependent upon the suggestions of § 181.

[44] Smith's Executory Devises, § 751; 2 Preston on Abstracts, 284.

[45] *Ante,* §§ 78, 79.

[46] Cro. Jac. 590; (5 Gray's Cases on Property, 163).

[47] *Ante,* § 88.

[48] "These limitations [executory devises] are not held to be mere possibilities, but are regarded as substantial interests or estates," *per* Walker, J., in Waldo *v.* Cummings, 45 Ill. 421, 428.

[49] Smith on Executory Devises, § 749.

law is the same here as in England.[50] The conveyance, however, must show an intent to transfer the future interest just as, in the transfer of springing and shifting equitable interests, an intent that they should pass must appear. As to when the instrument of conveyance sufficiently shows such an intent, it is believed that no distinction need be made between the case of a legal executory devise and springing and shifting equitable interests by will.

The careful conveyancer, of course, will so draft the instrument that the future interest to be transferred is expressly described and mentioned, leaving no doubt as to the intention of the transferor to convey it.

Suppose, however, the future interest is not mentioned expressly. Suppose, for instance you have simply a quit claim deed from the executory devisee.

If the transferor has a present, as well as a future interest in the property mentioned in the deed, it seems clear that there can be no expressed intent to convey the future interest,[51] and it seems to make no difference whether the quit claim deed be governed by the law as it stood before[52] the act of 1872 concerning the effect of the statutory quit claim deed,[53] or after that act.[54] It is conceived that the holding might have been different after the act of 1872.[55]

Suppose, however, that the grantor has only a future interest in the land mentioned and nothing else. Is a quit claim deed in the usual form, without mentioning any future interest, sufficient to transfer in equity the executory devise? The cases certainly seem to answer this question in the negative. In *Kingman v. Harmon*,[56] the point seems to have been fairly raised. The testator (as the court construed the will there involved) created a springing executory interest by

[50] *Ante*, § 75.

[51] Ridgeway *v.* Underwood, 67 Ill. 419; Glover *v.* Condell, 163 Ill. 566; Thompson *v.* Becker, 194 Ill. 119. See also Shephard *v.* Clark, 38 Ill. App. 66. Compare, however, Goff *v.* Pensenhafer, 190 Ill. 200, 216.

[52] Ridgeway *v.* Underwood, 67 Ill. 419

[53] *Ante*, § 77.

[54] Glover *v.* Condell, 163 Ill. 566; Thompson *v.* Becker, 194 Ill. 119. See also Shephard *v.* Clark, 38 Ill. App. 66.

[55] *Ante*, § 77-79, 180. Compare Goff *v.* Pensenhafer, 190 Ill. 200, 216.

[56] 131 Ill. 171.

devising lands to his children to be divided among them when the youngest attained the age of twenty years.[57] The guardian of the children by proper proceedings in the county court,[58] mortgaged the children's interest and wasted the proceeds. On a bill to foreclose the mortgages it was assumed that since the children's interest was contingent (as the court put it) the wards had no assignable estate.[59] This entirely overlooks the point that executory devises are assignable in equity.[60] Perhaps *Kingman v. Harmon* could be supported on the ground that by a proper construction of the deed it did not refer to any future interest, but purported to pass a present interest in possession which did not exist. This, however, is unsatisfactory since it tends to too much limit the effect of conveyances. The minors had no other than a future interest in these lands. It seems that under such circumstances the deed, though not referring to the future interest in terms, should be construed to refer to it by necessary implication.[62]

Both *Nevius v. Gourley*[63] and *Cassem v. Kennedy*,[64] present instances of the attempted transfer of legal executory devises. In both cases there had been a conveyance by deed of the future interest and in both relief was sought by the transferee. In neither case, however, had the event happened upon which the future interest was to take effect. In the

[57] The trustees took apparently for a term of years, until the youngest reached the age specified. They did not hold the fee subject to a trust to divide and distribute it among the children.

[58] No objection was made to these proceedings, so it is assumed that they were proper.

[59] The Court does not go upon the ground that the act relating to guardians (R. S. 1874, Chap. 64, sec. 24), did not authorize the guardian to mortgage. That act provides that "the guardian may by leave of the County Court, mortgage the real estate of the ward for a term of years not exceeding the minority of the ward or in fee * * * ." The Court evidently read this statute as if it gave the guardian power to mortgage in fee every assignable interest in real estate of the ward and so the question became this: Did the ward have any assignable interest at the time of the mortgage?

[60] Shephard *v.* Clark, 38 Ill. App. 66, may be *contra.*

[62] Upon the same ground that a will not specifically referring to a power, is held to exercise it when the property devised could only be disposed of under the power. *Post*, § 246.

[63] 95 Ill. 206, 97 Ill. 365.

[64] 147 Ill. 660.

first case it never could take effect and so the assignee of the future interest by way of mortgage, was denied any foreclosure. In the latter case the assignee brought a bill to construe the will and this was dismissed. The decision might have been put on the ground that the actual question might never require a decision. Upon the plaintiff's application, however, the court declared that the executory devisees' deed "conveyed nothing."

PART 4.

EFFECT OF FAILURE OF EXECUTORY DEVISE OR OF GIFT PRIOR TO EXECUTORY DEVISE.

§ 182. Effect on an executory devise of the failure of the prior gift: By the will involved in *Mills v. Newberry*[1] the testatrix devised to her mother upon a condition precedent, that the latter made a will devising all that she should leave unspent and undisposed of at the time of her death, to a charity mentioned. The mother refused to make the will. It was held that the whole gift to the charity failed.

The court disregarded the formal condition precedent to the gift to charity contained in the proviso that the mother must make a will, and treated the case as if the gift were to the charity designated of so much as remained undisposed of and unspent.[2]

Viewed in this way there would have been, if the mother had accepted the provision made for her, an insuperable objection to the gift over. It would have been an executory devise by way of forfeiture upon an attempted alienation by will[3] or upon intestacy.[4] Since, however, the mother renounced and refused to take under the will, we have a case similar in principle to the one where the interest preceding the gift over on intestacy fails because of the death of the first taker in the testator's life time. An English authority, *Hughes v. Ellis*,[5] has held that, under these circumstances, the gift over must fail because of the rule that, if events which put an end to the preceding estate had happened after the testa-

[1] 112 Ill. 123.
[2] 112 Ill. 123, 132-134.
[3] *Ante*, § 168a, note 7.
[4] *Ante*, §§ 169, *et seq.*
[5] 20 Beav. 193 (1855) (5 Gray's Cases on Prop. 210).

tor's death, and if, then, the executory devise would have failed, the gift to the second taker must fail if these events happened before the testator's death. If this rule be accepted the decision in *Mills v. Newberry* is, of course, correct. It is believed, however, that the principle announced is open to some objections. The case of *Hughes v. Ellis* has been doubted in England.[6] Furthermore, actual results do not support it. Suppose, for instance, personal property be bequeathed to A and the heirs of his body, but if A die without issue, then to B. If A outlives the testator and takes, B's interest is void for remoteness.[7] If, therefore, *Hughes v. Ellis* be followed, it must be void if A dies in the testator's life time. There seems, however, every reason to believe that, under the English authorities, the gift to B would not fail.[8] It must be apparent that the reasoning upon which this result rests would overthrow *Hughes v. Ellis.* The gifts over on an indefinite failure of issue or by way of forfeiture on alienation are void because they violate a rule framed in response to an active principle of public policy. How perfectly absurd, then, it would be, where the first taker dies in the life time of the testator or renounces the will after his death so that there could not possibly be any remoteness or forfeiture, to say that the gift to the second taker is void.

It might be urged as a reason for the result in *Mills v. Newberry,* that the condition upon which the gift over was to take effect had never actually happened, and never could happen, because the mother could not, in fact, die intestate as to the property bequeathed or fail to alienate it by will, since she did not take it under the will. But even assuming this to be so, it should be observed that there is a line of cases[9] where the event upon which a gift over is limited does not literally happen and where, nevertheless, if the preceding interest fails ever to take effect (as usually because the first taker does not come into existence), the second interest limited

[6] *Per* James, L. J., in In re Stainger's Estate, 6 Ch. Div. 1, 14, 15 (1877) (5 Gray's Cases on Prop. 212).

[7] *Post,* § 204.

[8] 1 Jarm. (4th ed.) 351, 5 Gray's Cases on Prop. 212.

[9] Jones *v.* Westcomb, 1 Eq. Cas. Ab. 245, pl. 10 (5 Gray's Cases on Prop. 199); other cases cited, 5 Gray's Cases on Prop. 200, note 1; also Tarbuck *v.* Tarbuck, 4 L. J. N. S. Ch. 129 (5 Gray's Cases on Prop. 207).

takes effect, or not according as it seems to be the testator's intent that it shall do so when a preceding interest is knocked out of the way, or only where a condition precedent has happened. Applying this test the gift to charity in *Mills v. Newberry* might well have been sustained.

In *Frail v. Carstairs*,[10] there was a devise to James, the son of the testator, in fee, but if James died unmarried, then there was a gift over to other children. James died in the testator's lifetime, without issue and unmarried within the meaning of the will. The decree below sustained the claim of the executory devisees. This, it would seem, was sound, either upon the ground that the testator intended the gift over to take effect when a preceding interest was knocked out of the way, or because the event had happened upon which the gift over was to take effect, and if the first taker had survived the testator, the gift over would have been upheld. The decree was, however, reversed because of the application of sec. 11 of the Statute on Descent[11] and it was held that, as to the share of James, there was an intestacy, and the executory devise was apparently defeated.

§ 183. **Effect of failure of gift over upon the preceding interest:** It may in general be said that the effect of the failure of a gift over because it is void for remoteness, is to leave the preceding gifts which are not too remote valid as the testator has limited them. If the preceding estate is a fee or absolute interest it will never be divested.[12]

It may be that the limitations of future interests can be so mixed up together or so made dependent upon each other that gifts not themselves too remote, but which precede an executory interest which is, will fail, upon the ground that both gifts were a part of the general scheme which was not intended to be carried out at all unless wholly as indicated. It would seem as if the extreme limit of the application of such a rule had been reached by our Supreme Court in *Lawrence v. Smith*,[13] *Eldred v. Meek*[14] and *Pitzel v. Schnei-*

[10] 187 Ill. 310.

[11] R. S. 1845, p. 539 § 14; R. S 1874 ch. 39, sec. 11.

[12] Post *v.* Rohrbach, 142 Ill. 600, 606; Howe *v.* Hodge, 152 Ill. 252. 279; Nevitt *v.* Woodburn, 190 Ill. 283, 288; Chapman *v.* Cheney, 191 Ill. 574, 586, 592.

[13] 163 Ill. 149.

[14] 183 Ill. 26, approving the same

der.[15] So far, it is believed, did the court go, that any comprehensive scheme of limitations of present and future interests is entirely jeopardized if one future interest is void for remoteness. It may even be a question whether these cases are not in fact inconsistent with the results reached in *Chapman v. Cheney* and *Howe v. Hodge*.[16]

PART 5.

ACCELERATION OF SPRINGING EXECUTORY DEVISES.[17]

§ 184. Blatchford v. Newberry[18] and Slocum v. Hagaman:[19] In both these cases the element of a legal life estate and remainder was absent. In both cases an annuity was given to the widow. In the first only an annuity was given and in the second, to an annuity was added some lands in fee. In both cases there was a residuary clause or its equivalent, apparently creating a springing executory interest to take effect after the death of the wife. In both cases the wife renounced. In *Blatchford v. Newberry* the future gift was held not to have been accelerated. In *Slocum v. Hagaman* the court seems to have given an unnecessary opinion to the effect that the future interests were accelerated and to have placed this opinion on the ground that the special context of the will indicated an intent that the property should be sooner divided if not necessary for the protection of the wife's annuity.[20]

PART 6.

INDESTRUCTIBILITY OF EXECUTORY DEVISES.

§ 185. Executory devises are indestructible: When a future interest is spoken of as destructible, destructibility by a rule of law defeating the expressed intention of the settlor is referred to. Thus, the rule of law which requires certain con-

position taken in Fosdick *v.* Fosdick, 6 Allen, 41, (5 Gray's Cases on Property, 609).

[15] 216 Ill. 87. See also Reid *v.* Voorhees, 216 Ill. 236.

[16] *Supra*, note 7.

[17] See *ante*, § 93 note on Acceleration of Remainders.

[18] 99 Ill. 11.

[19] 176 Ill. 533.

[20] The case could of course be sustained on the application of the doctrine of acceleration as applied to the case of remainders providing the wife took by implication a life estate in what was given after her death.

tingent future interests after a particular estate of freehold to vest in possession, at the termination of the preceding estate, or fail entirely,[21] made the future interest destructible by the act of the holder of the preceding estate in prematurely terminating the preceding interest by forfeiture or merger. The idea of destructibility, then, became associated with the power of the owner of the first interest to destroy the second.

Since *Pells v. Brown*,[22] in 1620, it is fundamental that executory devises are not destructible in this sense by any act of the first taker.[23] There is no exception to this in the case where the gift over is to take effect only if the first taker alienates in a particular manner. In such cases the gift over is for the most part invalid as being an illegal condition of forfeiture upon alienation.[24] But if the gift over be held valid, as in the case of an executory limitation conditioned to take effect upon the first taker's dying without issue him surviving and intestate,[25] it is clear that if the first taker alienate by deed or will the event will never happen upon which the gift over is to take effect. Hence, it will fail. In a very loose sense it may be said that the conditional limitation is destructible by the act of the first taker. It was only in this sense that it was hinted in *Friedman v. Steiner*[26] that the future interest might be defeated. There was, therefore, no reason why our supreme court, in *Orr v. Yates*,[27] should say that *Friedman v. Steiner* was

[21] *Ante*, §§ 81-92a.

[22] Cro. Jac. 590, 2 Roll. R. 196, 216, (5 Gray's Cases on Property, 163).

[23] The fact that executory devises are indestructible makes it proper for our supreme court to say in Waldo *v.* Cummings, 45 Ill. 421, 428: "These limitations [executory devises] are not held to be mere possibilities, but are regarded as substantial interests or estates."

[24] *Ante*, §§ 168a-173.

[25] *Ante*, §§ 174-176.

[26] 107 Ill. 125.

[27] 209 Ill. 222 232.

Note on the assessment of the inheritance tax (Laws (Illinois) 1895, p. 301) upon future interests of any sort whatsoever: Under the authority of three recent cases, (People *v.* McCormick, 208 Ill. 437, 443-444; Billings *v.* People, 189 Ill. 472, 485; Ayers *v.* C. T. & T. Co., 187 Ill. 42), the inheritance tax does not become payable till it can be finally ascertained, *i. e.*, till an interest under the will has become indefeasibly vested in somebody to some extent. Even then the tax can only become payable so far as it is levied upon such interest as has become indefeasibly vested. (People

overruled so far as it declared that the holder of a fee, subject to be defeated in favor of an executory devisee, can convey to one who takes an indefeasible title.

v. McCormick, 208 Ill. 437. Tax levied on the twenty year annuity to children). It is quite immaterial, therefore, whether the interests under the will in question are vested or contingent in the ordinary sense of those words. (People *v.* McCormick, 208 Ill. 437, 443-444; Ayers *v.* C. T. & T. Co., 187 Ill. 42, 60). If contingent they are not taxable till the contingency happens and they become vested. If vested, but not indefeasibly so, they are taxable only in so far as it can be said that they will not be defeated for a particular period of time in any event.

A point of great nicety and as yet undecided by our Supreme Court, is whether during the period preceding the time when the tax is ascertainable and payable, there is any lien upon any real estate which is the subject of the future interest. There is a very convincing and logical argument that it is not. The lien (sec. 22 of the Act) is upon the property "chargeable" with the tax. What property, then is the tax charged upon? Is it upon the property of the deceased as such, which he leaves at his death or is it upon the property of the deceased as such, which comes into the hands of the legatee or devisee? It is believed the latter is the sound construction of the Act. The tax is upon the *right of succession.* (People *v.* McCormick, 208 Ill. 437, 444; Billings *v.* People, 189 Ill. 472, 486, 487). The tax, by the very terms of the Act, is computed upon the amount *received* by the legatee. *Ergo,* the property chargeable with the tax is property received by the legatee or devisee. *Ergo,* the lien is on such proceeds of the sale of lands as are actually distributed to the legatee or devisee. (For the steps of this reasoning the writer is indebted to a copy furnished him of an opinion of Mr. John P. Wilson).

It might be urged also, that any other conclusion would result in hardship, because it would place upon land a lien for an unascertained amount which could not be gotten rid of. This, however, is not a position of any great strength, because it is believed that if the Act were amended it would simply result in a provision for the release of the lien upon giving the state security. If the lien be held to exist under the Act as it now stands, the result is substantially the same, only the security is given to the purchaser.

The doubt which arises respecting the effectiveness with the court of the reasoning above set forth is this: Should the view obtain, in accordance with that reasoning, that the tax is not a lien, then what practical chance has the state of collecting large amounts of taxes arising because of the devise of lands in this state where such lands are sold and the proceeds taken out of the state by foreign trustees? In Billings *v.* People, (189 Ill. 472, 486) there is the direct suggestion of the court that the tax, though not ascertainable and payable till a future time is yet "made a lien on the property which will continue until the uncertainty changes to certainty."

CHAPTER VI.

FUTURE INTERESTS IN PERSONAL PROPERTY.

§ 186. **Their validity—In general:** Where personal property is conveyed either *inter vivos*[1] or by will[2] upon certain trusts, it seems that the equitable future interests of whatever sort are validly created.[3] The important problem of this chapter is: How far are future interests in personal property valid where there is no intervention of trustees and no trust created?

So far as future interests in *chattels real* are concerned we have no actual decisions. Our supreme court has, however, on two occasions recognized the validity of a gift by will after an expressed life interest in a chattel real. In *Waldo v. Cummings*[4] the court recognized the force of *Manning's*[5] and *Lampet's* cases[6] which established the validity of such a future interest. In *Welsch v. Belleville Savings Bank*[7] the same result was approved. As to the creation of future interests in chattels real by a transfer *inter vivos*, there is nothing in this state except what may by inference be included in the *dicta* and decisions recognizing the validity of future interests in chattels personal[8] created in this manner.

As regards *chattels personal* it seems to be very clearly the law here that the future interest limited by *will* after a gift for life is enforcible.[9] The validity of the same future

1 Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 205.

2 Hetfield *v.* Fowler, 60 Ill. 45; Buckingham *v.* Morrison, 136 Ill. 437; Davenport *v.* Kirkland, 156 Ill. 169; Glover *v.* Condell, 163 Ill. 566; Ransdell *v.* Boston, 172 Ill. 439, (*semble*); Chapman *v.* Cheney, 191 Ill. 574.

3 Gray on Rule against Perpetuities, §§ 75, 78, 87.

4 45 Ill. 421, 427.

5 8 Co. 94b, (5 Gray's Cas. on Prop. 130).

6 10 Co. 46b., (1612).

7 94 Ill. 191, 204.

8 See *infra* this section.

9 Waldo *v.* Cummings, 45 Ill. 421; Burnett *v.* Lester, 53 Ill. 325; Trogdon *v.* Murphy, 85 Ill. 119; Walker *v.* Pritchard, 121 Ill. 221; Welsch *v.* Belleville Savings Bank, 94 Ill. 191, (*semble*); In re estate of Cashman, 134 Ill. 88, (*semble*);

interest when attempted to be created by *deed* might well have been regarded as left in doubt by the *dictum* of Mr. Justice Mulkey in *Welsch v. Belleville Savings Bank*.[10] But since the case of *McCall v. Lee*[11] the rule in this state ought to be regarded as settled, that such an interest can be limited by deed. The case goes beyond that proposition because there the instrument by which the future interest was created was not even a deed. It was simply a written contract founded upon valuable consideration accompanied by a delivery of the personal property itself to the first taker.

§ 187. Exception where articles are necessarily consumed in the using: It is well settled that upon a gift to A for life of specific chattels personal which are by their nature to be enjoyed and used by consuming them, as a cellar of wine, the absolute property passes to A. He may consume them and he will be answerable to nobody. This proposition is clearly recognized by the *dicta* of our supreme court.[12] Suppose, now, that a future interest in these same chattels be limited to B absolutely after the death of A, and that at the time of A's death a portion of them have not been consumed, will the future interest take effect as to the unconsumed portion as a valid executory devise after an absolute interest, or will it fail as an attempted gift which is void for uncertainty?[13] This is a question of some nicety upon the authorities at large.[14] Our supreme court has not hinted at the result which it might reach.[15]

Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 353, (*semble*). See also Turner *v.* Wilson, 55 Ill. App. 543, (164 Ill. 298); Randolph *v.* Hamilton, 84 Ill. App. 399.

[10] 94 Ill. 191, 205.

[11] 120 Ill. 261. See also Thornton *v.* Davenport, 1 Scam. (2 Ill.) 296, 299 (*semble*) *accord.*

[12] Burnett *v.* Lester, 53 Ill. 325, 334; Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 205; Buckingham *v.* Morrison, 136 Ill. 437, 446; Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 353; 2 Williams Executors, 7th Am. from 9th Engl. ed. star page 1253.

[13] *Ante*, § 171.

[14] In favor of the future interest in such a case: Hayle *v.* Burrodale, 1 Eq. Cas. Abr. 361, § 8 (1702); Healey *v.* Toppan, 45 N. H. 243, 260 (*semble*).

Contra: Randall *v.* Russell, 3 Meriv., 190 (1817) (*semble*); Andrew *v.* Andrew, 1 Coll. Ch. Cas. 686, 690 (1845).

[15] Observe, however that if the chattels personal specifically bequeathed be not of the sort necessarily consumed in the using, the addition of a power in the first

§ 188. Nature of the future interest whether legal or equitable: Is the valid future interest in personal property legal or equitable? In *Welsch v. Belleville Savings Bank,*[16] Mr. Justice Mulkey said: "In equity Arthur Herold had a vested remainder in the $4,000 in question. We say in equity, for the whole doctrine of remainders in personal estates is a product of purely equitable growth. Strictly speaking it is unknown to the law as distinguished from equity." This language was *dictum* in the case and in view of the number of authorities English and American to the effect that the future interest is *legal,*[17] the view of the learned judge may well be doubted.

§ 189. Whether vested or executory[18]—Where a chattel real is involved: The more difficult theoretical question is whether the future interest after a present interest for life is a vested or an executory limitation.[19] So far as we may judge from the language of our supreme court the future interest in case of *chattels real* is to be regarded as an executory limitation after an absolute interest in the first taker.[20] This was certainly the view upon which the earlier English cases proceeded.[21] "The reason why there could be no estate or in-

taker for life to sell, dispose, or use up for his own benefit (*post,* §§ 251, 253; Green *v.* Hewitt, 97 Ill. 113, 117, *semble;* Siegwald *v.* Siegwald, 37 Ill. 430; Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 202; Walker *v.* Pritchard, 121 Ill. 221, 229-230), will not prevent the second taker from acquiring what may be left at the first taker's death. *Ante,* § 168 a, note on Life Interests with power of disposition.

[16] 94 Ill. 191, 204.

[17] Future Interests in Personal Property by John Chipman Gray, 14 H. L. R. 397, 417; Gray's Rule against Perpetuities §§ 86, 88; Hoare v. Parker, 2 T. R. 376, (5 Gray's Cas. on Prop. 141); Anonymous (1802), 2 Haywood (N. C.) 161, (5 Gray's Cas. on Prop. 142); Duke *v.* Dyches, 2 Strob. Eq. (S. C.) 353 n. (5 Gray's Cas. on Prop. 145); Brummet *v.* Barber, 2 Hill. (S. C.) 543, (5 Gray's Cas. on Prop. 148); Rogers *v.* Randall, 2 Speers. (S. C.) 38, (5 Gray's Cas. on Prop, 160).

[18] On vesting of legacies in general, see *post,* §§ 208, *et seq.*

[19] For a full treatment of this question see Future Interests in Personal Property, by John Chipman Gray, 14 H. L. R. 397.

[20] Waldo *v.* Cummings, 45 Ill. 421, 427, (adopting the doctrine of Manning's & Lampet's cases); Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 204.

[21] Future Interests in Personal Property, by John Chipman Gray, 14 H. L. R., 397, 410, 411.

terest for life in a chattel real," says Professor Gray,[22] "was the technical one that in the eye of the law a life estate was greater than any estate for years; and therefore as a term for years, even for a thousand years, would merge in a life estate, so a grant of a term for years to one for his life purported to carry something which was greater than a term for years and which carried merely a term for years only because that was all there was to carry, and did carry the whole term."

§ 190. Where the limitation is of a chattel personal—The language of our Supreme Court: As regards the future interest after a limitation for life in *chattels personal*, it must remain doubtful, upon the language of our supreme court, whether it is vested or executory. In *Waldo v. Cummings*[23] the court said, in substance, that the gift of a chattel[24] for life came finally to be held to be a gift of the use only, and that the remainder over was good as an executory devise. This statement contradicts itself. If the first taker has merely the use for life, the second taker must have the absolute property and so a vested and not an executory interest. The language of Mr. Justice Mulkey in *Welsch v. Belleville Savings Bank*[25] is, therefore, more consistent. "When," he says, apparently speaking of a chattel personal, "a chattel is given to one for life, with a limitation over to another the first taker really aquires nothing but the right to the use, and such is the recognized doctrine at the present time." In *Glover v. Condell*[26] we find an apparent subscription to the statement from the American & English Encyclopedia of Law[27] to the effect that "all future interests in personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory." It certainly is a little difficult to see how, if the interest be

[22] Future Interests in Personal Property by John Chipman Gray, 14 H. L. R. 397, 402.

[23] 45 Ill. 421, 427.

[24] The court did not speak of chattels personal specifically, but such must have been the import of its language since the theory that the first taker held the use for life never had any application where a chattel real was involved. On the contrary the one who took a chattel real for life had the absolute property and the gift over was good as an executory devise. *Ante*, § 189.

[25] 94 Ill. 191, 204, 205.

[26] 163 Ill. 566, 586.

[27] Vol. 20 (1st ed.) 930.

vested, it can also be executory in the ordinary sense. Finally, in *Hobbie v. Ogden*[28] we find the court saying that "the principles applicable to the vesting of real estate apply generally in the case of personal property."

§ 191. The point actually decided: The language of our supreme court, then, will hardly settle anything concerning whether the future interest is vested or executory. Nor is the point involved in the usual case of a gift of a chattel personal to A for life and then to B absolutely. In such a case it does not become material whether B's interest is vested or executory. Professor Gray[29] has, however, pointed out two test cases where the question does become vital. The second of these is this: Suppose chattels personal are bequeathed to A for life and there is no gift over. If A take an absolute interest, then, there being no gift over, the property on A's death must go to his executor or administrator. If, however, A has merely the use of the property for life there will be a reversion to the testator's executor. This exact case was presented to our supreme court in *Boyd v. Strahan*.[30] It was there held that A had only the use for life and that after A's death the representatives of A's devisor might recover the property from the residuary legatees of A.

This is in accord with the view of the first English cases which recognized the validity of the future interest at all. They proceeded upon the theory that the first taker for life had only the use for life and that the second taker had the absolute property.[31]

§ 192. Rights of those interested in personal property[32] in which future interests are created—Enjoyment in specie or conversion and investment—Where the intent of the settlor

[28] 178 Ill. 357, 365.

[29] Future Interests in Personal Property, by John Chipman Gray, 14 Harvard Law Review, 397, 413-414, 417.

[30] 36 Ill. 355. For other cases in accord with this see Prof. Gray's article, 14 Harvard Law Review, 397, 418, note 5; cases *contra* referred to pp. 417-418.

[31] Future Interests in Personal Property, by John Chipman Gray, 14 H. L. R. 397, 410-411.

[32] Questions on the subject matter of this and §§ 193 and 194 come up most frequently in courts having probate jurisdiction upon the distribution of assets to the legatees. A draft of these sections was therefore submitted to the Hon.

is expressed in words: The first difficulty to be met with is whether the first taker for life is to enjoy the property in specie, or whether it must be converted into cash, the proceeds invested, and the income only, paid to the first taker for life. This is a question which in the first instance depends upon the expressed intent of the creator of the interests.[33] Thus, where the gift after the limitation for life is of "what is left," it is held that the life tenant has the right to enjoy in specie, even to consuming or using up perishable and depreciating personal property.[34] So, if the right be given to the first taker for life to use up and consume the subject-matter of the gift, he will be entitled to it in specie, even though it be given by a general or residuary clause and though the property may be such as must ordinarily be converted and invested and the income paid to the first taker for life.[35]

§ 193. Where no intent has been explicitly indicated by words: For the determination of the result to be reached in

Charles S. Cutting, Judge of the Probate Court of Cook County, asking how far they had stated the law as he was accustomed to lay it down in his court. In reply he said: "I think you may say, if you care to, that on this subject, your statement is quite in accord with the rulings of this court on the same subject."

[33] Buckingham *v.* Morrison, 136 Ill. 437, 449.

[34] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 201-203; Green *v.* Hewitt, 97 Ill. 113, 117; Siegwald *v.* Siegwald, 37 Ill. 430. See *post*, § 251.

[35] In re Estate of Cashman, 134 Ill. 88. Here the gift was of $3,000 for life. This must ordinarily have been invested by the executor and the income paid to the legatees for life (see *infra*). The executor, however, paid over the money in specie to the legatee and the credit for this amount in his final account was sustained. See also Sheets *v.* Wetsel, 39 Ill. App. 600.

It is often an important and difficult question to determine whether the first taker has a right to use up and consume the principal or not. The inclination seems to be to hold that a gift to the second taker after the first taker's life interest of "all that remains" or words of like effect, is sufficient to give the first taker the power to use up and consume the principal fund: Green *v.* Hewitt, 97 Ill. 113, (*semble*); Walker *v.* Pritchard, 121 Ill. 221; in re Estate of Cashman, 134 Ill. 88. In Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 201-202, a different result was reached upon the context of the will in other respects.

this sort of case certain rules have sprung up founded upon the implicitly expressed intention of the testator.

1. If the bequest is of a specific legacy the first taker is entitled to use the subject-matter of it in specie, and the second taker must receive the property at its value as lessened by any depreciation, which is the result of ordinary use.[36]

2. Suppose the bequest be a general legacy and yet not a general residuary legacy:

If the entire subject-matter of the general legacy be money, viz: if the bequest be of a general pecuniary legacy, then the only profit which the life tenant can derive from its use arises from its investment.[37] The investment must, it is believed, be in such securities as trustees are allowed to hold.[38] If the entire subject-matter of the general legacy be income bearing securities, not proper for trustees' investments, as shares of stock in a private corporation, can the stock be retained as an investment and the income used by the life tenant, or must it be converted into cash and invested in proper trustees' securities? If the former is the correct rule, then the result is the same as if the stock had been specifically bequeathed. If the entire subject-matter of the general legacy be an income producing property of a wasting or depreciating character,[39] as a general gift of leaseholds or live stock, can the life tenant take the profits of such wasting property in specie or must they be converted and invested, and only the net income paid to the life tenant?[40]

3. Suppose, as is frequently the case, the bequest is a general residuary gift of personal estate:[41]

[36] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206; Buckingham *v.* Morrison, 136 Ill. 437, 446.

[37] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206 (*semble*); Sheets *v.* Wetsel, 39 Ill. App. 600, 603; Leslie *v.* Moser, 62 Ill. App. 555.

[38] Investment may be in real estate if the remaindermen do not object, but title must be taken to life tenant for life with remainder over: Dee *v.* Dee, 212 Ill. 338, 355.

[39] For a more particular enumeration of property of this description, see *infra* in this same paragraph.

[40] In Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206, the Court speaks as if any general bequest of wasting personal property, whether residuary or otherwise, must be converted and the proceeds invested.

[41] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, (bequest of "all my estate of whatever the same may consist"); Burnett *v.* Lester,

In such a case the residue may consist of cash, personal property of a depreciating or wasting character (*i. e.*, property the depreciation of which in using is in fact a consumption of capital, as in the case of leasehold interests,[42] annuities, or chattels, such as live stock,[43] or horses and wagons, or machinery), chattels of a permanent or non-wasting character, such as pictures or ornaments, the actual use of which involves no necessary depreciation or using up of the thing itself, interest bearing investments proper for trustees to hold, and finally, improper trustees' investments, as stock in private corporations.

As to the cash, if it is to be enjoyed by the life tenant at all it must be invested in proper trustees' securities and the income only appropriated by the first taker.[44] It seems entirely clear that the wasting or perishable property must be at once converted and the proceeds invested.[45] As to chattels which may be spoken of as of a permanent or non-wasting character, as pictures or ornaments, we have no very clear hint in our supreme court of the result which would be reached.[46] No reason is perceived why they should be converted. The interest bearing securities which are proper trustees' investments, the life tenant can take the income from as they stand. Those which are improper trustees' investments must, it is believed, be converted into cash and invested in such securities as it is proper for trustees to hold, and the income from these latter only, paid over to the life tenant.[47] This seems to be an extension of the rule which requires perishable or depreciating property to be converted.

53 Ill. 325, (bequest of "all my personal property consisting of live stock, and also the interest on all moneys and credits due me at my death"); Buckingham *v.* Morrison, 136 Ill. 437, 447, (general residuary clause involved); Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 354.

[42] Burnett *v.* Lester, 53 Ill. 325, 335.

[43] Burnett *v.* Lester, 53 Ill. 325, 335.

[44] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206.

[45] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206; Burnett *v.* Lester, 53 Ill. 325, 335; Buckingham *v.* Morrison, 136 Ill. 437, 447; Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 354.

[46] See, however, Dickinson *v.* Griggsville Nat. Bk. 209 Ill. 350, 354.

[47] Buckingham *v.* Morrison, 136 Ill. 437, 448, (*semble*) (partnership interest must be converted).

The reason which required a conversion in this latter case, was that unless such a course were pursued, it was certain that the second taker could not enjoy the property actually given him. In the case of improper trustees' investments there is no such certainty, but only a danger that the second taker will not so enjoy. Nevertheless, the improper trustees' investments must be converted in order to avoid such danger.[48]

One reason for making any distinction between the different sorts of residuary property which must be converted, is that there are different rules fixing the amount upon which the income of the tenant for life is to be calculated. Under the rule of the English cases, perishable property is valued at the time of the testator's death and the life tenant is entitled to interest on that value from the testator's death. On the other hand, so much of the personal estate as is not in a proper state of investment at the testator's death, or which has not since become so, must be valued as at a period of one year after his death, and interest on the value so taken, be allowed from the testator's death at the standard rate.[49] "In some of the American cases," our supreme court said in

[48] In Buckingham *v.* Morrison, 136 Ill. 437, 448, our supreme court said: "Gradually the meaning of 'perishable' property has been enlarged so as to include securities of a wasting nature, or any form of investment of an uncertain kind, or attended with risk. The conversion and investment here spoken of were thus required, whenever the property so devised by the testator was found at his death to be invested in ships, annuities, leaseholds, railway shares, insurance, canal and gas stocks, partnerships, etc." The actual point involved in that case, however, was whether it was the duty of the trustees to convert, invest and pay over to the *cestui* for life, the income, or to permit the *cestui* for life to enjoy the profits of the partnership in specie. The above language may have applied to the case of conversion by trustees and it does not appear that no distinction would have been made between that case and the case of a legal life interest in the residue of personal property.

[49] Williams on Executors, (7th Am. from 9th Eng. ed.) star page 1248-9. This is what our supreme court referred to in Buckingham *v.* Morrison, 136 Ill. 437, 448, when it said: "In the English cases, the conversion is 'feigned' to have occurred at a given period, that is to say, a value is placed upon the estate at the date of the testator's death, or one year thereafter; the estate is considered as converted into money at such date; this value is made a principal, upon which the

Buckingham v. Morrison,[50] "each amount received from the conversion of the estate is distributed between the tenant for life and the remainder-man, by computing what sum with interest at the standard rate from the date fixed for the beginning of the income will produce the amount so received at the time when it is received, and by investing the original sum so computed as principal, and distributing the remainder as income."

There are questions also as to when interest begins to run in favor of the life tenant,[51] the standard rate of interest to be used,[52] and whether the income in favor of the life tenant is to be computed at simple interest or with rests.[53]

§ 194. How may the second taker protect his property interest: In answering this, several distinctions must be taken:

1. If the tenant for life is entitled to the possesion of the property in specie—as in the case of a specific bequest—no security can be demanded, unless there is a threatened injury.[54]

2. If the first taker is entitled to the possession of the property in specie and has power, either expressed or because of the nature of the property, to consume and use it up, it is clear that no security can be demanded at any time.

3. Suppose, however, there is no right to the actual possession and enjoyment of the property in specie—as if there is a general residuary gift of perishable or depreciating property, and no right in the owner for life to use it up. Must the legatee for life, in that case, before he can receive the actual property from the executors, give security for its proper conversion and investment?

The language of the court in *Burnett v. Lester*,[55] and in *Welsch v. Belleville Savings Bank*,[56] certainly furnishes some

standard rate is computed to determine the income to be paid to the tenant for life until the trust estate is actually converted and invested." See also Clifford *v.* Davis, 22 Ill. App. 316.

[50] 136 Ill. 437, 448.

[51] Buckingham *v.* Morrison, 136 Ill. 437, 447.

[52] Id. 448.

[53] Id. 448.

[54] 2 Williams' Executors (7th Am. from 9th Eng. ed.) star page 1252-3.

[55] 53 Ill. 325, 335.

[56] 94 Ill. 191, 206.

ground for answering this question in the affirmative.' In the latter case it almost seems to have been made one of the grounds for the decision that "where a testator gives to one for life a certain sum of money out of his estate, with a limitation over to another, the former has no right to the possession of the money so bequeathed. The title thereto devolves upon the executor, and it is his duty to see that the same is properly invested and that the annual accumulations are paid over to the tenant for life, and the principal to the remainder-man upon the former's decease." [57]

Hetfield v. Fowler,[58] which is apt to be cited as the strongest case in support of the position that the Probate Court may require the life tenant to give security as a condition precedent to his receiving the principal, does not support such a proposition in the slightest degree. In that case the County Court had decreed that the property be turned over by the executors upon the legatee for life giving security. This was reversed upon the ground that by the proper construction of the will creating the life interest the executors were the trustees of the fund and were directed to hold the principal and only pay the income to the life tenants.[59] The court did say, however: "At least, the exacting of reasonable security, on payment over of the funds, for its preservation for those entitled in remainder would seem to be no more than acting in the line of the faithful performance of the trusts of the will." But this merely indicates that if the trustees choose to pay over the principal to the life tenant before the time of payment, in breach of trust, it would have only been decent to at least demand security. It does not in any way countenance the proposition that the Probate Court has any power to exact security from the life tenant.[60]

[57] See also Sheets *v.* Wetsel, 39 Ill. App. 600, 603. In Leslie *v.* Moser, 62 Ill. App. 555, a bill was filed by the life tenant to compel the holders of the fund to invest as trustees should.

[58] 60 Ill. 45, 48.

[59] This distinguishes the case from Waldo *v.* Cummings, 45 Ill. 421, 430, where the time having come by the expressed terms of the will for distributing to the legatee for life, the trustees had no discretion but to distribute and could not demand security.

[60] The writer at first thought that the language of the court in Hetfield *v.* Fowler went very far

4. It has been suggested that even if the first taker have no right to the possession of the property in specie, yet if the future interest is to take effect upon a contingency which may or may not happen, and not merely after the first taker's death, no security need be given by the first taker, unless cause be shown for so doing.[61] The result reached in *Gannon v. Peterson*,[62] may indicate that such a distinction would be listened to by our supreme court. There it was held

toward the establishment of a rule that the Probate Court might require the legatee to give security. Upon submitting to the Honorable Charles S. Cutting, Judge of the Probate Court of Cook County, the text as originally written dealing with that case, the following reply was received: "I notice you cite *Hetfield v. Fowler*, 60 Ill. 45, as holding that it is proper for the court exercising probate jurisdiction to require a bond as a condition precedent to the turning over of the personal property to the life tenant, if I may use that expression. I have never considered that courts of Probate had this power, and although, under the peculiar circumstances of the Hetfield case the Supreme Court sustained inferentially such a procedure, you will note that the case was reversed upon other grounds and sent back; that it was not paid over at all, hence the question as discussed by the Supreme Court was purely academic. The money never was paid over and no bond ever was given after the hearing of the case by the Supreme court. I know of no other case in Illinois that holds as the Supreme court seems to hold in the Hetfield case, and I much doubt the existence of the rule as there stated. I think I would be willing to aid in the passage of a statute which would give such power, but as there is none, I doubt very much whether the Probate court possesses it.

"The method of disposing of many troublesome cases of that kind has grown up from the practice in this court where the holder of the intermediate estate is also administrator or executor. In such cases we approve the final account, distribute all the distributable assets, find the personal estate in the hands of the first taker and excuse him from further duty. This leaves him still an officer of this court, subject to its orders and bound to account, at such times thereafter as the court may direct, which would only be, of course, upon the complaint of some party in interest. At the death of the intermediate holder of the personalty, the second taker has two remedies: first, of course, against the estate of the deceased first taker, and second, against the bondsmen of the first taker who was also administrator or executor. We find in practice that this works well, and tends strongly to preserve the estate for its ultimate possession."

[61] Gray's Rule against Perpetuities, § 90; 2 Woerner on Administration, (2nd ed.) § 454.

[62] 193 Ill. 372.

that an executory devisee of real estate who was to take upon the death of the first taker without leaving issue him surviving, could not maintain a bill to prevent waste against the first taker in possession unless there were a strong probability that the event would happen upon which the gift over would take effect.

CHAPTER VII.

CROSS LIMITATIONS.

§ 195. Implication of cross limitations—General principles: In *Doe v. Webb*,[1] cross remainders were implied where the devise was to daughters in tail as tenants in common and in default of issue of the daughters then to the testator's right heirs. This result was reached upon the ground that if you did not imply cross remainders, then, on the death of a daughter without issue, the right heirs would take a moiety of the estate, whereas the intent was that the right heirs should take the whole estate together after the death of all the daughters without issue. In *Lombard v. Witbeck*,[2] the authority of *Doe v. Webb* and the usual rule for the implication of cross limitations were recognized at length. Our supreme court there quotes Jarman's summary[3] of Sir G. Jessel's[4] statement of it: "You must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir-at-law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived."

Suppose estates be limited to A, B and C for life as tenants in common with a gift, on the death of the survivor, to their children. A and B die. If cross remainders be implied then C will take the whole till his death. Otherwise, two one-third interests will descend to the testator's heirs-at-law. If the original gift be upon trust so that the life estates are equitable, then the heirs will take only until the death of C, when the ultimate future interest will come in. The existence of this gap into which the heirs come for a short period only,

[1] 1 Taunt. 234 (1808) (5 Gray's Cas. on Prop. 217).

[2] 173 Ill. 396, 409-411.

[3] 2 Jarman on Wills, (R. & T. ed.) p. 552.

[4] Maden *v.* Taylor, 45 L. J. N. S. 569 (1876), (5 Gray's Cases on Property, 229, note).

is the ground upon which the cross remainders in the case put are regularly implied.[5] It is argued from the fact that the heir is to be ultimately excluded that there is an expressed gift for the gap into which he would come. If there be no trust—*i. e.*, if the estate be legal—the result is the same. It might be urged that in such a case, upon the death of A, the heir would take and the future interest would be entirely destroyed as to one-third of the estate.[6] But the rule which operates to destroy the future interest is a rule of law which defeats the intention of the testator.[7] The actual intent expressed is exactly the same as when the interests were equitable. The construction, therefore, which gives us cross remainders by implication in that case should raise them, in the same way, where the interests are all legal. It is so held.[8]

§ 196. Cheney v. Teese[9] and Madison v. Larmon:[10] In *Cheney v. Teese* the testator devised to his grandchildren absolutely, after the death of two daughters, who were given life estates as tenants in common. The supreme court first held that the grandchildren were not to take till after the death of *both* daughters. That would seem to have made a plain case for the implication of cross remainders for life. The court, however, held that each daughter took an estate for her own life in one half and an estate for the life of the other in the same half. Upon the death, therefore, of one daughter before the other, the heirs or devisees of the deceased daughter would take instead of the other daughter. The ground for this construction in preference to that of cross remainders by implication is not perceived.

Madison v. Larmon[11] was a case where the implication of cross remainders for life was to some extent allowed, but where it might, it is believed, have been upheld to a much greater degree. The testator here left two children and fifteen grandchildren. Each one of these children and grandchildren were

[5] Scott *v.* Bargeman, 2 P. Wms. 68, (1722), (5 Gray's Cas. on Prop. 213); Armstrong *v.* Eldridge, 3 Bro. C. C. 215 (1791), (5 Gray's Cas. on Prop. 214).

[6] Fearne, C. R., 310, 311.

[7] *Ante*, § 89.

[8] Ashley *v.* Ashley, 6 Sim. 358, (1833), (5 Gray's Cas. on Prop. 226).

[9] 108 Ill. 473.

[10] 170 Ill. 65.

[11] 170 Ill. 65.

given, in different proportions, shares in the real estate involved, as tenants in common for life. The testator's son took two shares for life, with a further gift of the same two shares to the son's children who survived him for life. Each of the five children of the son living at the testator's death took one share for life. The testator's daughter took six shares for life, with a contingent gift of the same six shares to those of her children who survived her, for life. Each of the daughter's ten children, living at the testator's death, took a share for life. The two children of a deceased child of the testator took each a share for life. Then it was provided that if any of said grandchildren of the testator "shall die leaving no issue alive at the date of such death the share or shares of the child so dying shall be equally divided among the brothers and sisters, to be held by them, respectively, for and during their lives." There was a final gift when all the seventeen life tenants in existence at the testator's death had died, to all the grandchildren then living of the testator, and the issue of any deceased grandchild. Here, then, we have a gap between the time when the larger part of the life estates terminate and when the final gift of the whole estate is to take effect. If the gifts be carried out according to the intention of the testator it is apparent that the heirs-at-law will have to step in and fill that gap temporarily. The case would seem to be a perfectly proper one, therefore, to imply cross remainders in general. But such cross remainders cannot be implied among the seventeen life tenants altogether, nor yet between the fifteen grandchildren. The testator has clearly indicated that the grandchildren are to be regarded in three groups, viz., the children of each one of his three children form a separate group. The cross remainders, then, must first be implied among the grandchildren of each group. Such is certainly the position taken in Judge Tuley's opinion, which was adopted as the opinion of the supreme court.[12] This is as far as the learned judge went in implying cross remainders. He seems, in effect, to have refused to imply them between the different groups of grandchildren. It is the *dictum* of the opinion that if all the grandchildren of one group die without having issue before the time for vesting in possession of the

[12] 170 Ill. 65 at page 70.

ultimate limitations, the final gift as to the shares limited to that group will be destroyed[13] under the rule which causes certain contingent future interests after a particular estate of freehold to fail unless they take effect by way of succession.[14] It is an interesting question whether this is not a case where cross remainders for life should not be so implied as to fill up completely the possible gap occurring prior to the time of taking effect of the ultimate gift.[15]

§ 197. "Survivor" construed as "other": As a general rule survivor is to be taken in its primary or literal meaning. If, therefore, you have a gift to A, B and C, and if either die without having issue him surviving, then his share to go over to the survivors, and A die first leaving children and then B die without leaving issue him surviving, C being the only survivor at that time, will take all of B's share.[16] Under certain circumstances, however, it has become the settled rule that "survivor" shall be construed "other," so that in the case just put B's share will go, one-half to A's children and one-half to C.[17] The rule may be thus stated: Where by taking "survivor" literally there is one contingency not provided for, upon the happening of which the property will pass to the heir-at-law or next of kin as on an intestacy, if the other contingencies are provided for, including the ultimate gift over, "survivor" is to be construed "other."

Thus, in *Lombard v. Witbeck*[18] there was a devise to trustees for the benefit of three grandchildren during their lives, with a provision that if a grandchild died without leaving issue "then one-third to go to survivors of said three grandchil-

[13] 170 Ill. 65 at p. 78.

[14] *Ante*, §§ 81-92a.

[15] This could be done by implying cross remainders for life, as Judge Tuley seems to have done, among the individuals composing each group of grandchildren, the cross remainders being contingent upon the grandchildren dying without leaving issue surviving. You might then imply cross remainders for life among the several groups of grandchildren contingent upon the death of all the grandchildren of a group who die without issue surviving. Finally, cross remainders might be implied among the two children of the testator, contingent upon the death of either without issue surviving.

[16] Duryea *v.* Duryea, 85 Ill. 41.

[17] Same result by expressed language: Pitzel *v.* Schneider, 216 Ill. 87.

[18] 173 Ill. 396.

dren," and an ultimate gift over of the whole estate if all three grandchildren died without leaving issue them surviving. One grandchild died without leaving issue him surviving. Upon a bill filed to construe the will, it was held that the two surviving grandchildren each took one-half of the one-third as "survivors." The supreme court, however, went on to settle all questions which might arise under the will by declaring that if either of the two remaining grandchildren died leaving issue surviving and then the other died without leaving issue surviving, the share of the one so dying last would pass to the issue of the one so dying first. In short, "survivor" was construed "other." This result would seem to be clearly in accordance with the rule. Here the testator has provided for the contingencies of grandchildren singly and all grandchildren dying without issue surviving. He has omitted, however, to provide for the case where one dies leaving issue before one dying without issue. In such an event if "survivor" be taken literally the heirs of the testator would come in. The general scheme, however, of the testator, in providing for the various contingencies, and especially in announcing the ultimate gift over, produces so strong an argument against any intestacy that the temptation to exclude the heir or next of kin by turning "survivor" into "other," could hardly be resisted. On the other hand, in *Duryea v. Duryea*,[19]

[19] 85 Ill. 41. But compare the passage from Redfield on Wills which the court quoted in Arnold *v.* Alden, 173 Ill. 229, 242.

NOTE ON GIFT TO SURVIVORS—*To what period of time survivorship is referred:*

I. When survivorship is upon death merely, it is by the rule of Cripps *v.* Wolcott, 4 Mad. 11, to be referred to the period of distribution.

(a) If there is no previous interest given, then the period of division is at the death of the testator and the survivors at his death will take the whole property.

(b) But if a previous life estate be given, then the period of division is the death of the tenant for life and the survivors at such death, will take the whole property. (Temple *v.* Scott, 143 Ill. 290). In the following cases it was made clear by expressed words, that survivor, referred to the determination of the preceding life estate: Haward *v.* Peavey, 128 Ill. 430; Mittel *v.* Karl, 133 Ill. 65; Chapin *v.* Crow, 147 Ill. 219; Madison *v.* Larmon, 170 Ill. 65).

(c) So, where there is a gift to take effect at a future time limited to the surviving members of a class, or to persons named, and the survivors of them, the survivors are those who outlive the

there was no gift over in case all the devisees died without leaving issue surviving. The principal reason present in *Lombard v. Witbeck* for construing "survivor" as "other" was, therefore, absent. For this reason it was properly held that "survivor" must be given its literal meaning. The result was that the children of the devisee who died first did not take the

period of distribution. This is most clearly true where there is a shifting devise over to the survivor or survivors of a class to which the first devisee belongs. (Duryea *v.* Duryea, 85 Ill. 41; Lombard *v.* Witbeck, 173 Ill. 396; Summers *v.* Smith, 127 Ill. 645, 650). It is equally true where there has been no previous gift to the members of a class to the survivors of which the gift in question is made. (Ridgeway *v.* Underwood, 67 Ill. 419, 424, 425; Blatchford *v.* Newberry, 99 Ill. 11; Blanchard *v.* Maynard, 103 Ill. 60; Cheney *v.* Teese, 108 Ill. 473, 482).

(d) Prior to Cripps *v.* Wolcott the rule seems to have been contray to what was laid down in that case, by a long line of decisions, (2 Jarman on Wills, (6th ed., Bigelow) star pages 1533-1544) and survivorship was regularly referred to the death of the testator, unless a different intent appeared. This seems to have been the position approved and followed, and in fact necessary to the decision in Hempstead *v.* Dickson, 20 Ill. 193. There are some expressions of the Court approving the same doctrine in Arnold *v.* Alden, 173 Ill. 229, 241. They were, however, unnecessary to the decision.

II. The above general rule of course gives way when there is a different period to which survivorship must be referred by the expressed context of the instrument. Thus, in Nicoll *v.* Scott, 99 Ill. 529, Grimmer *v.* Friederich, 164 Ill. 245, (cited with approval in Clark *v.* Shawen, 190 Ill. 47, 55), and Arnold *v.* Alden, 173 Ill. 229, the context may have indicated that survivor referred to those who survive the testator. The language of the will in Grimmer *v.* Friederich is to "my surviving children" and in Arnold *v.* Alden it is to "my surviving brothers and sisters." The expression in both these cases is very like the language from which the inference was made in Shailer *v.* Groves, 6 Hare 162, (2 Jarman on Wills, (6th ed., Bigelow) star page 1548) that survivorship must be referred to the testator's death.

In Grimmer *v.* Friederich the court reached the conclusion that survivorship referred to the death of the testator because of the words "and their heirs" in the gift to "my surviving children and their heirs." In Theobald on Wills, 2nd ed.) p. 510, it is suggested that perhaps the addition of such words would be sufficient to make survivorship refer to the death of the testator, but in the last (6th ed.) of the same work, the English cases standing for such a result are put down as inconsistent with the current of authority.

share of the other devisee who died last without leaving any issue surviving.

§ 198. Accrued shares: In *Lombard v. Witbeck*[20] there was a devise to trustees for the benefit of three grandchildren during their lives, with a provision that if a grandchild died without leaving issue, "then one-third to go to survivors of said three grandchildren" and an ultimate gift over of the whole estate if all three grandchildren died without leaving issue them surviving. One grandchild died leaving issue him surviving. Upon a bill filed to construe the will, it was held that the surviving two grandchildren each took one-half of the one-third as "survivors." The supreme court, however, went on to settle all questions which might arise under the will by declaring that, if either of the two remaining grandchildren died leaving no issue surviving, the share already accrued by survivorship together with the original share, would pass to the surviving grandchild.[21] This rests upon the same argument against intestacy which is set out in § 197.

[20] 173 Ill. 396.

[21] 173 Ill. 396, at page 411. The reasoning upon which this is based is given at page 409.

CHAPTER VIII.

GIFTS OVER ON FAILURE OF ISSUE.

§ 199. Possible meanings of "die without issue" and importance of the usual question of construction which arises: In the case of a gift if the first taker die without issue, "without issue" may mean "if the first taker die in the lifetime of the testator without issue, then the second taker shall stand in his place to prevent a lapse."[1] This, however, must be an unusual construction and should require direct support from the context of the instrument. The primary and most usual meaning of the phrase "die without issue" is "if the first taker die without issue, either before or after the testator's death."[2] In this sense, the words, when the context so indicates, may mean "if the first taker dies either before or after the death of the testator without ever having had issue.[3] The usual and primary meaning of the words standing alone, however, is, "if the first taker shall either before or after the death of the testator, be dead without issue living."[4]

Where the usual and primary meaning of the phrase "die without issue" is taken the all important question is

[1] Duryea *v.* Duryea, 85 Ill. 41; Fishback *v.* Joesting, 183 Ill. 463; Kohtz *v.* Eldred, 208 Ill. 60. In Chapin *v.* Crow, 147 Ill. 219, 225, the limtations were to H. W. for life and then to G. W. and J. W. absolutely if they both survived H. W. and if either "die without issue him surviving" then over. It was held that "die without issue him surviving" meant dying before H. W. without issue surviving.

[2] Thomas *v.* Miller, 161 Ill. 60, 70, (citing O'Mahoney *v.* Burdett, L. R. 7 H. L. 388, 5 Gray's Cases on Property 195); Smith *v.* Kimbell, 153 Ill. 368, 377-378; Summers *v.* Smith 127 Ill. 645, 649. Kohtz *v.* Eldred, 208 Ill. 60 *contra*, seems to lay down the proposition that the primary and usual meaning of "die without issue" is die in the lifetime of the testator without issue. This seems entirely unsound.

[3] Voris *v.* Sloan, 68 Ill. 588; Field *v.* Peeples, 180 Ill. 376.

[4] Thomas *v.* Miller, 161 Ill. 60, 70, (citing O'Mahoney *v.* Burdett, L. R. 7 H. L. 388, 5 Gray's Cases on Property, 195); Smith *v.* Kimbell, 153 Ill. 368, 377-378; Summers *v.* Smith, 127 Ill. 645, 649; Huff *v.* Browning, 96 Ill. App. 612. Kohtz *v.* Eldred, 208 Ill. 60 *contra*, seems unsound.

whether the contingent gift is to take effect upon a definite failure of issue in the first generation, or an indefinite failure of issue in any generation. Is the future interest to take effect if the first taker shall be dead without issue him surviving, or only when the first taker shall be dead without issue, in whatever generation that may occur?

The answer to this question is important because of the different results which follow according as you adopt one construction or the other. If the gift be upon a definite failure of issue it is valid. If it be limited after a life estate it may be destructible.[5] If it be limited after an absolute interest in realty or personalty it is valid, if created by will, as a shifting executory devise.[6] If limited in a deed it should be equally valid as a shifting use raised by bargain and sale.[7] If, however, the gift be upon an indefinite failure of issue several results obtain. If personal property is involved, it is void for remoteness.[8] If the gift be of real estate, then there are a variety of results possible which are hereafter[9] considered in detail.

§ 200. Gifts on a definite failure of issue—Plain cases: There are a number of cases in this state in which the language of the limitations plainly indicates that a definite failure of issue in the first generation is meant. This is so, for instance, where the gift over is expressed to be upon the death of the first taker without leaving issue him surviving;[10] or where the gift over is upon the death of the first taker without living heirs of his body.[11]

§ 201. Particular rules of construction: Outside of the plain cases there is a very great difficulty in determining that a definite failure of issue is meant. This is because a gift over if the first taker dies without issue means primarily an indefinite failure of issue.[12] Under the English system of con-

[5] *Ante*, §§ 81-92a.

[6] *Ante*, §§ 164-167.

[7] For the doubt thrown upon this result by the Illinois cases, see *ante*, § 139, and especially Palmer *v.* Cook, 159 Ill. 300.

[8] Glover *v.* Condell, 163 Ill. 566, 585 (*semble*).

[9] § 204 *et seq.*

[10] Friedman *v.* Steiner, 107 Ill. 125; Koeffler *v.* Koeffler, 185 Ill. 261.

[11] Glover *v.* Condell, 163 Ill. 566.

[12] Arnold *v.* Alden, 173 Ill. 229, 238 (*semble*); Strain *v.* Sweeny, 163 Ill. 603, 606 (*semble*); Smith *v.* Kimbell, 153 Ill. 368, 374 (*semble*); Voris *v.* Sloan, 68 Ill. 588, 593, (*semble*).

veyancing this was an undesirable result in any case. If personalty were involved the gift over was too remote and so wholly void.[13] If realty were in question then the first taker took an estate tail[14] and the remainder was destructible. Thus, it came about that various slight circumstances were taken advantage of in order to construe a definite failure of issue.[15]

The English cases, however, have tended to make a difference between gifts of realty and personalty—more freedom being permitted in construing a definite failure of issue where personalty is involved. There was certainly no sound principle in this distinction, and a survey of the Illinois cases, most of which have arisen in regard to realty, indicate that the English authorities, applicable where only personalty was involved, to make out a definite failure of issue, may be relied upon in this state in cases of realty. Thus it was settled in the English courts that a gift over if the first taker died "without *leaving* issue," meant an indefinite failure of issue if realty was involved, but a definite failure of issue if personalty were in question.[16] In this state, however, it seems always to have been held that the gift over in such a case is upon a definite failure of issue even in the case of realty.[17] So, if the gift were in case either one of two devisees die without issue, then to the *survivor*, the English authorities held that if personalty were involved a definite failure of issue was meant.[18] If realty were in question an indefinite failure of issue was indicated.[19] The Illinois cases, where realty was involved, seem, however, to settle the rule in favor of a definite failure of issue in such a case.[20]

[13] Glover *v.* Condell, 163 Ill. 566, 585 (*semble*).

[14] Smith *v.* Kimbell, 153 Ill. 368, 376 (*semble*); Summers *v.* Smith, 127 Ill. 645, 650 (*semble*).

[15] Smith *v.* Kimbell, 153 Ill. 368, 374 (*semble*); Strain *v.* Sweeny, 163 Ill. 603, 607 (*semble*).

[16] Forth *v.* Chapman, 1 P. Wms. 663, (1720); (5 Gray's Cases on Prop. 256).

[17] Smith *v.* Kimbell, 153 Ill. 368; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Metzen *v.* Schopp, 202 Ill. 275, *post*, § 273.

[18] Hughes *v.* Sayer, 1 P. Wms. 534, (1719), (5 Gray's Cases on Prop. 255).

[19] Chadock *v.* Cowley, Cro. Jac. 695, (1624), (5 Gray's Cases on Prop. 253).

[20] Summers *v.* Smith, 127 Ill. 645; Arnold *v.* Alden, 173 Ill. 229; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Waldo *v.* Cummings, 45 Ill. 421. The same rule might have been ap-

§ 202. Whether a definite failure of issue is not primarily meant: It is noticeable that our supreme court has never yet distinctly held in this state, that a future interest was limited to take effect upon an indefinite failure of issue. The court has, indeed, in two[21] instances at least, gone very far in finding from the general context of the will that a definite failure of issue was meant and expressed.[22] In two cases,[23] where, however, the position was unnecessary to the decision, it was announced quite emphatically that a gift on failure of issue always meant primarily a definite failure of issue. This *dictum* was supported by the following reasoning: It was the existence under the English system of estates tail and limitations after an estate tail, that caused a gift on failure of issue to mean an indefinite failure of issue. Estates tail, however, are no longer, under our statute of 1827,[24] permitted to exist as such, and they have dropped out of our system of conveyancing, except as a matter of accident. The change, therefore,

plied to sustain the result reached in Johnson *v.* Johnson, 98 Ill. 564. In Silva *v.* Hopkinson, 158 Ill. 386, it seems to have been assumed that a definite failure of issue was meant, though on that supposition it is very difficult to support the decision. *Ante*, § 166. For some valuable remarks upon this case in this connection, see Mr. Lessing Rosenthal's article in 28 Chicago Legal News, p. 257.

[21] Strain *v.* Sweney, 163 Ill. 603; Gannon *v.* Peterson, 193 Ill. 372.

[22] In Strain *v.* Sweney, 163 Ill. 603, the devise was to A in fee "but in case he should die without *issue of his body then* the same shall go to B." The court construed a definite failure of issue because "issue of his body" meant "children," and because "*then*" was an adverb of time and referred to the death of A. See also Lunt *v.* Lunt, 108 Ill. 307.

Observe, also, four cases where realty was involved and where, after a life estate to A, there were limitations to the issue of A, but, if A "died without issue" then to B absolutely: Healy *v.* Eastlake, 152 Ill. 424; Kellett *v.* Shepard, 139 Ill. 433; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58. In each of these cases, the gift over if A died without issue, was held to be valid and the court seems to assume in three of them, at least, that a definite failure of issue was meant. It should be noted, however, that even though an indefinite failure of issue was meant, yet if the interest of A was not turned into an estate tail (*post*, § 206) the holding in each of these cases would have been perfectly sound (*post*, §§ 271, 272) provided it be the law of this state that contingent remainders are destructible. (*Ante*, §§ 81-92a).

[23] Summers *v.* Smith, 127 Ill. 645, 650-651; Smith *v.* Kimbell, 153 Ill. 368, 376.

[24] *Ante*, § 114.

in our practice of conveyancing, dating from the beginning of the history of this jurisdiction, has altered the primary meaning of the phrase "die without issue."

§ 203. The interest after an estate tail must be considered as limited upon an indefinite failure of issue: A future interest which, apart from statute, would be a remainder after an estate tail presents the most likely case of a gift on an indefinite failure of issue. Thus, suppose estates be limited to A for life and, if A die without issue, then to B in fee. If A in that case takes an estate tail he does so by a rule of construction founded on the assumption that B's estate is upon an indefinite failure in the issue of A.[25] There would seem to be a palpable absurdity in holding, in such a case, that B's interest after the statutory estates into which the estate tail in A is turned takes effect upon any other than an indefinite failure of issue.[26]

Suppose the estates be limited "to A and the heirs of his body and, in the event that the said A dies without issue, then to B and his heirs." This was the form of the gift in *Chapin v. Nott*.[27] "In the event that A dies without issue," while not the most artistic formula for limiting a remainder after an estate tail,[28] was fully effective for that purpose. Whatever difficulties may have arisen in respect to this phrase in other cases there can be no doubt that when used to limit a further interest after an estate tail it referred to an indefinite failure of issue. So clearly was this in

[25] Theobald on Wills, (2nd ed.) 563.

[26] If in a given jurisdiction there is in force a statute which declares that dying without issue means primarily a definite failure of issue, then if that applies the life estate in A cannot be turned into an estate tail. If it does not apply it must be because by the context of the instrument it is expressly indicated that an indefinite failure of issue is meant. The life estate must then be enlarged into a fee tail and the interest after it becomes one upon an indefinite failure of issue. In Nott *v.* Fitzgibbon, 107 Tenn. 54, the court seems to have performed the curious process of holding that the rule which enlarged the life estate into a fee and the statute which required "dying without issue" to mean a definite failure of issue could both be applied to the same limitations.

[27] 203 Ill. 341.

[28] The usual expression seems to have been "for default of such issue." 2 Greenleaf's Cruise on Real Property, 666; Hayes and Jarman, Forms of Wills (8th ed.) 388.

accordance with the real intent of the grantor or devisor that when the Wills Act[29] provided that the words "die without issue" should be construed to mean a want or failure of issue in the lifetime or at the death of the person referred to, and not an indefinite failure of issue, it added this proviso among others: "Unless a contrary intention shall appear by the will by reason of such person having a prior estate tail." So strong is the inference from the context that the limitation to B is expressed to be upon an indefinite failure of issue, that even if such a statute contained only the general exception "unless a contrary intention shall appear," it ought still to be held that an indefinite failure of issue was meant. How, then, can the creation of statutory estates in place of an estate tail alter that expressed intent? The ultimate interest must still remain a gift over on an indefinite failure of issue.[30]

§ 204. Results in Illinois of holding a gift to be limited upon an indefinite failure of issue—In general: The Illinois Supreme Court never having held a future limitation to be upon an indefinite failure of issue and the indication being that, perhaps, except in the case of a gift after an estate tail,[31] it never will, there remains only an interesting speculation as to what results would be obtained if, in a given case, the future interest were held to have been expressed to take effect upon an indefinite failure of issue. Without doubt, if personalty be involved, the future interest is too

[29] 1 Vic. c. 26, s. 29; Leake, Digest of Land Law, 183; Theobald on Wills, (2nd ed.) 535; 2 Jarman on Wills, (6th ed. Bigelow) star page 1322.

[30] Grout *v.* Townsend, 2 Hill (N. Y.) 554, 2 Den. (N. Y.) 336, seems to sustain this view. There the New York Court of Errors, 2 Denio (N. Y.) 336, held that even if the donee in tail took a fee under the statute, which was originally subject to be defeated by her dying without issue surviving at her death, yet it was none the less alienable, and, the donee having died leaving issue, it never could be divested. Then, it went on to say very pointedly that the limitation over was void because to take effect upon an indefinite failure of issue: "In determining that she (the donee) took an estate in fee simple by force of the statute abolishing entails, it follows of course that remainders limited to take effect upon the failure of issue in tail are void." See, also, Wilkes *v.* Lion, 2 Cow. (N. Y.) 333, 397 (1823).

[31] *Ante*, § 203.

remote. If real estate be in question, then the following inquiries must be answered: *First,* will the preceding interest, if expressed to be for the life of the first taker or in fee simple, be turned into an estate tail upon which our Statute on Entails will then operate?[32] *Second,* if the preceding interest is not turned into an estate tail what results are obtained?

§ 205. Where the first taker does not take an estate tail: The second of the two questions of § 204 may be answered first. If the first taker have a fee simple then the future interest must be void for remoteness. If the first taker have only a life estate then, provided the rule obtain that the future interest will fail entirely unless it takes effect by way of succession at the termination of the preceding interest,[33] there can be no objection that the gift on an indefinite failure of issue is too remote,[34] because it must vest in interest, if at all, before or at the termination of the preceding estate.[35] If contingent remainders are no longer destructible in this state[36] then, of course, the future interest is executory and hence void for remoteness.

If the peculiar definition of a vested remainder, which seems to obtain in Illinois,[37] be applied, then in case the first taker has no issue when the limitations are created the future interest to a living person must be vested.[38] As such, there may be no ground for saying that it is void for remoteness. But the moment issue is born to the first taker the future interest must be divested. It must become a contingent as distinguished from a vested future interest. If the rule, which causes it to fail unless it take effect by way of succession at the termination of the preceding estate, be in

[32] If the first taker has an estate tail as a result of the gift on an indefinite failure of issue, then a question arises concerning the interest limited after the estate tail. What effect does the turning of the estate tail into the statutory estates have upon it? This question is dealt with *post* §§ 270-273.

[33] *Ante,* §§ 81-92a.

[34] *Post,* §§ 270-273.

[35] This would explain the validity of the future interest in Healy *v.* Eastlake, 152 Ill. 424; Kellett *v.* Shepard, 139 Ill. 433; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58.

[36] *Ante,* §§ 81-92a.

[37] *Ante,* §§ 95, 100, 101.

[38] See Kellett *v.* Shepard, 139 Ill. 433; *ante,* §§ 100, 101.

force,[39] it is valid. If that rule is not in force in this state, the future interest is executory and so void for remoteness.[40]

§ 206. Whether or not the first taker does take an estate tail: Under the English cases it is clearly the law that if real estate be limited to A for life with a remainder to B upon an indefinite failure of issue in A, A takes by implication an estate tail.[41] A in the same manner takes, under the English cases, an estate tail, if real estate be limited to him in fee, with a gift to B upon an indefinite failure of issue on the part of A.[42] Do these rules of construction obtain in Illinois today?

In four cases,[43] in this state, there was an opportunity for the discussion of the application of the first of these rules. In each, there was substantially a gift to A for life, with a contingent remainder in fee to A's issue, and, if A died without issue then a remainder to B. In not one instance did the court refer in the most remote way to the possibility of A's taking an estate tail by implication. In two cases, at least, our supreme court recognized the existence, under the English cases, of the rule that a gift on an indefinite failure of issue in the first taker would cut down his expressed fee simple to an estate tail. In no case, however, has the application of that rule in this state been directly passed upon. In *Strain v. Sweeney*[44] the court said that if the gift on the first taker's dying "without issue of his body" meant an indefinite failure of issue the gift over was void for remoteness. Real estate was here involved, yet the court did not even consider the possibility of the first taker's having an estate tail by the rule of construction of the English cases.[45]

It might be urged that since estates tail are not now, and

[39] *Ante*, §§ 81-92a; *post*, §§ 270-273.

[40] If there be the gift of an absolute interest to the first taker's issue and they, on birth, take a vested interest, then the gift over, on an indefinite failure of issue may, if created by deed, be subject to the further objection that it is void by the doctrine of Palmer *v.* Cook, 159 Ill. 300; *ante*, § 139.

[41] Theobald on Wills, (2nd ed.) 563.

[42] Theobald on Wills, (2nd ed.) 324.

[43] Healy *v.* Eastlake, 152 Ill. 424; Kellett *v.* Shepard, 139 Ill. 433; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58.

[44] 163 Ill. 603, 606.

[45] This is the more significant because if the first taker had the

never have been part of our system of conveyancing,[46] it would be absurd to raise one by implication or to cut down a fee to a fee tail by the application of the above rules of construction. Such reasoning is relevant to support the rule that "dying without issue" means a definite failure of issue in the first generation.[47] Why, then, it will be asked, is it not equally relevant to prevent the application of rules of construction which turn the first taker's interest into an estate tail? Estates tail, however, are not abolished by our statute. They still exist as an estate upon which the statute takes effect. The statute only operates upon what would, apart from the statute, be an actual existing estate tail.[48] The act in fact provides that wherever at common law (meaning under the statute *de donis*) an estate tail would, in fact, be created, a certain result shall follow. It is the creation of an estate tail which causes the act to operate. It is the creation of the estate tail which represents the intent and act of the donor. The first step to the operation of the statute is to find an intent properly expressed to create an estate tail. No reason is perceived why the rules of construction of the English cases, founded upon the donor's intent, which raised an estate tail, should not be applicable here to indicate the same expressed intent. Then, too, the Illinois Act on Entails was passed in 1827,[49] when the rules of construction of the English cases, by which estates tail were created, had become established and were known. That statute in referring to "cases where, by the common law, any person or persons might hereafter become seized, in fee tail," may well be regarded, for the purposes of certainty, as referring to any form of limitation which, under the English cases, at that time amounted to an estate tail.

It will doubtless be urged that it would be senseless to turn a *life estate* into an estate tail, because our statute on entails[50] would turn the estate tail back into the same limita-

statutory estates raised in place of an estate tail then the ultimate gift, if it be the rule in this state that contingent remainders are destructible (*ante*, §§ 81-92 a), would not be void for remoteness. (*Post*, §§ 271, 272).

[46] *Ante*, §§ 114 *et seq*, also § 202.
[47] *Ante*, § 202.
[48] *Ante*, § 115.
[49] *Ante*, § 114.
[50] *Ante*, § 114.

tions as were originally created. This, however, will not carry very far. It only avoids the application of the rule of construction in the one case where a life estate is limited to A with a fee to his issue, and a gift over to B in fee on an indefinite failure of issue in A;—and, not even then, unless it be that the issue of A take, under the Statute on Entails, exactly the same interest that they take by the express limitations.[51] The argument that it is absurd to turn a fee simple into an estate tail when the ultimate result is to cause the fee to be turned into a life estate, is not well taken, since the same sort of reasoning would prevent any formula of words ever being construed to create an estate tail. Furthermore, the creation of the life estate is the work of the statute which operates to defeat the expressed will of the settlor or testator.

Observe, finally, that the net result of not applying the rule of construction which cuts down the *fee* of the first taker, A, to an estate tail with a vested remainder to B, who is to take upon an indefinite failure of issue, is that the future interest is wholly void for remoteness. On the other hand, if the rule of construction be applied, there is a chance of saving the future estate. If A's interest is reduced to a life estate, and the contingent future interest in B is subject to the rule which causes it to fail entirely unless it take effect by way of succession upon the termination of the preceding interest,[52] then it will not be void from the beginning for remoteness.[53] Should our supreme court decide to recognize the destructibility of contingent remainders it would seem that it ought to incline toward holding that the rule of construction which turns a fee into a fee tail shall be recognized.

§ 207. **Ewing v. Barnes**:[54] An attempt has been made to explain *Ewing v. Barnes* upon the ground that the gift over, which was held void, was upon an indefinite failure of issue in the first taker and so too remote.[55] This may be done if you treat the gift over as you would a similar gift over of

[51] For the exact interest which the statute gives the issue of it, see *ante*, §§ 116-120.

[52] *Ante*, §§ 81-92a.

[53] *Post*, §§ 270-273.

[54] 156 Ill. 61, *ante*, § 166.

[55] Article of Mr. Lessing Rosenthal, in 28 Chicago Legal News,

personal property, denying the application of the rule of construction of the English cases which would turn the first taker's interest into an estate tail.[56] On the other hand, if you turn the first taker's interest into an estate tail then, by the statute,[57] the limitations would read: A term for years in trustees till A reached 25, and subject thereto a legal estate to A for life, contingent remainder in fee to designated heirs of A, and an ultimate interest upon an indefinite failure of issue to B. If, then, the destructibility of contingent remainders is recognized,[58] B's interest, though liable to be defeated or fail, is not void from the beginning for remoteness.[59]

257, (April 4, 1896). If the same attempt had been made to explain Burton *v.* Gagnon, 180 Ill. 345, *ante*, §§ 175, 178, the remarks of the text would apply.

[56] This seems to have been the assumption of the court.

[57] *Ante*, § 114.

[58] *Ante*, §§ 81-92a.

[59] *Post*, §§ 271, 272.

NOTE—(1) *On meaning of "unmarried" in gifts over upon the first taken dying unmarried:* Frail *v.* Carstairs, 187 Ill. 310; Theobold on Wills, (2nd ed.) p. 527-528.

(2) *Gift to issue of first taker raised by implication from gift over if life tenant leaves no issue:* Orr. *v.* Yates, 209 Ill. 222; Pinkney *v.* Weaver, 216 Ill. 185; Theobald on Wills, (2nd ed.) pp. 568, 569.

(3) *When a gift over will be implied to be on condition that A dies "without such heirs":* Young *v.* Harkleroad, 166 Ill. 318.

CHAPTER IX.

VESTING OF LEGACIES.[1]

§ 208. **Distinction between bequests of personalty and legacies charged upon land:** The rules applicable to the vesting of bequests of personalty are to be distinguished from those governing the vesting of charges upon land. It should be observed, however, that where realty is devised upon trust to be converted and legacies paid out of the proceeds, or the proceeds divided, the legacies are not payable out of, or charged upon, realty. The directions to sell amount to an equitable conversion and the legacy becomes payable out of personalty.[2] The rules applicable to the vesting of legacies payable out of personalty,[3] therefore, apply. Our supreme court has acted in two cases, upon the assumption that this was the law, without, however, particularly noticing the point.[4]

§ 209. **Vesting of bequests of personalty—Where there is an express direction as to the period of vesting:** When a testator expressly declares that a legacy shall vest at a certain period he must ordinarily be taken to mean that it shall vest in interest at that time. This has been held to include the expressed intention that the gift shall be contingent upon the legatees surviving that period.[5]

Chapman v. Cheney,[6] however, is a reminder that the word "vest" is flexible in its meaning and, that, upon the whole context of the will, it may appear to refer to vesting

[1] The following rules may to some extent be applicable to real estate. See Eldred *v.* Meek, 183 Ill. 26, 37.

[2] Lash *v.* Lash, 209 Ill. 595, 604; Ebey *v.* Adams, 135 Ill. 80, 85; Dorsey *v.* Dodson, 104 Ill. App. 589, 592.

[3] Theobald on Wills, (2nd ed.) 407; In re Hart's Trusts, 3 DeG. & J., 195, (5 Gray's Cases on Prop., 290).

[4] Scofield *v.* Olcott, 120 Ill. 362; Hawkins *v.* Bohling, 168 Ill. 214.

[5] Theobald on Wills, (2nd ed.) pp. 407-408. See Spengler *v.* Kuhn, 212 Ill. 186, 194, (207 Ill. 166).

[6] 191 Ill. 574.

in possession or vesting indefeasibly.[7] In that case the question arose whether the gift to grandchildren in the seventh paragraph[8] of the will was too remote. That depended upon whether it was contingent upon the grandchildren attaining thirty, or vested, subject to a postponed enjoyment till that time. The court was clear that by the principal clause of the seventh paragraph the grandchildren took a vested interest, when born. The gift after the death of the son, the life tenant, did not make the original gift contingent, since the payment at a future time had reference to the position of the estate, *i. e.*, the postponement was for the convenience of the estate.[9] There was, then, here a direct gift at the death of the tenant for life, with a subsequent direction as to vesting at thirty. There was much in this situation alone to warrant the court in hold-

[7] In the same way the use of the word "vest" in Lunt *v.* Lunt, 108 Ill. 307, as indicating the time when the property should vest in possession and indefeasibly in the testator's children, must be regarded as depending upon the effect of the gift over, (*post*, § 220), which the court regarded as sufficient to make the gift vested in interest on the testator's death in spite of some other expressions pointing to a different conclusion.

[8] This was, in part, in the following language: "I hereby give, devise and bequeath the fee simple title of all my lands, lots and real estate, wherever situated, together with all my personal property of every name, grade or description, to my grandchildren, whatsoever number they may be, born to my said son, Alexander M. Cheney, share and share alike, to take possession only after the death of my said son. * * * * * [Here followed the gift of a life estate to the son Alexander M. Cheney, and the paragraph concluded:] Provided always, and the foregoing devise of the fee simple title of my real and personal estate is and shall be subject to the following conditions: No such grandchild shall acquire or be vested with an interest or any estate of inheritance in any part of my said real or personal estate unless such grandchild shall live to reach the age of thirty years. In the event that any such grandchild shall die before attaining the age of thirty years, he, she or they shall take nothing under the provisions of this will, neither shall any interest in any part of my said real or personal estate be thereby vested in any person or persons through devise, inheritance or otherwise. In the event that any such grandchild shall die before attaining the age of thirty years, leaving a child or children, then in that case such child or children, living or posthumous, shall take the share which the parent would have taken had he or she survived and attained the age of thirty years."

[9] *Post*, § 212.

ing that vesting referred to indefeasible vesting or vesting in possession.[10] But there was more than this. The interest which it was expressly provided the grandchildren should not take unless they lived to reach the age of thirty years, was "an interest or any estate of inheritance." This language would seem irresistibly to mean an indefeasible interest when it is observed that there was a gift over "in the event that any such grandchild shall die before attaining the age of thirty years, leaving a child or children," to the child or children of such grandchild. The clause, "In the event that any such grandchild shall die before attaining the age of thirty years, he, she or they shall take nothing under the provisions of this will, neither shall any interest in any of my said real or personal estate be thereby vested in any person or persons through devise, inheritance or otherwise," was, considering the provisions regarding the testator's son, very sensibly interpreted to express an attempt to guard against the son's inheriting by the death of a grandchild under thirty. It did not, in the face of the other clauses of paragraph seven make the gift to the grandchildren contingent.[11]

§ 210. Where there is no express direction as to vesting—(1) Where there is a direct gift, an additional direction to pay at a future time will not postpone the vesting: The legacy in such a case vests at the death of the testator with a postponed enjoyment until the period prescribed. If, for instance, a legacy be bequeathed to A "to be paid at twenty-one," the words "to be paid" cause the gift to be construed to take effect at once with merely a postponed enjoyment. The legacy is, therefore, vested immediately upon the testator's death.[12] This follows the well settled rule of the English cases.[13]

[10] Theobald on Wills, 2nd (ed.) p. 209.

[11] So much has been said in support of the conclusion reached in this case, because there has appeared a confident assertion in the notes on Recent Cases, 15 Harvard Law Review 496, that the construction placed upon the will was incorrect—that the grandchildren took a contingent interest.

[12] Ruffin *v.* Farmer, 72 Ill. 615. See also Sheets *v.* Wetsel, 39 Ill. App. 600; Bowerman *v.* Sessel, 191 Ill. 651; Eldred *v.* Meek, 183 Ill. 26, 37, (*semble*); Ingraham *v.* Ingraham, 169 Ill. 432, 453; McCartney *v.* Osburn, 118 Ill. 403, 419, 420, 421, 422.

[13] Theobald on Wills, (2nd ed.) p. 410.

Howe v. Hodge[14] is clearly explainable upon the same principle. In that case the testator devised the residue of his estate, consisting of reversions after life interests created by previous clauses of the will, real estate in fee not subject to any estate for life or years, and personal property, to his executors in trust for the following purposes: Certain real estate "shall be sold, and the proceeds arising from such sales, and all moneys coming into their hands under this paragraph, shall be invested and kept secured on farm lands, the interest being yearly turned into principal, and the fund thus arising shall be divided among all my grandchildren, as they shall respectively arrive at the age of thirty (30) years. * * * * My intention in disposing of the property named in this paragraph is to divide it equally among all my grandchildren." A decree in the lower court found this gift to the grandchildren void for remoteness. This our supreme court reversed upon the ground that the gift to the grandchildren was vested at once upon the testator's death, with only the right to possession postponed. This result was founded wholly upon the ground that by the last sentence of the residuary clause of the will there was a present gift to the grandchildren, and that the direction to divide among the grandchildren as they should respectively arrive at the age of thirty years, had reference only to the distribution or the taking effect of the interests in possession. Of course it made no difference that the direct gift to the grandchildren came after instead of before the clause postponing the possession of the interest.[15]

Another class of cases of this sort arises in respect to language to this effect: A legal or equitable life estate is created in A with a direct gift after the death of A to B and C, with a direction to the executor or the trustee to convert and divide or distribute after the death of A. Here the fact that the gift is only to take effect in possession after

[14] 152 Ill. 252. See also Ill. Land and Loan Co. *v.* Bonner, 75 Ill. 315. But compare Pitzel *v.* Schneider, 216 Ill. 87, and Reid *v.* Voorhees, 216 Ill. 236.

[15] Theobald's Wills, (2nd ed.) p. 410; 1 Jarman on Wills, (6th ed. Bigelow) star page 796.

A's life estate does not make it contingent because the postponement is inevitable considering the position of the estate. The case must, therefore, be treated as if there were a direct gift to B and C with a direction to divide at a future time, thus giving B and C a presently vested interest with a postponed enjoyment. So it has been held in this state,[16] and elsewhere.[17]

§ 211. (2) Suppose the only gift is to be found in the direction to pay or to divide at a future time—General rule: Our supreme court has fully recognized that in the case supposed, as a general rule the legacy is contingent upon the legatee being alive at the time specified.[18] In quoting with approval from Theobald on Wills it put the matter more concretely, thus:[19] "When payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time."[20] However the principle may be worded, it is clear that when the gift is to *A at twenty-one*, it is contingent upon A's reaching that age.[21] Thus, in *Howe v. Hodge*,[22] we have the very carefully considered *dictum* of the court that the gift of a mixed residue to trustees upon trust to sell and divide the fund arising "among all my grandchildren, as they shall respectively arrive at the age of thirty (30) years," gives to the grandchildren only an interest contingent upon their attaining thirty,—following *Leake v. Robinson*.[23]

[16] Chapman *v.* Cheney, 191 Ill. 574, *ante*, § 209; Nicoll *v.* Scott, 99 Ill. 529, 538; Hempstead *v.* Dickson, 20 Ill. 193; Kelly *v.* Gonce, 49 Ill. App. 82. Banta *v.* Boyd, 118 Ill. 186, *post*, § 215, seems *contra*.

[17] Collier *v.* Grimesey, 36 Oh. St. 17.

[18] Dee *v.* Dee, 212 Ill. 338, 352, 353; Clark *v.* Shawen, 190 Ill. 47, 56; Knight *v.* Pottgieser, 176 Ill. 368, 373-374; Ducker *v.* Burnham, 146 Ill. 9, 24; McCartney *v.* Osburn, 118 Ill. 403, 419; Hobbie *v.* Ogden, 178 Ill. 357, 366; Schuknecht *v.* Schultz, 212 Ill. 43.

[19] Scofield *v.* Olcott, 120 Ill. 362, 373. See also Eldred *v.* Meek, 183 Ill. 26, 36-37, *semble*; McCartney *v.* Osburn, 118 Ill. 403, 421.

[20] Grimmer *v.* Friederich, 164 Ill. 245, 248.

[21] Powers *v.* Egelhoff, 56 Ill. App. 606. See also Bennett *v.* Bennett, 66 Ill. App. 28, where contingencies were plainly attached to the gift at a future time.

[22] 152 Ill. 252, 275-277.

[23] 2 Mer. 363. In Lunt *v.* Lunt, 108 Ill. 307, it was practically conceded that, apart from the effect of other clauses, (*post*, § 220) the gift to the testator's children, which

Ridgeway v. Underwood,[24] is a case of this class which deserves some consideration. Here there was, first, a devise to the testator's wife of a living and support out of the farm left by the deceased. Then the third paragraph of the will proceeded as follows: "I will, at the death of my wife, and on my youngest child coming of age, the farm on which I now reside, as aforesaid, be sold and the proceeds divided amongst my seven youngest children, * * [naming them], their heirs and assigns forever, and if one or more of said seven children should die before inheriting his, her or their inheritance, to be divided equally amongst the remainder of the seven." Mr. Justice Lawrence, giving the opinion of the court, held, as one of the grounds for the decision, that the gift to the children vested in those only who survived the period of distribution, *i. e.*, when the youngest reached twenty-one. This would seem to be perfectly sound upon the ground that the third clause contained a direction to divide on the youngest child's coming of age, which is the same as a legacy to A at twenty-one.[25]

§ 212. Qualification of the general rule where the postponement was for the convenience of the estate: Our supreme court, following the statements of Jarman[26] and Theobald,[27] has actually announced[28] the following qualification of the general rule given in § 211: "But even though there be no other gift than in the direction to pay or distribute *in futuro*, yet, if such payment or destribution appear to be postponed for the convenience of the fund or property, as where the future gift is postponed to let in some other interest, for instance, if there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the deccase of the legatee for life, or after payment of debts, the gift in remainder vests at once, and will not be deferred

read "when my children, or the survivors, shall arrive at the age of thirty years, if my wife still survive, the remainder of said two-thirds of my property shall go to and vest in my said children equally," conferred a contingent future interest.

[24] 67 Ill. 419.

[25] Observe, however, that there was, here, in the gift over an argument that the gift to the children was vested, (*post*, §§ 219-220).

[26] Jarman on Wills, (6th ed. Bigelow), star page 798.

[27] Theobald on Wills, (2nd ed.) p. 412.

[28] See cases cited, *post*, § 213.

until the period in question." Under such circumstances, therefore, the gift is not to a contingent class, but to an ascertained class at a future time.[29]

§ 213. Illinois cases in support of this qualification: The limitations where the distinction taken in § 212 has been applied by our supreme court are substantially as follows: A life interest in real estate to A, or a trust for the benefit of A for life, with a direction that the executor or trustee, at the death of A convert the estate into cash and divide the proceeds between B and C. Here the distribution at a future time has reference merely to the position of the estate. B and C, therefore, take vested interests.

Thus, in *Scofield v. Olcott*,[30] there was a devise of real and personal property to trustees to pay the rents and profits thereof to the wife for life, and, after her death, to convert sufficient to pay certain bequests. The testator then proceeded: "I order and direct my said trustees to convey, assign, and deliver all the rest and residue of my estate to my said son, William, as soon as said legacies have been fully paid." William died before the life tenant. After the death of the life tenant, the trustee having a balance in his hands after paying the legacies, a contest arose between the heirs of the testator who were his brothers and sisters, and the devisees of the mother and only heir of William. A decree for the latter was affirmed. As to the proceeds of the conversion, the court took the position that the will bequeathed a legacy out of personal estate. The court also considered whether William's interest was vested upon the theory that "there was no original gift to him, but only a direction to pay, or to 'convey, assign and deliver' at a future time." Looking at the will this way they were satisfied that William's legacy vested at once upon the testator's

[29] Observe, however, that this qualification does not cover the case of a gift to A till his youngest child reaches twenty-five, and then property to be equally divided among all of A's children: Schuknecht *v.* Schultz, 212 Ill. 43. In that case, the court seems to have proceeded upon the hypothesis that the gift to A's children was contingent upon their surviving the time of distribution. This is contrary to the rule of Boraston's Case, 3 Co. 21 a. b. (Hawkins on Wills, p. 237), if that rule be applied to gifts of personal property, or converted real estate.

[30] 120 Ill. 362.

death. The general rule was repeated "that when there is no original gift, but only a direction to pay at a future time, the vesting will be postponed till after that time." The court then went on to state from Jarman and Theobald the qualification of the general rule given in § 212 and to apply it to the limitations in question.

So, in *Hawkins v. Bohling,*[31] there was a devise upon trust for the husband for life, with a direction that what real estate remained unsold at the time of the husband's death be sold "and the proceeds of the sale divided share and share alike," between Ethel Bohling and Margaret Craig. Margaret Craig died before the death of the life tenant. After the death of the life tenant the heir of the testatrix filed a bill for partition. This was dismissed and the decree was affirmed. Again the contention was made that "here there was no original gift to Mrs. Craig, but only a direction to sell and pay over to her after the death of the life tenant. The court, however, relying upon *Scofield v. Olcott,* met this suggestion by saying, "It appears by the will that the payment or distribution was postponed for the convenience of the estate,—that is, to let in the prior interest given to the husband—and was not postponed for reasons personal to the legatee, and * in such cases the interest will vest on the death of the testator."[32]

In *Ducker v. Burnham,*[33] the testator devised to his wife for life and on her death the estate then remaining to "be by my surviving executor equally divided between my said five children." The interest of the children was held to be vested because the division was postponed only for the convenience of the property.

In *Knight v. Pottgieser,*[34] there was a devise to the testator's wife for life and upon her death "the same to go to and be divided amongst my children and their descendants in equal shares." Here, also, it was held that the children took vested interests, because, though the gift arose wholly out of the direction to distribute *in futuro,* yet such distribution

[31] 168 Ill. 214.

[32] This rule is repeated again in Harvard College *v.* Balch, 171 Ill. 275, 282, (*semble*). See also Kelly *v.* Gonce, 49 Ill. App. 82, 89-90; Dorsey *v.* Dodson, 104 Ill. App. 589.

[33] 146 Ill. 9, 24.

[34] 176 Ill. 368, 373.

was deferred merely because of the presence of the life estate and not for any reasons personal to the legatee.

In *Dee v. Dee*,[35] after a gift to the testator's wife for life of all real and personal property, the will provided: "After the decease of my said wife all my property, both real and personal, shall be divided between all of my children." It was held that the children took vested interests because the postponement was merely for the convenience of the estate and not for reasons personal to the legatee.

§ 214. Illinois cases to some extent contra—People v. Jennings:[36] In spite of the soundness of the rule supported by the cases of § 213 we have at least three cases containing *dicta* and one, certainly, an actual decision, in direct conflict with it.[37]

The first of these is *People v. Jennings.* The will in that case contained a direction to executors to sell "as soon after my death as convenient." It then provided that "should there be anything remaining after paying my just debts, funeral expenses, bequests and necessary expenses of the settlement of my estate, that the same may be equally divided between my following named children * * [naming four] and in case of the death of either or all of my last named children, then to be divided among their children, the child, or children of each one taking their deceased parent's portion among them." One child died after the testator, but before any conversion, leaving a wife, Bulia, and several children. Upon the land being sold the share of the deceased child was paid by his administrator to his children to the exclusion of his widow. Suit was brought

[35] 212 Ill. 338, 352-354. See, also, CLARK *v.* Shawen, 190 Ill. 47, 56; Grimmer *v.* Friederich, 164 Ill. 245, 248; Carper *v.* Crowl, 149 Ill. 465, 483, *post*, § 222; Ducker v. Burnham, 146 Ill. 9, 24.

See the following cases at large in accord with those of the text: Bayley *v.* Bishop, 9 Ves. Jr. 6; Smith *v.* Palmer, 7 Hare Ch. 224; Bromley *v.* Wright, 7 Hare Ch., 334; Parker *v.* Sowerly, 1 Drew, 488; Leeming *v.* Sherratt, 2 Hare, 14; Rumsey *v.* Durham, 5 Ind., 71, 75, (1854); Allen *v.* Watts, 98 Ala. 384, (1892); McClure's Appeal, 72 Pa. St. 414, (1872); Thomman's Estate, 161 Pa. St. 444; Weymouth *v.* Irwin, 5 Oh. N. P. 248; Moore *v.* Herancourt, 10 Oh. C. C. 420.

[36] 44 Ill. 488.

[37] See, also, Bates *v.* Gillett, 132 Ill. 287, and Boyd *v.* Broadwell, 19 Ill. App. 178.

by the widow upon the bond of the administrator. It was dismissed and this was affirmed.

The decision is clearly correct upon the ground that the testator specifically provided that, upon the death of one of his children, the share of that child shall go to the deceased child's children (excluding the widow). There was absolutely no reason why that clause should not be given effect. The court certainly placed its decision upon this ground, Mr. Chief Justice Breese saying: " * * by the express terms of the will, in case of the death of any one of testator's children, his share was to go to such children as he might leave."

The court, however, also said "we are satisfied no present interest passed to Israel Jennings, Jr. [the deceased son], as the land was not converted into money until after his death." It is submitted that this additional ground for the decision is erroneous. One could hardly put a case where the postponement of the legacy was more clearly for the mere convenience of the estate—convenience in turning realty into personalty, to pay debts and legacies. If the court intended to cite *Marsh v. Wheeler*,[1] to sustain its position that the son here did not take a vested interest till the conversion, it was unfortunate, for that case is a most excellent authority for the contrary. It is on all fours with the Illinois cases of § 213, only if anything, stronger in favor of holding the legacy vested, because the conversion was not to take place till a year after the testator's death.[2]

§ 215. Banta v. Boyd:[3] Here we have *People v. Jennings* over again with the same correct ground of decision present and the same erroneous view taken upon the point of vesting. In this case there was a direct bequest in these words: "I devise and bequeath to each one named below, a part or portion of all the proceeds of all the real and personal estate of which I may die possessed (after paying all my debts, which may be few, or probably none,) which portion or share is to be paid to each one named below, to-wit: * * [Then follow the

[1] 2 Edw. Ch. (N. Y.) 156.

[2] Whether the *dictum* that the interest is contingent can be supported by the gift over, see, *post*, § 219-221.

[3] 118 Ill. 186; see also Boyd *v.* Broadwell, 19 Ill. App. 178.

names of the legatees.]'' The testator then appoints executors and gives them power to sell and divide the proceeds as designated ''in a convenient and reasonable time.'' Then the will concludes: ''In the event of the death of anyone named above, then the portion or share of the deceased to be paid to his or her offspring. * * * .'' One of the legatees died thirteen days after the testator and long before any conversion was made. In holding that the deceased legatee's children were entitled and not the deceased's administrator, the court took due notice of the clause expressly providing that they should take in the events which happened. The opinion, however, is pregnant with the idea that the gift to the deceased legatee was contingent, whereas by every rule in aid of construction it was vested. This is clearer than in *People v. Jennings*,[4] because here the gift is not alone contained in the direction to divide, but there is a present direct bequest to the legatees. It would seem to be clear enough also that the postponement of the legacy was merely for the convenience of the estate. Unless, therefore, the construction sustained can be supported by inferences drawn from the gift over it must be open to criticism.[5]

§ 216. **Ebey v. Adams**:[6] In this case the whole estate real and personal was devised to the widow for life. Then the will provided: ''Upon the death or re-marriage of my wife, Minerva, it is my will, and I do so direct, that all my estate, real and personal, shall be sold,'' and from the proceeds certain legacies be paid, ''and the balance of the proceeds of my estate my executors are hereby directed to distribute among my children or their heirs.'' One of the testator's children, Elmira Lewis, died before the life estate terminated, leaving her children as her heirs. She had, however, conveyed all her interest under the will to Ebey. A decree that the children took as against Ebey was affirmed.

Nothing could be clearer than that this decision is correct. It is correct upon the supposition that Elmira took a vested interest, for, even if she did, the effect of the word ''or'' was to make a substitutionary gift, which would, and did in

[4] 44 Ill. 488, *ante*, § 214.

[5] As to how far the argument based upon the gift over will take you, see *post*, §§ 219-221.

[6] 135 Ill. 80.

fact, operate to divest any previously vested interest in Elmira.[7] Any vested interest, therefore, which Ebey took by deed from Elmira was divested. Nor could the heirs of Elmira be estopped by her deed because they did not take under her but under the will of the testator.

The court, however, placed its decision wholly upon the ground that "the vesting of the estate in interest, as well as in possession, in the children of the testator, depended upon their surviving the day of distribution,—in other words time is of the substance of the gift, and relates to the vesting of the legacies in interest as well as in possession." The first ground for this result was that the gift was contained only in a direction to divide at a future time—*i. e.*, the time of conversion after the termination of the life estate. This is clearly contrary to the settled doctrine of the English cases, under which it would, it is submitted, without question, have been declared that the postponement in this case was merely for the convenience of the estate and the legacy vested upon the testator's death. In the next place, the court construed (and very properly as it would seem[8]), the word "or" to mean "in case a child dies before the death of the life tenant, then over to that child's heirs." From this limitation over they undertook to say that the gift to the children must be contingent.[9] It may be conceded that an argument against vesting arises from the presence of the gift over, but unless the decision against vesting is required by it the case must be regarded as open to criticism.[10]

§ 217. **Strode v. McCormick**:[11] In 1846 James M. Strode conveyed by deed to trustees certain real estate in trust for his wife for life, and "at her death" the trustees were

[7] *Ante*, § 113.

[8] Theobald on Wills, (2nd ed.), p. 493.

[9] See also Bates *v.* Gillett, 132 Ill. 287, 294.

The limitations involved in Richey *v.* Johnson, 30 Oh. St. 288 (1876), were, as the court there construed them, identical with those in Ebey *v.* Adams, *supra*. The actual decison of the Ohio court was that the legatees took a contingent interest and the reasoning of the court upon which this was based was precisely like that in the Illinois case. See also Kline *v.* Marsh, 12 Ohio C. C. 645.

[10] As to how far the arguments based upon the gift over will carry, see *post*, §§ 219-221.

[11] 158 Ill. 142.

directed to "sell and dispose of said lot and its appurtenances, and divide the proceeds equally among the children of said James M. Strode, the issue of his marriage with said Mary B. Strode, share and share alike * * ." There was no gift over here. In 1871, one son, Eugene, died leaving a wife and five children. In 1874 the land was mortgaged by the trustees and others equitably interested, not including the children of Eugene. In 1879 a master's deed issued upon foreclosure proceedings. In 1878 the life estate expired and in 1891 the children of Eugene filed a bill to establish their equitable rights and for a partition or sale. The bill was dismissed with a finding that McCormick claiming under the master's deed was the owner in fee and that the plaintiffs had no rights. This was affirmed.

The supreme court disregarded all reasons in favor of their decision based upon the power of the trustees of the original settlement to mortgage, or of the wife of Eugene (who joined in the mortgage) to bind her children under the will of Eugene, or upon the Statute of Limitations, and rested its whole opinion upon the point that the children under the settlement took an interest contingent upon surviving the period of distribution—*i. e.*, the death of the life tenant. As Eugene died long before the life tenant he never took anything under the settlement. His children, therefore, took nothing from him by devise or descent. This construction of the settlement was based entirely upon the view that the only gift to the children was contained in the direction to divide equally among them after the death of the life tenant, and that this was to be read as if it were a limitation to such as might be the children of the settlor after the death of the life tenant. Under the general run of English[12] and American decisions,[13] the force of which has been clearly recognized in this state,[14] it would seem that the interest in the settlor's children was vested in them as a class.[15] The fact that the only gift to them was in a direction to divide at a future time should not have been allowed to make the gift

[12] *Ante*, § 213, note 35.

[13] *Ante*, § 213, note 35.

[14] *Ante*, § 213.

[15] Subject, no doubt, to open and let in other afterborn children up to the period of distribution, *ante*, § 108.

contingent, because the postponement was clearly for the convenience of, or owing to the position of the estate, in the hands of the life tenant.[16]

§ 218. (3) Effect of the payment of interest or income upon the vesting of legacies otherwise contingent: Another ground, which the court did not notice, for holding the future limitation, involved in *Howe v. Hodge*,[17] vested, was that interest upon the fund was also payable to the grandchildren.[18] It made no difference that the income was not payable till the grandchild attained thirty.[19] It is significant, however, that in *Lunt v. Lunt*,[20] though the temptation must have been strong, the court did not resort to any argument founded upon the fact that the trustees were to apply the income from the trust estate to the support and education of the testator's daughters, to hold the gift to the daughters vested. In this, it is believed, the court showed very nice discrimination for such an argument must have been founded upon *Fox v. Fox*.[21] The rule of that case has not always been accepted in England[22] and, even when it has been,[23] it is very strictly confined by *In re Parker*[24] to the case where the trustees are to apply the income for maintenance and education from individual or presumptive shares. Its application is denied in a case, like *Lunt v. Lunt*, where

[16] *Quære*, whether Ridgeway *v.* Underwood, 67 Ill. 419, *ante*, § 211 is not open to criticism upon the same ground as Strode *v.* McCormick, *supra*, and the cases in §§ 214-216. See also Spengler *v.* Kuhn, 212 Ill. 186, 194. In Thompson *v.* Adams, 205 Ill, 552, 559, the court appears to say that a gift after the re-marriage or death of the widow, which was contained only in the direction to distribute at that time was contingent upon the legatees named surviving that period. In fact, however, there was other language in the will which supported this construction.

[17] 152 Ill. 252, *ante*, § 210.

[18] Theobald on Wills, (2nd ed.) pp. 412 *et seq.*

[19] Elliott *v.* Elliott, 12 Sim. 276, (5 Gray's Cas. on Prop. 758).

[20] 108 Ill. 307.

[21] L. R. 19 Eq. 286 (1875), (5 Gray's Cas. on Prop. 295).

[22] In re Ashmore's Trusts, L. R. 9 Eq. 99 (1869), (5 Gray's Cases on Prop. 293); In re Wintle, Tucker *v.* Wintle, L. R. [1896] 2 Ch. 711. See also Dohn's ext'r. *v.* Dohn, 23 Ky. Law Rep. 356.

[23] In re Turney, Turney *v.* Turney, [1899] 2 Ch. 739.

[24] 16 Ch. Div. 44, (1880), (5 Gray's Cas. on Prop. 298).

there was one fund from which several were to be supported.[25]

§ 219. (4) Effect of a gift over upon vesting:[26]—Arguments in favor of vesting founded upon the presence of a gift over—General principles: The effect of the gift over is, it is believed, purely a matter of rational inference. If the gift over is entirely consistent with and performs a perfectly rational function on the hypothesis that the preceding interest is contingent, then it can furnish no argument that it is vested. Thus, if the gift is to A at twenty-one so that standing alone it must be contingent, a gift over to B if A dies under twenty-one cannot make the gift to A vested.[27] The gift over performs its proper and natural function if A's interest is contingent, since it provides for a gift in the event of A's interest never vesting. On the other hand, if the gift over performs no function at all, unless the preceding interest be vested, it furnishes an argument for construing the preceding interest vested. Thus, if the gift be to a class,—as the children of A when they reach twenty-one —followed by a clause of accruer giving the interests of those dying under twenty-one to the other members of the class, the gift over would clearly be useless if the shares were contingent on the members of the class reaching twenty-one. There is, therefore, in such a case, a natural inference in favor of vesting.[28] In the same way, upon a gift to A at twenty-one, with a gift over if A die without leaving issue him surviving, the gift over furnishes no argument for vesting prior to the legatee's attaining twenty-one, because it has a perfectly reasonable effect upon the assumption that the interest does not vest till the legatee attains twenty-one.[29] If, however, the gift over is upon the death of A under twenty-one and without issue, it may well be argued,[30] that an

[25] See also Pitzel *v.* Schneider, 216 Ill. 87, where, for the same reasons, no point could have been made that the grandchildren took vested interests.

[26] See also for the effect upon vesting of a charge of a legacy upon the share of a particular legatee: Nicoll *v.* Scott, 99 Ill. 529, 539.

[27] Theobald on Wills (2nd ed.), p. 416.

[28] Theobald on Wills (2nd ed.), p. 416.

[29] Id., p. 417.

[30] Theobald on Wills (2nd ed.), p. 417.

intent is shown that A is to be deprived only if he die under twenty-one without issue. This intent could not possibly be effective unless the preceding interest were vested.[31]

§ 220. Illinois cases where the gift over furnished an argument for vesting: In *Illinois Land and Loan Co. v. Bonner*,[32] the interest preceding the gift over was clearly enough vested apart from the gift over, because there was a direct gift in trust for Rosalia and Percy in addition to a direction to the trustee to convey one moiety to Rosalia upon her arriving at eighteen years of age, and, upon her brother's arriving at the age of twenty-one years, to convey the other moiety to him. The gift over in case Rosalia died under eighteen without issue to Percy, though not necessarily conclusive that the two took vested interests, yet furnished a strong argument for such a view because the gift over would have been unnecessary if the original gift had been contingent to both. Then, too, the gift over here was if Rosalia died under eighteen and *without issue,* which would indicate that she was to be deprived only in those events. Hence she must take indefeasibly in all other contingencies, *i. e.,* her interest is vested to start with.[33]

In *Ridgeway v. Underwood*,[34] the gift over was of such character that an argument might have been made from it that the preceding interest was vested. There was a devise to the seven youngest children, naming them, to take effect at a future time, and then a gift over if any one or more died before the period of distribution to the remainder of the seven. It is clear that the gift over here performed no function at all unless the preceding interest in the seven children were vested. Yet the inference from this fact was after all only an argument for vesting. It did not require that the preceding interest be regarded as vested. The opinion of the court, therefore, that the preceding interest was contingent, resting as it does on other facts,[35] may be perfectly sound in spite of the argument possible from the gift over.

In *Lunt v. Lunt*,[36] the court seems to have drawn from

[31] See explanation of these distinctions in Bland *v.* Williams, 3 M. & K. 411, quoted at length by our court in Lunt *v.* Lunt, 108 Ill. 307, 314.

[32] 75 Ill. 315.

[33] *Ante*, § 219.

[34] 67 Ill. 419; *ante*, § 211.

[35] *Ante*, § 211.

[36] 108 Ill. 307.

the presence of one gift over, such an argument as sustained a result very desirable to reach, without noticing that an argument in favor of an opposite result might equally well be drawn from the presence of another gift over. It failed to observe that the inferences from the gifts over contradicted each other and should, therefore, have been given no weight. In that case the testator devised to trustees in trust as to four-ninths of the estate as follows: [4] "when my said [two] children, or the survivor, shall arrive at the age of thirty years, if my wife still survive," the said four-ninths "shall go to and vest in my said children equally, [5] or in the survivor, and the issue of the deceased, if any exist, equally, [6] or if both die leaving issue, then at such period as the youngest of my said children would have been thirty years of age the same shall vest in the issue of each of my children equally, the children taking a parent's share, [7] and if both die without issue, then to my heirs at law." It was held that under these clauses the two children took vested interests, subject to a postponed enjoyment until they were thirty. It was conceded that by clause marked 4 their interest was most clearly contingent. But it was argued that it was vested by force of the gift over contained in clause 7, which was, if both children should die without issue under thirty then to testator's heirs at law. The authorities for this position were cited and there can be no doubt that, from such a gift over, it may be argued that, except for the event mentioned, the devisees were to have the interest indicated.[37] The difficulty with the entire conclusion of the court is that the gift over is only the ground for an argument and the terms of clause 4 are, even more than in *Ridgeway v. Underwood*,[38] against any vesting of an interest in the two children. But more than this, clause 5 contains an argument for the gift being considered contingent and the gift over of clause 6 is quite as strong for holding the gift to the children contingent as clause 7 is for holding it vested. There is very little reason for the gift over in clause 6, except upon the hypothesis that the gift to the children is contingent, since, if vested, each child's share would descend to her issue on her death. The arguments, then, to be drawn

[37] *Ante*, § 219.

[38] 67 Ill. 419, *supra*.

from all the gifts over equalize each other. Together they have no force.

§ 221. **Arguments in favor of the gift being contingent, founded upon the presence of a gift over:** Again the matter is all one of rational inference and argument. Suppose the gift be to A, to be paid at twenty-one, so that, standing alone, it would be vested, and then a gift over be added to the issue of A in case A dies under twenty-one leaving issue. Here, unless A's interest is contingent the gift over would be unnecessary, since A's vested interest would descend to his issue. We have, therefore, in the gift over an argument in favor of holding A's interest contingent. That argument, however, is far from strong for the gift over is likely to appear pretty clearly to be merely an express repetition of what the testator desires to have happen. Then, too, it might very properly be expected to perform one function even supposing the interest of A to be vested. It ought to bar A's wife of any share.[39]

In *Banta v. Boyd*,[40] and *Ebey v. Adams*,[41] the bequest prior to the gift over must, under the usual rules and apart from the gift over, have been vested, on the ground either that there was a direct gift, or that the direction to pay at a future time was merely for the convenience of the estate[42] or for both reasons.[43] In each case the gift over was limited, if the legatee died before the period of distribution leaving issue, to such issue. From this some inference could be drawn that the prior legacy was contingent. It is believed, however, that in the above two cases this did not begin to furnish a ground for overcoming the other reasons in favor of vesting.

In *Eldred v. Meek*,[44] the different weight to be attached to the presence of two gifts over was very neatly brought out.

[39] Under Buckworth *v.* Thirkell, 1 Coll. Juris. 322; 3 Bos. & Pul. 652, note; Butler's Co. Lit. 241a, note; 6 Gray's Cases on Property, 690; 1 Scribner on Dower, 2nd ed. p. 302; 10 Am. & Eng. Enc. 161, 2nd ed., perhaps it does not bar her of dower.

[40] 118 Ill. 186. See also People *v.* Jennings, 44 Ill. 488.

[41] 135 Ill. 80. See also Spengler *v.* Kuhn, 212 Ill. 186, 194 (207 Ill. 166).

[42] Ebey *v.* Adams, 135 Ill. 80; *ante*, § 216; People *v.* Jennings, 44 Ill. 488; *ante*, § 214.

[43] Banta *v.* Boyd, 118 Ill. 186; *ante*, § 215.

[44] 183 Ill. 26.

There the trustees were directed, by separate clauses, to convey to each of three grandchildren by name upon such grandchild becoming twenty-five. There was a gift over, if a grandchild died at any time without child or children to the others who reached twenty-five, and a further gift over, if any died with children under twenty-five, to such children. The court held the gifts to the grandchildren were contingent. Here it would seem to be clear enough that the devises were contingent in the first place, in spite of the court's admission that, without the gifts over, they might have been vested. Assuming that there was any doubt as to the character of the devise from the language of the original gift, it is clear that the first gift over, being upon death without children at any time, furnished no argument at all for the vesting of the gift to the grandchildren.[45] On the other hand, the second gift over, if a grandchild died with children, to such children, furnished a strong argument that the original gift was contingent.[46]

§ 222. Vesting of legacies charged upon real estate: Of course all gifts contingent if payable out of personalty are equally contingent when charged upon land. It was the holding of *Yates v. Phettiplace*,[47] that a distinction must be taken between a legacy payable out of personalty and one charged on real estate. Even, therefore, if the legacy was such as would be vested if not charged upon real estate, as to A, to be paid at twenty-one,—yet if it was charged upon real estate it was contingent, and if the legatee died before twenty-one his next of kin could not take.[48] This was recog-

[45] In this respect the gift over here was different from the first gift over of clause [6] in Lunt *v.* Lunt, 108 Ill. 307; *ante*, § 220.

[46] In this state the fallacy that a gift over after an absolute interest is void has had an application of uncertain scope. At one time at least all shifting interests by will were held void (*ante*, §§ 165-166), and even now those created by deed are menaced (*ante*, § 139). That, it is submitted, is the special reason why unheard of force seems to have been given to gifts over to make the first gift contingent, so that, in the case of future interests in real estate, you may have contingent remainders in double aspect.

[47] 2 Vern. 416 (1701), (5 Gray's Cases on Prop. 263).

[48] Note that in Powers *v.* Egelhoff, 56 Ill. App. 606, the court seizes upon the rule to aid it in holding the legacy contingent upon the legatee's reaching twenty-five.

nized by our supreme court in *McCartney v. Osburn.*[49] *Carper v. Crowl,*[50] however, shows every possible disposition on the part of the same court to get away from such a distinction. There the will by clause 8 gave the wife an estate in the homestead farm for life or until remarriage. Clause 9 provided that the testator's daughter should "have her support out of the avails of said homestead during the life time or widowhood of my said wife, and at her death or marriage to have out of said homestead $3,000." The daughter died before the widow and the question arose as to whether her next of kin would take the $3,000. The court assumed that the gift was in such terms as would make it vested if it were not charged upon the realty.[51] The question then arose —did that fact make any difference? The court, after recognizing that there was a general rule of the English cases which, if taken without qualification, would make it contingent, went on directly to adopt the relaxation of that rule stated by Jarman,[52] as follows: "If the postponement of payment appear to have reference to the situation or convenience of the estate, as, if land be devised to A for life, remainder to B in fee, charged with a legacy to C, payable at the death of A, the legacy to C will vest *instanter,* and consequently, if C die before the day of payment his representatives will be entitled."

§ 223. How far legacies heretofore regarded as either vested or contingent may in fact be certain executory interests: The consideration of the cases dealt with in §§ 208 to 222 and the results reached by them are likely to induce the conclusion that all legacies payable at a future time are either vested or contingent. This, it is believed, may lead to error. There is as certainly a third class of future interests in regard to legacies as there is in regard to future interests in real estate.[53] You may have a certain executory interest in personalty which is neither vested nor contingent. Thus, suppose a residue of

[49] 118 Ill. 403, 420.

[50] 149 Ill. 465, 482-485.

[51] *Ante,* § 212.

[52] 1 Jarman on Wills (6th ed. Bigelow) star page 792. Same passage quoted with approval in Powers *v.* Engelhoff, 56 Ill. App. 606. See also Theobald on Wills (2nd ed.) p. 407, same statement. Also King *v.* Withers, 2 Eq. Cas. Ab. 656, pl. 10, Cas. temp. Talb. 116 (5 Gray's Cases on Prop. 266).

[53] *Ante,* § 178.

personalty be given to A from and after the death of the testator's wife,—no disposition having been made of such residue in the meantime. If the subject-matter of the gift were real estate it is clear that it would not be contingent, since there is no contingency upon which the gift is to take effect—the event being certain of happening. It is executory, however, because it takes effect at a future time by way of interruption. Why do not the same results follow where the subject-matter of the gift is personalty?

The certain executory interest is transmissible by descent and devise,[54] so that if A dies before the death of the wife of the testator, the interest descends to his next of kin or to his devisees. They will, therefore, take at the death of the testator's wife. The certain executory interest may, then, be called "vested" in the sense of being transmissible. Whether it is vested only in this sense or in the sense in which it is used where questions of remoteness arise is obviously not at all settled by the case where A dies before the death of the testator's wife, and the only question is whether his next of kin, or the next of kin of the testator take. On either theory the result is the same,—the next of kin of A take.[55] It is submitted, however, that in the case put the interest must be considered neither vested as distinguished from executory, nor contingent as distinguished from non-contingent. It is, in fact a certain or non-contingent executory interest.

Is the gift to "A at twenty-one" a certain or non-contingent executory interest or a contingent executory interest? The cases are clear that it is the latter.[56] It would seem, however, that it might have originally been held to be a certain or non-contingent executory interest. No reason is perceived why

[54] *Ante*, § 179.

[55] Observe that according to the definition of vested, as used in connection with legacies, put forward in Hawkins on Wills, p. 223, the word includes gifts which are "not subject to a condition precedent." Thus it includes only legacies vested in the sense used in connection with questions of remoteness and in the sense of being transmissible.

[56] *Ante*, § 211. Reid *v.* Voorhees, 216 Ill. 236, holds that a gift to nephews and nieces "thirty years after my death" is executory so as to offend the rule against perpetuities, even though the rents and profits in the meantime are to be divided among the same nephews and nieces.

the tendency today should not be in the direction of so holding it.

Is the gift to "A to be paid at twenty-one" vested as distinguished from a certain or non-contingent executory interest? It must be apparent that the cases[57] which hold the gift so limited to A vested, do not really go farther than to hold it vested in the sense of being transmissible. Whether it is a vested as distinguished from an executory future interest is a question about which it is conceived there might be a difference of opinion.[58] It is important, therefore, to observe the cases where one view or the other would result in a different holding.

Suppose, for instance, the gift be to A (a person of five years of age) to be paid at twenty-five. If this is a certain executory interest then the intent of the testator must prevail and A cannot take till he reaches twenty-five. If, however, it is a vested as distinguished from an executory interest, then the question will arise whether the creation of a trust to remain indestructible after the *cestui* has reached twenty-five is possible. The English cases,[59] and doubtless many in this country,[60] take the view that A's interest is vested and that the creation of an indestructible trust cannot be allowed, so that A at twenty-one can require a transfer of the legal title to himself. Such a holding seems to the writer conclusive in favor of the view that the interest to A, to be paid at twenty-one, is vested as distinguished from executory.

The point is not so easily brought up for adjudication in some American jurisdictions where it is held, under the rule of *Claflin v. Claflin*,[61] that A cannot require a transfer of the principal until he reaches twenty-five. If A is bound to reach twenty-five within twenty-one years after the testator's death, or sooner, such a decision as that in *Claflin v. Claflin* may go upon the ground, either that the interest is vested as distinguished from executory, and that the trust is indestructible, or that A has a certain executory interest payable to him when he actually reaches twenty-five or when he would

[57] *Ante*, § 210.

[58] See Reid *v.* Voorhees, 216 Ill. 236, *supra*, note 56.

[59] *Post*, § 289.

[60] *Post*, § 289.

[61] 149 Mass. 19 (6 Gray's Cases on Prop. 141); *post*, § 288 *et seq.*

have reached twenty-five had he lived, or, perhaps, to A when he reached twenty-five or on his death if he died under twenty-five.[62] If, at the time of the testator's death, A was only four years old, so that he would not reach twenty-five within twenty-one years after the testator's death, it is clear from the authorities that the gift would take effect at once in A and the postponement alone would be rejected. This, however, may proceed upon the ground that A takes a vested as distinguished from an executory interest, and the postponement is void because it continues for too long a time,[63] or because the executory interest contained in the words "to be paid" is rejected as a separate interest contained in a modifying clause, leaving the absolute gift to A to stand.[64]

It is conceived, however, that where *Claflin v. Claflin* is law, the real nature of the interest in A may arise in this way: Suppose the subject-matter of the gift is a specific legacy and the gift is to A (a person of five years of age) to be paid at twenty-five. A cannot reach the subject-matter of the legacy until he reaches the age of twenty-five. Suppose there is no disposition of the income in the meantime. If the interest be a non-contingent or certain executory interest, then the income must pass to the next of kin, or to the residuary legatee.[65] If A has a vested as distinguished from an executory interest, then why must not he be entitled?

[62] *Post*, § 230.

[63] *Post*, § 293.

[64] *Post*, §§ 266-268.

[65] 1 Jarman on Wills (6th ed. Bigelow) star page 614.

NOTES: Legacies Apparently Subject to a Condition Precedent that the Testator's Debts Shall be First Paid, Held not Subject to any Condition in Fact: Scofield *v.* Olcott, 120 Ill. 362, 376; Ducker *v.* Burnham, 146 Ill. 9, 20; Hawkins *v.* Bohling, 168 Ill. 214, 220; Nevius *v.* Gourley, 95 Ill. 206; *post*, § 275, note on Trusts.

Divesting of Interests: Interests are not divested unless the event upon which the divesting is to occur strictly happens: Henderson *v.* Harness, 176 Ill. 302; McFarland *v.* McFarland, 177 Ill. 208, 217; Myers *v.* Warren County Library Association, 186 Ill. 214.

Substitutional Gifts: See *ante*, § 113. Also Theobald on Wills, 2nd ed. page 493; Reiff *v.* Strite, 54 Md. 298; Richey *v.* Johnson, 30 Ohio State, 288.

"Or" Construed "And": Kindig's Executors *v.* Smith, 39 Ill. 300; Olcott *v.* Tope, 213 Ill. 124; Ayers *v* Chicago Title & Trust Company, 187 Ill. 42.

Intermediate Income: The following question is apt to arise where springing interests, whether legal or equitable are created: Who is entitled to the income of

the estate during the gap before the springing interest takes effect in possession? This is often, and always should be, explicitly provided for, as in Blanchard *v.* Maynard, 103 Ill. 60; Hale *v.* Hale, 125 Ill. 399; Waldo *v.* Cummings, 45 Ill. 421, and Rhoads *v.* Rhoads, 43 Ill. 239. Where this is not done, however, and the gap is not filled by any interest raised by implication, the English cases adopted different rules of construction for the disposition of the intermediate income. One of these was: If the springing interest was of a mixed residue of real and personal property, the income must be accumulated and paid over to the one ultimately entitled.

(a) This rule obtained where an express trust was created and the gift was of the "residue" of real and personal property: Glanvill *v.* Glanvill, 2 Meriv. 38; Waldo *v.* Cummings, 45 Ill. 421, (*semble*). In Blatchford *v.* Newberry, 99 Ill. 11, it would seem that the income of the residue before the widow's death must have been accumulated, though this point was not involved. (b) It made no difference, according to the English cases, that there was no trusteeship: Genery *v.* Fitzgerald, Jac. 468; Rogers *v.* Ross, 4 Johns. Ch. (N. Y.) 388. (c) The use of the word "residue" would seem to be unnecessary so long as some form of expression is used which brings real and personal property into a single blended fund: In re Taylor, Smart *v.* Taylor [1901], 2 Ch. 134, ("all real and personal estate not otherwise disposed of"); Lachlan *v.* Reynolds, 9 Hare 796 ("the interest of real and personal property"); Dougherty *v.* Dougherty, 2 Strob. Eq. (S. C.) 63, ("all my property both real and personal"); In re Dumble, Williams *v.* Murrell, L. R. 23 Ch. Div. 360, (realty and personalty were devised by different clauses, yet the rule of Genery *v.* Fitzgerald, *supra*, was applied; thus carrying the rule very far.) In Lambert *v.* Harvey, 100 Ill. 338, the devise was of "all property both real and personal and mixed." The holding, however, that there was an intestacy as to the real estate, so that title descended to the heir at law, was not contrary to the above mentioned English Cases, because the action was ejectment by the residuary legatee, and the only question was whether the residuary legatee possessed the legal title to the real estate prior to the time when the springing future interest vested in possession. The court were not called upon, and did not pretend to decide that the heir at law did not hold the rents and profits in trust to accumulate for the benefit of the residuary legatee. (d) On the other hand, when you begin to enumerate property specifically, so as to designate both real and personal property, but not to include them together in one fund, it may be that only the income of the personal property will accumulate, while the rents and profits of the real estate will go to the heir at law as intestate property: In re Drakeley's Estate, 19 Beav. 395. (Here the gift was not of "residue" but of specific kinds of property, mentioning them: "Freehold, copyhold and all his real estate, and bequeathed all his ready money, securities for money, stocks and personal estate, etc.")

CHAPTER X.

DETERMINATION OF CLASSES.[1]

§ 224. **Introductory[2]—Gift to a class distinguished from a gift to individuals spoken of as a class:** In *Lancaster v. Lancaster*,[3] the testator devised "to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother W. P. L. and his wife M. L. (now both deceased)." J. E. L. and J. L. G., both heirs of the bodies of the given ancestors, were alive at the making of the will, but J. L. G. died before the testator. The decree below gave J. E. L. one-half and the heirs generally of J. L. G. the other half. This was clearly error. It was so held. Then the nice question was presented, whether the heirs of the testator would take as upon a lapsed devise, or whether J. E. L. would take all because the gift was to a class.[4] In favor of the former, it

[1] NOTE ON RULE IN WILD'S CASE, 6 Co. 17 (1599). The rule in Wild's Case was: "If a devise is made to A and his children, and A has children living at the time of the devise, A and the children are at common law joint tenants for life. If A has at that time no children, he takes an estate tail." (5 Gray's Cases on Prop. p. 304; Beacroft *v.* Strawn, 67 Ill. 28, 33; Baker *v.* Scott, 62 Ill. 86.) By secs. 5 and 13 of our Act on Conveyances (R. S. 1874, ch. 30), the first part of the above rule would give A and his children a joint estate as tenants in common in fee. See Faloon *v.* Simshauser, 130 Ill. 649; *ante*, § 161. (The limitations here were in a deed. So far, however, as this part of the rule in Wild's Case goes there is no difference between a gift by deed and a gift by will.) By the other part of the rule there would simply be created an estate tail for the Statute on Entails (*ante*, § 114) to operate upon. *Quære*, whether under these circumstances the second part of the above rule would have any application. See the reasoning (*ante*, § 206) on the point of how far in this state an estate tail may be implied from a gift over of real estate upon an indefinite failure of issue.

[2] Regarding the validity of gifts to a class, so far as the members of it, not in existence at the time the gift is made, are concerned, see *ante*, §§ 160, 161.

[3] 187 Ill. 540.

[4] The general rule being clear that upon a gift to a class, if one member of the class dies before the testator, those *in esse* at the death of the testator take all: McCart-

might have been urged that both parents being dead and the testator reciting that fact in the will, the gift was really to individuals as if they had been named. It was long ago, however, held in England that this distinction was too fine,[5] and that the gift was to a class. Our supreme court reached the same conclusion independently of the authorities.[6]

PART 1.

WHEN THE CLASS DETERMINES.

§ 225. Does not depend upon whether the gift is vested or contingent: Thus, if you have a gift to the children of A to be paid at twenty-one the gift is vested. If it be to the children of A who reach twenty-one it is contingent. Yet in each case the class is determined, not with reference to when the interest vests, but to the time when the first distribution is made.[7] Whether the interest is vested or not merely affects the amount which the members of the class will take. If it be vested,[8] then, upon the death of any member of the class taking a vested interest, such interest will pass to his representatives. That is, the maximum amount which each member of the class will take is fixed. On the other hand, if the

ney *v.* Osburn, 118 Ill. 403, 418; Lancaster *v.* Lancaster, 187 Ill. 540, 546; Rudolph *v.* Rudolph, 207 Ill. 266, 271. Observe, however, that under sec. 11 of our Act on Descent (R. S. 1874, ch. 39, sec. 11) if the class consists of children or grandchildren of the testator and one dies in the life of the testator, leaving children, and no provision is made for that contingency, the children of the child or grandchild so dying will take the share their parent would have taken had he outlived the testator: Rudolph *v.* Rudolph, 207 Ill. 266.

[5] Viner *v.* Francis, 2 Cox 190 (1789), (5 Gray's Cases on Prop. p. 307).

[6] In Ebey *v.* Adams, 135 Ill. 80, the court speaks of a gift to his children or their heirs (naming six living children) as if the gift were to a class. In fact the gift was held to be contingent to all the children named who survived the life tenant, so there was no gift to a class.

[7] *Post*, §§ 226 *et seq.*

[8] In the following cases the gift to the class was vested at the testator's death, yet the class, according to the general rule, was allowed to increase until the period of distribution: Cheney *v* Teese, 108 Ill. 472, 473; Howe *v.* Hodge, 152 Ill. 252, 277 *et seq.*, *ante*, § 210; Chapman *v.* Cheney, 191 Ill. 574, *ante*, § 209; Flanner *v.* Fellows, 206 Ill. 136, *ante*, § 108.

interest is contingent,[9] then, if one dies before the contingency happens, the other members of the class surviving the contingency take all. In this case the maximum amount of the share of each is not determined until the contingency happens and all the interests vest.[10]

§ 226. Rule where the period of distribution is the death of the testator: Suppose there is a gift to all the children of A, and they are to take at the testator's death. It is the settled rule that if A have children at the death of the testator, they take and subsequently born children are not let in.[11] Of course the testator may, by apt words, include in the class designated, not only those born at his death, but all who may at any time thereafter be born to A. This effect was given to the language of the will in *Handberry v. Doolittle*,[12] on the ground that, while in one part of the will the devise to the children of a deceased brother was by name, the gift to the children of a living brother was "to the children of R."

§ 227. Rule when the period of distribution is the termination of a life estate:[13] If no members of the class are in

[9] In the following cases the gift to the class was contingent on its members surviving the period of distribution: Ridgeway *v.* Underwood, 67 Ill. 419, *ante*, § 211; Blatchford *v.* Newberry, 99 Ill. 11; Bates *v.* Gillett, 132 Ill. 287; Ebey *v.* Adams, 135 Ill. 80, *ante*, § 216; Pitzel *v.* Schneider, 216 Ill. 87.

In Schuknecht *v.* Schultz, 212 Ill. 43, the future interest was either certain or non-contingent executory or else contingent executory, (*ante*, § 223), yet that did not affect the rules for the determination of classes.

[10] Observe that vesting here need have no stronger significance than that of transmissible, *i. e.*, for the purposes of the above distinctions, it includes not only vested interests as distinguished from those that are executory but also certain executory interests as distinguished from contingent executory interests. The character of the interest must, of course, be settled with reference to principles discussed elsewhere, (*ante*, §§ 178-223).

[11] Lancaster *v.* Lancaster, 187 Ill. 540; Ingraham *v.* Ingraham, 169 Ill. 432, 467 *et seq.* (*semble*); Handberry *v.* Doolittle, 38 Ill. 202, 206, (*semble*); Schuknecht *v.* Schultz, 212 Ill. 43, 46, 47 (*semble*); Low *v.* Graff, 80 Ill. 360, 370; McCartney *v.* Osburn, 118 Ill. 403, 418.

[12] 38 Ill. 202.

[13] Observe that in Blatchford *v.* Newberry, 99 Ill. 11, the great question was whether, by the proper construction of the will, the period for the distribution of the residue came at the death of both the tes-

existence at the time the testator dies or the settlement is made, then it is perfectly clear that the class will increase at least till the death of the life tenant. This is brought out by the cases where there is involved the limitation of an estate tail to A, who is at the time without issue. By the Statute on Entails,[14] A at once takes a life estate with a contingent remainder to a class. Under the decisions of our supreme court there is some ground for saying that this remainder is the equivalent of a gift to "children."[15]. It seems always to have been assumed that all the children born to A at any time will take.[16] Even, however, if there be one or more members of the class in existence at the time the testator dies or the settlement *inter vivos* is executed, it seems clear that the class may increase until the death of the life tenant, but not beyond that time.[17]

Lancaster v. Lancaster,[18] is somewhat peculiar. There the devise was to A for life "and to the heirs of her body begotten after her death." At the time of the testator's death A had one child. The court seems to have said that this one child should take to the exclusion of any others which might afterwards be born because the class was determined at the testator's death. It is not clear that this was necessary to the decision. It must be regarded as an oversight. In any view that you take of the limitations, the period for the determination of the class must, according to the general rule,

tator's daughters without leaving issue, or upon that event and the death of the widow, who took no life estate in the residue under the will.

[14] *Ante*, § 114.

[15] *Ante*, §§ 116-120.

[16] Voris *v.* Sloan, 68 Ill. 588; Kyner *v.* Boll, 182 Ill. 171; Turner *v.* Hause, 199 Ill. 464.

[17] Handberry *v.* Doolittle, 38 Ill. 202; Mather *v.* Mather, 103 Ill. 607; Cheney *v.* Teese, 108 Ill. 473, 482; McCartney *v.* Osburn, 118 Ill. 403, 418; Bates *v.* Gillett, 132 Ill. 287; Schaefer *v.* Schaefer, 141 Ill. 337, 345; Young *v.* Harkleroad, 166 Ill. 318; Madison *v.* Larmon, 170 Ill. 65, 81; Field *v.* Peeples, 180 Ill. 376, 381; Ebey *v.* Adams, 135 Ill. 80; Schuknecht *v.* Schultz, 212 Ill. 43, 47, 48; Pitzel *v.* Schneider, 216 Ill. 87. In Handberry *v.* Doolittle, *supra*, the court found this additional reason from the context of the will for declaring that children born after the testator's death were included. In providing for the children of the testator's deceased brother Irwin he mentioned them by their proper names. When he devised to children of his living brother Rawley he did so by naming them as a class.

[18] 187 Ill. 540, 546.

have been the death of the life tenant. It is most clearly so if you leave them as they are. It is equally so if you apply, first the rule in Shelley's case, and then our Statute on Entails,[19] and make the further extreme assumption that under that statute the remainder is substantially to children.[20] In *Lehndorf v. Cope*,[21] for instance, where the direct limitations of an estate tail was involved, we have the *dictum* of the court that the remainder created by the statute went to the children of the life tenant (the donee in tail) "*in esse* at the time of making the deed [creating the estate tail], subject possibly, however, to be opened to let in after-born children of the same class."

§ 228. **Suppose the property to be distributed to the class is subject in part to a life estate and the gift to the class is in terms immediate:** Where there is nothing in the will from which it could be specially inferred that children born up to the time of the death of the life tenant, or later, were intended to share, the rule of the English cases[22] would seem to be that only children born at the death of the testator could take.[23] In accordance with this holding the class of grandchildren in *Howe v. Hodge*,[24] must have been determined, as regards the whole estate, including that part subject to a life interest, not when the life tenant died, but when the time came for actually paying over a share to one of the members of the class,[25] that is, at least, when the eldest grandchild reached twenty-five.

[19] *Ante*, § 131.

[20] *Ante*, §§ 116-120.

[21] 122 Ill. 317, 330.

[22] Conventry *v.* Coventry, 2 Dr. & Sm. 470; Hill *v.* Chapman, 1 Ves. p. 405; Hagger *v.* Payne, 23 Beav. 474; Hawkins on Wills, pp. 74-75; Theobald on Wills, (2nd ed.) p. 246; 2 Jarman on Wills, (6th ed. Bigelow), star page 1013.

[23] A North Carolina case, Britton *v.* Miller, 63 N. C. 268, 270, announcing a little different rule, did not go farther than to let children born after the testator's death, but before the termination of the life estate, share in that part subject to the life estate.

Annable *v.* Patch, 3 Pick. (Mass.) 360, where it was held that the class remained open as to the whole estate till the end of the life estate in part, seems to have gone upon the ground that by the special context of the will involved all the grandchildren born at any time were included.

[24] 152 Ill. 252.

[25] *Post*, § 230.

§ 229. Rule when the period of distribution comes because of the happening of a contingency to a member of the class—Where there is a contingent gift to the children of A who reach twenty-five. The first period of distribution here comes when the first child, whether the first born or otherwise, actually reaches twenty-five. If a specific sum, or a residue, be left to be distributed among the whole class, then the class will determine at that time.[26]

§ 230. Where the gift to the class is vested: Suppose, now, the gift to the class, instead of being contingent upon the members of it reaching a certain age, is vested in interest at once upon the testator's death or the execution of the settlement *inter vivos*, but subject to a postponed enjoyment until the members of the class respectively reach a certain age,—let us say twenty-five. Apart from any question of remoteness in the gift to the class, or of the invalidity of the postponed enjoyment clause itself because it may last too long, the postponement would be valid. It is of course, valid, where *Claflin v. Claflin*,[27] is law. It is equally valid under the English cases[28] which recognize as a general rule that these postponements of absolute equitable interests beyond the period of the *cestui's* minority are bad. There the postponement is said to be valid as a relaxation of the general rule when the sustaining of it is for the benefit of persons other than the *cestui*—viz., other members of the class.[29]

When, now, does the class determine in such a case?

This depends according to the usual rules for the determination of classes upon the time when the first period of distribution arrives. There are three possible points of time at which this may occur. *First*, when the first child living at any time reaches twenty-five; *second*, when the eldest child actually reaches, or if he had lived, would have reached

[26] This rule yields to the special context of the instrument, as in Ingraham *v.* Ingraham, 169 Ill. 432, 469, where the distribution was to occur to nephews and nieces if they should be at any time during their respective lives in need, but by the words describing the nephews and nieces as those "*who are* the children" of the testator's brothers and sisters, the class was determined at the testator's death.

[27] 149 Mass. 19, 6 Gray's Cases on Property, 141. *Post*, §§ 288 *et seq.*

[28] Oppenheim *v.* Henry, 10 Hare 441.

[29] *Post*, § 265.

twenty-five; *third*, when the eldest child reaches twenty-five or dies under that age. It is submitted that the first time indicated is out of the question. It would of course lead to absurdity where all the children die under twenty-five. There can be no reason for thus adopting a view which may in fact greatly extend the time for the payment of the share of the children beyond the period actually expressed in the testator's will.[30] As between the second and third views perhaps a choice may be difficult.[31] It seems to the writer that the third is the proper one, because it is the earlier, and because the postponement is a matter purely personal to the legatee.[32] It is introduced so that he may reach years of discretion before being allowed to handle the principal of the property. When, therefore, he dies, his administrator or executor ought to be able to demand at once the payment of his vested share.[33] It

[30] Comments upon Kevern *v.* Williams, 5 Sim. 171 (1832), (5 Gray's Cas. on Prop, 759), have, it is believed, assumed the gift to the grandchildren of the testator's living brother, which was vested, but subject to a postponement of payment till each respectively reached twenty-five, would, upon the usual rule for the determination of classes be too remote. As the eldest grandchild in that case was ten years old at the testator's death, such an assumption must have proceeded upon the supposition that the first period of distribution does not come till the first grandchild born at any time actually reaches twenty-five. Such a premise is, it is believed, out of the question.

[31] The attitude of the court in Howe *v.* Hodge, 152 Ill. 252, regarding the increase of the class seems consistent with either view, since the eldest grandchild *in esse* at testator's death was over four years old.

[32] It was suggested to the writer by Mr. Herbert Pope that a difference might be made between a gift to a class and a gift to an individual as to when the postponement ends; that in the case of an individual it might end at his death while, in the case of a class, it might end when the eldest would have reached the required age had he lived, so that the class could increase.

[33] In support of this, see the hint in Claflin *v.* Claflin, 149 Mass. 19, (6 Gray's Cases on Property, 141), to the effect that a creditor or grantee of the *cestui* might be entitled to immediate possession of the property, although the *cestui* had not reached the age set for the distribution. Consistent with this suggestion as well as with the view that the postponement is wholly void are Sanford *v.* Lackland, 2 Dill. 6, (Gray's Restraints on Alienation 2nd ed. § 114), and Havens *v.* Healy, 15 Barb. 296 (*id.* § 116). Note, also, that in Lunt *v.* Lunt, 108 Ill. 307, the postponed enjoyment clause, so far

may, however, be settled by authority that the second period is the proper one.[34]

§ 231. Where the gift is to children of A, to be divided among them when the youngest reaches twenty-one: What is meant by the "youngest"? Does it mean the youngest living at the testator's death, the youngest of all the children living at any one time,—or the youngest of any that may ever be born? It is believed that our supreme court has never had to go farther than to hold that it meant the youngest of those living at the testator's death, for in the only two cases, in this state where the point has been raised, the youngest living at the testator's death had not reached the required age.[35] In both cases, however, the court refers to a child born subsequent to the testator's death as the "youngest" child designated, and gives the impression that the period of distribution would not arrive until that child reached the required age. This would suggest the rule that the period of distribution arrived when all the children living at any one time had reached the required age.

§ 231a. Where the gift is after a life estate to such children of A as reach twenty-one: If the preceding life estate is in A then the class closes at A's death and then only. If the life interest is in one other than A, then the class closes

as it affected the share of the youngest child would last for too long a time, unless by its proper construction it was operative only until the devisee actually reached thirty or died under that age, since the youngest child was only one year old at the testator's death. The actual holding of the postponement valid is really a decision that the postponement only continues till the devisee reaches thirty, or dies under that age.

[34] Chester *v.* Painter, 2 P. Wms. 335; Roden *v.* Smith, 2 Amb. 588; Maher *v.* Maher, 1 L. R. Ir. 22; Theobald on Wills, 2nd ed. p. 139.

[35] In Handberry *v.* Doolittle, 38 Ill. 202, the child of A, born after the testator's death but when the youngest child living at the testator's death was only seven years old, was permitted to share. In McCartney *v.* Osburn, 118 Ill. 403, partition proceedings were held to have been prematurely brought, where a child of A, born after the testator's death, had not reached twenty-one. It is fair to infer, however, that A's youngest child living at the testator's death had not reached twenty-one because A was a woman and had borne seven other children at the time of the testator's death and one born a year afterwards.

only upon the happening of two events,[36]—the termination of the life estate and the coming of the time when the eldest member of the class actually reaches twenty-one, or would have done so had he lived, or, perhaps, when he reaches that age or dies before attaining it.[37]

§ 232. General character of the rules concerning the determination of the class: The rule for the determination of classes is that principal one which sets the first period of distribution as the time for the closing of the class. This rule is not thought to be exactly one of construction. It is true that it yields to an expressed intention of the testator, which is more than usually emphatic, but where it applies, the belief is indulged, that, to a certain extent, it defeats the actually expressed intent of the testator. It is submitted that the direct gift to all grandchildren who reach twenty-one, means what it says, and includes *all*.[38] The rule, therefore, which, to a certain extent cuts down the class, defeats the intent. The rule is, it is believed, properly called a rule of convenience in administering the estate, that is, a rule of law which interferes with the testator's expressed intent, to some extent, because, to carry it out, would result in great inconvenience in the distribution of the property. This characterization of the rule indicates at once its real nature and its justification.

PART 2.

WHO ARE INCLUDED IN THE DESCRIPTION OF THE CLASS.

§ 233. Devise of a future interest to the testator's "heirs": Suppose the testator limits a future interest after a life estate or a shifting executory devise after a fee, to his heirs (or next of kin). What is the scope of the word "heirs"? Does

[36] Pitzel *v.* Schneider, 216 Ill. 87.

[37] *Ante*, § 230.

[38] Gray's Rule against Perpetuities, § 639.

[1] NOTE: *On the Meaning of the Words "Heirs," "Descendants," "Issue" and "Children":*

(1) In its primary meaning the word "heirs" refers to persons entitled to succeed in case of intestacy: Rawson *v.* Rawson, 52 Ill. 62; Richards *v.* Miller, 62 Ill. 417; Kelley *v.* Vigas, 112 Ill. 242; Kellett *v.* Shepard, 139 Ill. 433, 442; Smith *v.* Kimbell, 153 Ill. 368, 375; Ayers *v.* Chicago T. & T. Co., 187

it mean testator's heirs at the time of his death, or heirs at the termination of the life estate or fee simple? Of course the primary meaning of "heirs" is "heirs" of the testator at the

Ill. 42, 60; Clark *v.* Shawen, 190 Ill. 47 and Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 151, 152.

In a number of cases, however, the word "heirs" under the special context of the instrument in which it occurs, was held to mean "children": Richards *v.* Miller, 62 Ill. 417, 423, 424; Bland *v.* Bland, 103 Ill. 11, 17; Kelley *v.* Vigas, 112 Ill. 242; McCartney *v.* Osburn, 113 Ill. 403, 413; Carpenter *v.* Van Olinder, 127 Ill. 42, 50; Seymour *v.* Bowles, 172 Ill. 521; Fishback *v.* Joesting, 183 Ill. 463; Gannon *v.* Peterson, 193 Ill. 372, 397; Bradsby *v.* Wallace, 202 Ill. 239. See also Hobbie *v.* Ogden, 178 Ill. 357, 72 Ill. App. 242.

Observe the cases, *ante*, § 129, under the Rule in Shelley's case.

In a number of cases we find a gift over expressed to be upon the first taker's dying "without heirs of his body," (Summers *v.* Smith, 127 Ill. 645) or "leaving no issue," (Smith *v.* Kimbell, 153 Ill. 368) or "without issue of his body," (Strain *v.* Sweeny, 163 Ill. 603). In all of these cases it was held that the gift over was on a definite failure of issue, (*ante*, §§ 200-202). Apparently some ground was found for this construction from the fact that "heirs" or "issue" might mean "children." It is clear, however, from Strain *v.* Sweeny, that it was not held that "heirs" or "issue" in these cases were the absolute equivalent for "children," for they included any issue of the first taker that might be living at the time of his death.

(2) "Descendants" is co-extensive in meaning with "issue": Bates v. Gillett, 132 Ill. 287, 297.

(3) The word "issue" has sometimes been held on the special context of the instrument in which it occurs, to mean "children": Arnold *v.* Alden, 173 Ill. 229, 238; Gannon *v.* Peterson, 193 Ill. 372, 379.

(4) For the construction of the word "children" so as to include grandchildren, see Arnold *v.* Alden, 173 Ill. 229.

In a gift to the "children of A" the legally adopted children of A were held to be included in Butterfield *v.* Sawyer, 187 Ill. 598, (two Judges dissenting). Clarkson *v.* Hatton, 143 Mo. 47, is *contra*. See also 2 Jarman on Wills, (6th ed. Bigelow), star page 1000, note 1, and cases there cited.

In McCoy *v.* Fahrney, 182 Ill. 60, a post-nuptial settlement directed the trustee upon the death of the settlor's wife to convey all lands held in trust to "all the children" of the wife. Held, only children of the wife by the grantor were included.

See also Schaefer *v.* Schaefer, 141 Ill. 337, 342 where "children" was held equivalent to "heirs" as a word of limitation.

In Bland *v.* Bland, 103 Ill. 11, the question was simply upon conflicting clauses of a will whether the testator had devised to all his children or only to his minor children.

time of his death,[2] and this will be the meaning of heirs[3] in the cases put unless something appear to lead to a contrary conclusion. The testator may, no doubt, by apt words, make his meaning perfectly clear. But suppose he does not do so. Under what circumstances will a court undertake to say that those who are heirs at the end of the life tenancy, or on the termination of the fee, are meant?

The above problem has come up in Illinois in this form: The testator devises to A for life, and if A dies without issue living at his death, then to the testator's heirs at law. Suppose A is one of the several heirs at law of the testator. Following the leading English case of *Holloway v. Holloway*,[4] our supreme court has held that under these circumstances there is nothing to prevent "heirs" from having its primary meaning of heirs of the testator at the time of his death.[5] If, on the other hand, the life tenant, A, is the sole heir of the testator at the time of his death, it may be argued that the giving of the life tenant a fee in remainder would defeat the plain gift of the life estate. A recent Illinois case[6] appears to have taken this view and to have settled the law, here, that in such a case "heirs" means heirs of the testator at the time of A's death. It is worth noting, however, that the present tendency of the English cases[7] is to retain the primary meaning of "heirs," even where the life tenant is the sole heir of the testator. This position is taken upon the ground that the gift to "heirs" is only put in to fill a gap and prevent an

[2] Clark *v.* Shawen, 190 Ill. 47; Kellett *v.* Shepard, 139 Ill. 433, 442; Kelley *v.* Vigas, 112 Ill. 242; Richards *v.* Miller, 62 Ill. 417; Rawson *v.* Rawson, 52 Ill. 62; Ayers *v.* Chicago T. & T. Co., 187 Ill. 42, 60 (*semble*); Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 151-152.

[3] Note that in such cases the quantity of the estate which the heirs at law take is governed by the Statute on Descent, (Kelley *v.* Vigas, 112 Ill. 242; Richards *v.* Miller, 62 Ill. 417; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 150-152; Thomas *v.* Miller, 161 Ill. 60, 73), except, however, when the terms of the will clearly indicate otherwise, (Auger *v.* Tatham, 191 Ill. 296).

[4] 5 Ves. 399, (5 Gray's Cas. on Prop. 318).

[5] Kellett *v.* Shepard, 139 Ill. 443; Thomas *v.* Miller, 161 Ill. 60, 72, seems *contra*.

[6] Johnson *v.* Askey, 190 Ill. 58.

[7] Bird *v.* Luckie, 8 Hare 301; Theobald on Wills, (2nd ed.) pp. 280-281.

intestacy. There is, therefore, no absurdity in the life tenant taking all.

Suppose, now, the testator devises to A *in fee,* and, if A dies without issue living at his death, then to the testator's heirs at law. If A is one of several heirs at law of the testator, will "heirs" have its primary meaning of heirs of the testator at the time of death? It is believed the answer should be in the affirmative, because there is no absurdity in taking away the whole fee from A and giving back part to him. There is much in *Burton v. Gagnon* [8] in support of this view. There the devise was to the testator's two children with the proviso "that should all of my children die intestate and without lawful issue" then over to the "heirs at law of my deceased father." This last was declared to mean those who were the father's heirs at the time of the testator's death,[9] in

[8] 180 Ill. 345.

[9] Why did not the gift to "heirs" mean heirs of the father at the father's death? If it had it would have included the testator himself, and so there would have been an intestacy as to part. This was obviously not intended.

NOTE: *On Whether Members of a Class take Per Stirpes or Per Capita:* Our Supreme Court in two cases (Pitney *v.* Brown, 44 Ill. 363; McCartney *v.* Osburn, 118 Ill. 403, 424) recognized and followed a general rule as stated by Jarman, (2 Jarman on Wills, (6th ed. Bigelow) star pages 1050, 1051), that if a gift be made to one person and the children of another person, as for instance to A and the children of B, A and the children of B in such case, in the absence of anything to show a contrary intention, will take *per capita* and not *per stirpes.* In both cases the court recognized that in the language of Jarman "this mode of construction will yield to a very faint glimpse of a different intention in the context." But in each case it was held that there was not sufficient in the context of the will to furnish an excuse for a result contrary to the general rule.

There is one class of cases in this state where by statute there must be a *per stirpes* distribution. Where the gift is to the "heirs of A," and A leaves as his heirs a child and the children of a deceased child by the Statute on Descent (R. S. 1874, ch. 39, sec. 1), the children of the deceased child will take only the share their parent would have taken. Hence the distribution is, in fact, *per stirpes* and not *per capita:* Richards *v.* Miller, 62 Ill. 417, 425 (what law governed was here also considered); Kelley *v.* Vigas, 112 Ill. 242; Thomas *v.* Miller, 161 Ill. 60, 72, 73; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 148, 149. See also Young *v.* Harkleroad, 166 Ill. 318. Observe, however, that the heirs may take *per stirpes* if the intention is so clearly expressed: Augur *v.* Tatham, 191 Ill. 296. But ob-

spite of the fact that by so doing the two children of the testator who took the fee, subject to the executory devise, were, with others, included in this meaning of "heirs," and so took as executory devisees over.

serve that the direction to "divide equal among my heirs" (Kelley *v.* Vigas, *supra*) is not sufficient to induce a construction that the heirs take *per capita* and not *per stirpes*. See, also, to the same effect Kirkpatrick *v.* Kirkpatrick, *supra*.

CHAPTER XI.

POWERS.

Part 1.

Operation and Extinguishment.

§ 234. Validity of legal interest created by the exercise of a power: There can be no doubt but that the exercise of a power in this state is sufficient to confer a legal title to the appointee. It makes no difference whether the power is created in a deed[1] or by will.[2] The appointee under the power takes title from the donor and not from the donee of the power.[3] The exercise of the power, therefore, results in the creation of a springing or shifting future interest.[4] Thus, we have instances where the exercise of a power by an executor[5] or a life tenant[6] cuts short the interest which has descended to the heirs at law, so that a springing future interest is

[1] Butler *v.* Huestis, 68 Ill. 594; Morrison *v.* Kelly, 22 Ill. 610.

[2] See cases cited *infra* notes 5-8. Observe also that since 1829 a statute has been in force in this state as follows: "In all cases where power is or may be given in any will, to sell and dispose of any real estate, or interest therein, and the same be sold and disposed of in the manner and by the persons appointed in such will, the sales shall be good and valid." Laws 1829, p. 191, sec. 89 (1 A. & D. R. E. S. 466); R. S. 1845, ch. 85, p. 426, sec. 93 (1 A. & D. R. E. S. p. 514); Laws 1872, p. 77, sec. 97 (1 A. & D. R. E. S. p. 570); R. S. 1874, ch. 3, sec. 97.

[3] See Christy *v.* Pulliam, 17 Ill. 59, where Roach *v.* Wadham, 6 East, 289, (5 Gray's Cases on Property, p. 338), is cited with approval. In Pulliam *v.* Christy, 19 Ill. 331, 333, the Court said "nor was it ever doubted in this case, that Christy, as the appointee under the power, derives his title, not under the person executing the power, but under the will." Observe also Henderson *v.* Blackburn, 104 Ill. 227.

[4] §§ 138, 146, 164.

[5] Rankin *v.* Rankin, 36 Ill. 293; Purser *v.* Short, 58 Ill. 477; Hughes *v.* Washington, 72, Ill. 84; Starr *v.* Moulton, 97 Ill. 525; Lambert *v.* Harvey, 100 Ill. 338 *semble.*

[6] Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59, 19 Ill. 331; Markillie *v.* Ragland, 77 Ill. 98; Crozier *v.* Hoyt, 97 Ill. 23. See also Lomax *v.* Shinn, 162 Ill. 124.

created. We have, also, cases where the executor's,[7] or life tenant's,[8] exercise of a power cuts short the interest of the devisees under the will so that a shifting future interest is created.[9] The legal estate appointed must, then, be valid most usually because the conveyance creating the power operates under the Statutes of Uses or Wills.[10]

§ 235. Who may be the donee of a power: The only question that has ever arisen in this state upon this point centers about the distinction between the holding of *Morrison v. Kelly*,[11] and that of *Leman v. Sherman*.[12] In the former it was held that the power to appoint a new trustee might be conferred upon a court of chancery, which by law had jurisdiction to perform the function required of it, and especially where the estate in question was administered by the same court in the exercise of its proper jurisdictional powers. In the latter it was held that the probate court, having no jurisdiction to act in such manner, could not be made the donee of such a power.

§ 236. Extinguishment of powers: So far as the total extinguishment of powers goes our supreme court seems never to have gone farther, in the absence of statute, than to hold that a power which by the terms of its creation is not to be exercised after a certain time has elapsed, cannot be exercised after that time.[13] Perhaps this is more a question of the extent of the power than its extinguishment.

[7] Pahlman *v.* Smith, 23 Ill. 448; Hamilton *v.* Hamilton, 98 Ill. 254; Railsback *v.* Lovejoy, 116 Ill. 442 (*semble*); Hawkins *v.* Bohling, 168 Ill. 214, 220 (*semble*); Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144 (*semble*). Also Gilman *v.* Bell, 99 Ill. 144 (*semble*).

[8] Funk *v.* Eggleston, 92 Ill. 515; Kaufman *v.* Breckinridge, 117 Ill. 305; Walker *v.* Pritchard, 121 Ill. 221; Gaffield *v.* Plumber, 175 Ill. 521. See, also the *dicta* of the following cases: Griffin *v.* Griffin, 141 Ill. 373; Clark *v.* Clark, 172 Ill. 355; Ely *v.* Dix, 118 Ill. 477; Goff *v.* Pensenhafer, 190 Ill. 200; Kurtz *v.* Graybill, 192 Ill. 445.

[9] Powers of sale in mortgages have received no treatment in the text of this volume. They were valid in instruments executed before July 1, 1879; Longwith *v.* Butler, 3 Gilm. (Ill.) 32. By an act of 1879 (Laws 1879 p. 211) such powers in instruments executed after that date are void.

[10] *Ante*, §§ 138, 146, 164.

[11] 22 Ill. 610.

[12] 117 Ill. 657.

[13] Smyth *v.* Taylor, 21 Ill. 296. See also Ely *v.* Dix, 118 Ill. 477, 482.

Statutes,[14] however, which prescribe the conditions upon which foreign corporations, having power to act as executor, etc., may do business in this state, prohibit a foreign corporation which is an executor and which has not complied with those conditions, from exercising a power as to land in this jurisdiction.[15]

An amendment of 1872[16] to an act of 1857 creates a partial extinguishment or suspension of the right of foreign executors under a foreign will, to exercise the power. The act of 1857[17] confers power upon foreign executors under wills probated in other states to exercise a power of sale over lands in this state. The amendment of 1872 withdrew this authority on the part of foreign executors "where letters testamentary or of administration upon the estate of the deceased shall have been granted in this state and remain unrevoked."

PART 2.

SURVIVAL OF POWERS.

§ 237. General rule: A power proper cannot survive the death of the donee. Accordingly, if there are two donees of the power and one dies, there can be no survival of the power in the remaining donee, and he, therefore, cannot appoint.[18] In this state no exceptions to this general rule have ever been recognized except those referable to some act of the legislature.

§ 238. Survival in case of the death of one of several executors: Since 1829 we have had in the statutes of this state a provision[19] that where "one or more executors shall de-

[14] Laws 1887, p. 144 and Laws 1889, p. 99; Laws 1871-2, p. 296, § 26 (R. S. 1874, chapter 32, § 26).

[15] Pennsylvania Co. *v.* Bauerle, 143 Ill. 459.

[16] Laws 1871-2, p. 292, sec. 34, (R. S. 1874, chapter 30, sec. 34). This Act was further amended by Laws 1879, p. 80.

[17] Laws 1857, p. 39, (1 A. & D. R. E. S. p. 191). See also Pennsylvania Co. *v.* Bauerle, 143 Ill. 459, 468.

[18] Clinefelter *v.* Ayers, 16 Ill. 329, 333; Wardwell *v.* McDowell, 31 Ill. 364, 373. On the same principle all the donees of the power must execute it: Pennsylvania Co. *v.* Bauerle, 143 Ill. 459; Wilson *v.* Mason, 158 Ill. 304.

[19] Laws, 1829, p. 191, sec. 89; R. S. 1845, ch. 109, sec. 93; Laws,

part this life" before exercising a power of sale, "the survivor or survivors shall have the same power, and their sales shall be good and valid as though they all joined in such sale."[20] This act, it has been held, applies whether the power is in the form of a direction to sell or merely a discretionary right to sell.[21]

§ 239. Survival in case one of several executors refuses to act: The statute mentioned in § 238 covered only the case where one of several executors had *died.* It did not apply where one of several executors had *refused to act.* The statute of 21 Hen. VIII, ch. 4,[22] however, covered this latter case. It provided that when part of the executors "do refuse to take upon him or them the administration" of the will, and the other or others do accept, then the exercise of the power by those accepting shall be valid. In *Clinefelter v. Ayres,*[23] and *Pahlman v. Smith*[24] it was held that under a general act, in force in this state since 1807[25] adopting the common law of England, this act was in force in Illinois. Since 1872 the substance of the statute of Hen. VIII has been embodied in our laws in terms.[26] In *Pahlman v. Smith,*[27] and *Ely v. Dix,*[28] therefore, where the executors not joining in the sale had *refused* to act, the sale was valid. It made no difference whether there was a direction to sell or a discretionary power merely.[29]

Is there any further rule as to how the executor's refusal to act must appear? In *Clinefelter v. Ayres,*[30] and *Wardwell v. Mc-*

1871-2, p. 775, sec. 97; R. S. 1874 ch. 3, sec. 97; Hurd's R. S. (1903) ch. 3, sec. 97; (1 A. & D. R. E. S. pp. 514, 570).

[20] Thus, in Ely *v.* Dix, 118 Ill. 477, a sale by one executor after the death of the other was valid. See also Spengler *v.* Kuhn, 212 Ill. 186, 191.

[21] Ely *v.* Dix, 118 Ill. 477.

[22] 5 Gray's Cas. on Prop. 348.

[23] 16 Ill. 329, 334.

[24] 23 Ill. 448, 452. See also Ely *v.* Dix, 118 Ill. 477, 481.

[25] Except from March 30, 1818, to Feb. 4, 1819: Laws 1807, Pope's Compilation of 1815, p. 34; Laws 1819, p. ——, R. L. 1833, p. 425 (1 A. & D. R. E. S. 913; 2 A. & D. R. E. S. 1668); R. S. 1845, ch. 62, sec. 1, p. 333; R. S. 1874 ch. 28; Hurd's R. S. (1903) ch. 28, p. 435.

[26] Laws 1872 p. 77, sec. 97, (1 A. & D. R. E. S. 570); R. S. 1874 ch. 3, sec. 97; Hurd's R. S. (1903) ch. 3, sec. 97.

[27] 23 Ill. 448.

[28] 118 Ill. 477.

[29] Wardwell *v.* McDowell, 31 Ill. 364, 376; Ely *v.* Dix, 118 Ill. 477.

[30] 16 Ill. 329, 337.

Dowell,[31] it is pretty plainly hinted that where letters testamentary issue from a court of record, "record evidence of refusal or renunciation was alone competent to establish the fact." Certainly a careful conveyancer would not demand less than such a written renunciation, duly filed in the court *issuing* the letters, as appeared in *Pahlman v. Smith*[32] and *Ely v. Dix*.[33] The actual holding of the court in *Ayres v. Clinefelter*,[34] and *Wardwell v. McDowell*,[35] that evidence other than record evidence might be given of an affirmative act of refusal may go upon the ground that the letters testamentary in those cases were issued by a justice of the peace whose court was not a court of record.

§ 240. Survival in case one of several executors fails to qualify: If you construe the statute of Hen. VIII[36] as requiring an affirmative act of refusal it is plain that, no matter how that may be required to be proved, the statute does not cover the case where there is a mere failure or neglect to qualify. Thus, in *Clinefelter v. Ayres*,[37] the mere recital in an entry by a justice of the peace with probate powers, made when letters issued, that "persons named in said will as co-executors decline acting" meant no more than that they had *failed* to qualify and hence the statute of Hen. VIII did not apply. The power, therefore, was not properly exercised by the executor who did qualify.

The law remained in this shape until July 1st, 1872, when by an act of that year,[38] the statute in force since 1829 was amended (by adding the words italicized),[39] so as to read "where one or more executors shall *fail or refuse to qualify*, or depart this life" the survivor or survivors shall exercise the power. Since this statute it might be supposed that the mere failure or neglect to qualify, would make the exercise of the power by those who did qualify valid.[40]

[31] 31 Ill. 364, 369 *et seq.*

[32] 23 Ill. 448.

[33] 118 Ill. 477.

[34] 20 Ill. 465.

[35] 31 Ill. 364.

[36] *Ante*, § 239.

[37] 16 Ill. 329. See also Wardwell *v.* McDowell, 31 Ill. 364, 369, *accord*. But *quære* about Wisdom *v* Becker, 52 Ill. 342.

[38] Laws 1872, p. 77, sec. 97 (1 A. & D. R. E. S. 570); R. S. 1874, Ch. 3, sec. 97; Hurd's R. S. (1903) ch. 3, sec. 97.

[39] Ely *v.* Dix, 118 Ill. 477, 481.

[40] Ely *v.* Dix, 118 Ill. 477, does

§ 241. No survival to the administrator with the will annexed: This seems always to have been the law of this state so far as the exercise of a power under the will of a deceased resident is concerned. In *Hall v. Irwin*,[41] where a testator had given a power of sale to his executor but had not named anybody to fill that office, it was held that the administrator with the will annexed, could not exercise the power. The two dissenting judges attempted to rest an opposite conclusion upon the language of the act[42] providing for the appointment of such an administrator. In this connection, however, the act did not do more than provide in what events the administrator with the will annexed was to be appointed, and that his duties should be the same as those of the executor as such. A statute in force July 1st, 1872,[43] and still operative,[44] provided that "when a sole or surviving executor or administrator dies, without having fully administered the estate, if there is personal property not administered, or are debts due from the estate, *or is anything remaining to be performed in the execution of the will*, the county court, shall grant letters of administration, with the will annexed," etc. After this act it was argued from the words italicized that the administrator with the will annexed, might exercise a power of sale conferred by the will. Nevertheless, it was held that these words meant only "something to be performed as executor, and belonging to the office proper of executor, and do not extend to anything to be done as agent or trustee, under a power given to sell land."[45]

It would seem, however, that since 1879 a power of sale

not quite come up to so holding because there the executor did affirmatively renounce by an instrument in writing, filed in Probate Court and made a part of its records. See, however, the comments of our Supreme Court in Wardwell *v.* McDowell, 31 Ill. 364, 371, on the decisions from other jurisdictions where, under a statute using the phrase fail to qualify, a mere neglect to do so is held to be the event contemplated.

[41] 7 Ill. 176 (two judges out of seven dissenting).

[42] R. S. 1845 p. 540, sec. 19.

[43] Laws 1871-2 p. 77; R. S. 1874, ch. 3, sec. 37.

[44] Hurd's R. S. (1903) ch. 3 sec. 37.

[45] Nicoll *v.* Scott, 99 Ill. 529, 536-537. Bigelow *v.* Cady, 171 Ill. 229, and Stoff *v.* McGinn, 178 Ill. 46, (*semble*), *accord.*

of lands in this state may, under some circumstances, be exercised by an administrator with the will annexed of a foreign will where such an administrator has been appointed at the foreign domicile of the testator, and by the laws of that domicile an administrator with the will annexed can exercise a power of sale. This must rest upon an amendment, by the act of 1879,[46] of R. S. 1874, ch. 30, sec. 34.

It seems to have been intimated that an administrator with the will annexed can file a bill to have a trustee appointed to exercise a power.[47] The chief authority for this is *Stoff v. McGinn*.[48] On examination, however, this case will not be found to hold that such a proceeding is proper where a real power[49] to sell is given. In that case the will actually devised the legal title of all the testator's property to a trustee upon trust to divide. Upon the resignation of the trustee the administrator with the will annexed filed a bill to have a new trustee appointed with directions to sell. The decree was had accordingly. The only holding of *Stoff v. McGinn* was that this decree could not be attacked collaterally for want of jurisdiction in a court of equity.

§ 242. Survival in the case of spurious powers: When there is the conveyance of an absolute interest to a trustee upon certain trusts, and, among other provisions, there is a "power to sell," the trustee has not properly speaking a power at all. He has the legal title which he may transfer. Unless, however, he is given the right to transfer, a conveyance by him will be a breach of trust and the purchaser will take subject to the trusts. The so-called power in such a case is, therefore, in reality only an authority which prevents a sale by the trustee being in breach of trust. It is for this reason that, when one of several trustees dies, the rest can exercise the so-called power without question. On the same principle, where the trustees in a trust deed by way of mortgage all die, a court of chancery may appoint a new one and he may thereupon exercise the power of sale.

[46] Laws 1879, p. 80.

[47] Wenner *v.* Thornton, 98 Ill. 156; Stoff *v.* McGinn, 178 Ill. 46.

[48] 178 Ill. 46.

[49] *Post*, § 242.

PART 3.

NON-EXCLUSIVE POWERS AND ILLUSORY APPOINTMENTS.

§ 243. **Illusory appointments:** The recent Illinois case of *Hawthorn v. Ulrich*,[50] has swept away the whole doctrine of illusory appointments for this state. There the testator's wife was given a power to appoint "between her heirs in the manner in which she may decide." She appointed by her will five dollars apiece to all her heirs except Grace A. Perkins, and to her she appointed all the rest of the property. The other heirs of the donor filed a bill for partition of real estate included in the appointment and contended that, since all but one heir received only a nominal share, the whole appointment was illegal and should be entirely set aside and the entire property divided equally among the wife's heirs. The bill was, however, dismissed and this was affirmed. It was held that the power was non-exclusive—that is "that each heir of the wife must take something"; but the court repudiated the whole doctrine of illusory appointments, making the law in Illinois substantially what it is in England under the act of 1 Wm. IV c. 46.

§ 244. **Non-exclusive powers:** It should be observed that the doctrine of non-exclusive appointments,—*i. e.* that if the power be to appoint among a class without express words indicating that certain members of the class may be excluded, each member of the class must take something,—ought logically to fall with the repudiation of illusory appointments. As soon as you say that the donee must appoint something to each member of the class, but that he can cut any member off with only a cent, you practically make the power exclusive. By requiring an appointment of something to each member of the class, you simply leave a pitfall for testators. Accordingly, a later English statute[51] has abolished non-exclusive powers.

[50] 207 Ill. 430.

[51] 37 and 38 Vict., c. 37.

PART 4.

WHAT WORDS EXERCISE A POWER.

§ 245. The plain case: Where the instrument recites that it is made pursuant to the power and for the purpose of exercising it, the words are clearly sufficient to accomplish that object.[52] Ordinarily careful conveyancing should not be satisfied with less than this.

§ 246. The difficult case occurs where the donee makes a general gift of all his property without any direct reference to the power or his intention to exercise it: In considering whether the power is exercised or not in such a case, several distinctions must be taken:

(1) It may fairly be said that the rule of *Clere's* case[53] has been followed so far as it declared that one who had no land of his own, but only land over which he had a power of appointment, would be held to have exercised the power, though he conveyed only in general terms.[54]

(2) The chief difficulty is over the case where the donee conveys in general terms only, without explicit reference to any power and has lands or personal property of his own to which the language used may apply.

[52] Hawthorn *v.* Ulrich, 207 Ill. 430, 432; Griffin *v.* Griffin, 141 Ill. 373, 383. In Henderson *v.* Blackburn, 104 Ill. 227; Markillie *v.* Ragland, 77 Ill. 98; Kaufman *v.* Breckinridge, 117 Ill. 305 and Jenks *v.* Jackson, 127 Ill. 341, it does not appear what the terms of reference to the power may have been.

[53] 6 Co. 17b, (5 Gray's Cas. on Prop. 333).

[54] Wimberly *v.* Hurst, 33 Ill. 166, 173, (*semble*). Is not this the proper explanation of Purser *v.* Short, 58 Ill. 477? Here the executors with power of sale under the will, but having themselves no beneficial interest in the real estate conveyed, purported to sell under a decree which was void. It was held, however, that the deed could operate as the exercise of a power.

Christy *v.* Pulliam, as reported in 17 Ill. 59, might go upon the same ground. In this case, however, as reported in 19 Ill. 331, it appears that the donee of the power had a life estate in the property over which she had a power of appointment. It was held, however, that her life estate was inalienable. (*Post*, § 295). Upon that supposition she had no transferable interest except that over which she had a power of appointment and hence the power may be regarded as well exercised under the rule in Clere's case, *supra*.

The English courts, before the Wills Act,[55] administered this very rigid rule. General words of conveyance which might apply to the property of the transferor over which he has a right of disposal apart from the power, operated to transfer such property only, and could not amount to the exercise of the power, unless there were a very direct and specific indication of an intention so to do. The Wills Act changed this for a large number of cases by providing that a general devise of real and personal property shall operate as the exercise of a general power unless a contrary intent appear from the will.

Our supreme court has not adopted either of these views. It certainly cannot be relied upon as administering the statutory rule, for in *Harvard College v. Balch*,[56] it distinctly held that the general residuary clause of the will of the donee would not operate as a valid appointment. According to the English cases under the Wills Act, the result would have been otherwise.[57] The fact, which the Illinois court calls attention to, that the will of the donee was made prior to the time when the will creating the power, was probated, would not have made any difference under the English cases.[58] In the same way the attitude of the English cases before

[55] 7 Wm. IV and 1 Vict., c. 26, s. 27.

[56] 171 Ill. 275, 283. See also Coffing *v.* Taylor, 16 Ill. 457, 474; Davenport *v.* Young, 16 Ill. 548, 552.

Observe, however, the following cases which seem almost to come up to the rule of the Wills Act: Goff *v.* Pensenhafer, 190 Ill. 200, 210 *et seq.*, and Fairman *v.* Beal, 14 Ill. 244. See also Christy *v.* Pulliam, 17 Ill. 59 and 19 Ill. 331, *supra*, note 54.

In Griffin *v.* Griffin, 141 Ill. 373, 381-382, the widow, who took a life estate under the will and had power of sale to pay debts, made a deed to Henry Griffin. The exercise of the power was sustained though the court said: "It is true that the power there granted was granted to Mary Griffin, the executrix, in her trust official capacity of executrix, and that she did not attach the designation of executrix to her signature to the conveyance, or name herself therein as executrix, or refer to any will or power. These, however, in our opinion are only matters of form and not material."

[57] Spooner's Trust, 2 Sim. N. S. 129; Clifford *v.* Clifford, 9 Hare, 675; Attorney General *v.* Brackenbury, 1 H. & C. 782; In re Wilkinson, L. R. 4 Ch. App. 587; Theobald on Wills, (2nd ed.) page 178.

[58] Boyes *v.* Cook, 14 Ch. Div. 53; Theobold on Wills, 2nd ed. 179.

the Wills Act seems to have been directly repudiated in this state.[59]

The rule as administered in Illinois lies somewhere between the extremes. It is about this: The instrument of appointment must still affirmatively show an express intent on the part of the donee to exercise the power;[60] but any circumstances, actually indicating that intent and appearing upon the face of such instrument, are sufficient. Thus, in *Funk v. Eggleston*,[61] the court laid great stress upon the fact that the donee specifically devised a watch which belonged to the estate of the donor and over which she had no power of disposal by will, except in the exercise of the power. She devised this watch as her property. From this it was argued by the court that whenever she spoke of her property she was including the property over which she had a power of disposition under the will of her husband. In *Goff v. Pensenhafer*,[62] the power was held to have been well exercised by a quit claim deed of land in which the donee had a life estate and a power of appointment in fee, both held under the will of her husband. For this result the court relied only upon the language of the deed by which the grantor conveyed all her right, title and interest in the land of which her husband died seized and "which shall have or shall hereafter accrue to her by virtue of the last will and testament of her deceased husband."[63] So, in *Foster v. Grey*,[64] the donee bequeathed legacies three times in excess of her own personal property, but less than her assets and those over which she had a power of disposition combined. She also gave her executors full power to convey real estate. She had no real estate of her own, but she did have a power of appointment over some. From all these circumstances an expressed intent was found to exercise the power as to realty and personalty.

[59] Funk *v.* Eggleston, 92 Ill. 515. See, also, cases cited *infra* notes 62-64.

[60] Coffing *v.* Taylor, 16 Ill. 457, 474; Davenport *v.* Young, 16 Ill. 548, 552.

[61] 92 Ill. 515.

[62] 190 Ill. 200.

[63] So, in Fairman *v.* Beal, 14 Ill. 244, the exercise of a power by the devisee who was life tenant under the will which created the power, was held valid, though the deed contained only "a reference to the will."

[64] 96 Ill. App. 38.

PART 5.

APPOINTED PROPERTY AS ASSETS.

§ 247. The usual rule in force here: *Gilman v. Bell*,[65] recognized the doctrine of *Holmes v. Coghill*,[66] and held that so long as there had been no execution of a general power by the donee, the donee's creditors could not reach the property subject to the appointment. The same Illinois case clearly recognized the force of *Bainton v. Ward*,[67] holding that if a general power to appoint by deed or will, be exercised by the donee to a volunteer, creditors can reach the property subject to the appointment.[68]

Skinner v. McDowell,[69] must, it would seem, rest upon the ground that the life tenant who executed the mortgages, had no power to do so. Hence, the power was not exercised and the court was, therefore, justified in the remark that "to admit that the mortgages mentioned, were fraudulent and set them aside, could in no way benefit the complainants," who were judgment creditors of the donee of the power.

PART 6.

DEFECTIVE EXECUTION.

§ 248. Suggestions of our supreme court in favor of the usual doctrine: In *Gilman v. Bell*,[70] our supreme court stated by way of *dictum* merely, that "where there has been a defective execution, the court will supply the defective execution of the power in favor of a purchaser, creditor, wife or child"; thus referring in terms to the usual doctrine of the English cases.[71] In *Breit v. Yeaton*,[72] the court refused

[65] 99 Ill. 144.

[66] 7 Ves. 499 (5 Gray's Cases on Property, 447).

[67] 2 Atkyns 172.

[68] Observe that the court in Gilman *v.* Bell notices that Bainton *v.* Ward, as it appears in the report in Atkyns was inaccurately stated and that anything *contra* to the doctrine as stated in the text, was mere *dictum* and not afterwards followed by Lord Hardwicke.

[69] 169 Ill. 365.

[70] 99 Ill. 144, 149.

[71] See also the language of Breit *v.* Yeaton, 101 Ill. 242, 263.

[72] 101 Ill. 242, 263.

to aid a defective execution. In that case the wife had a power to appoint under a marriage settlement, provided she did so by an instrument having three attesting witnesses. She made a conveyance to her husband. This was defective as an execution of the power because of the absence of the attesting witnesses. The wife was dead. There was a meritorious consideration and a substantial appointment. All the requirements of the English cases, for aiding a defective appointment were present, except that the defective appointment was by a wife in favor of her husband. On that ground our supreme court held that a court of equity would not aid the defective execution.

PART 7.

CONSTRUCTION.

§ 249. Introductory: This division of the subject of powers is purely utilitarian. No legal principles are involved and it is not contended that to any great extent the following cases announce rules of construction, other than such as are applicable for determining the meaning of any instrument in writing. The following cases are classified and arranged because they may be useful as a guide to the way the mind of our supreme court has acted upon such facts as were presented. The principle division of the subject is: *first*, the cases where the existence of a power has been involved; and *second*, those involving the extent of the power.[73]

§ 250. Where the question was as to the existence of a power—Whether a power of sale of real estate was created in executors or trustees:[74] When the power to sell real

[73] It is not believed that it is necessary here, to make any distinction between real and spurious powers. Whether a power exists in an executor or trustee or in a life tenant or trustee, the question of construction is, it is believed, the same.

[74] Observe the jurisdiction of a court of equity to break in upon trusts and order a sale where no power is expressed: Longwith

estate is directly given to executors or trustees,[75] the only difficulty is the extent of that power.[76] When the power is not directly expressed, nice questions arise as to when one may with certainty say that it is found by implication. One line of reasoning at least, by which a power may be implied, has been approved in this state. It is this: Where a testator expressly provides that a mixed fund of realty and personalty shall be dealt with as cash, there is, by necessary implication, a power to sell real estate. There is such an express provision clearly enough when the testator directs that a distribution be made in cash,[77] or, if the mixed fund be directed to be loaned out at the highest rate of interest obtainable,[78] or invested "in good bonds or mortgages."[79] So, where, in a settlement *inter vivos*, there was a direction to trustees to pay debts, to devote the principal of the fund to the support of the sellor's family, and to *pay over* the fund to persons named, it was held there was a power of sale of real estate given.[80] It is equally clear, however, that no express intent that the mixed fund shall be dealt with as cash, arises from the direction to trustees or executors to "divide" the estate.[81]

v. Riggs, 123 Ill. 258; Gavin *v.* Curtin, 171 Ill. 640; Stoff *v.* McGinn, 178 Ill. 46; Marsh *v.* Reed, 184 Ill. 263; Thompson *v.* Adams, 205 Ill. 552; Spengler *v.* Kuhn, 212 Ill. 186; Denegre *v.* Walker, 214 Ill. 113.

[75] White *v.* Glover, 59 Ill. 459.

[76] *Post*, § 252.

[77] Poulter *v.* Poulter, 193 Ill. 641.

[78] Davenport *v.* Kirkland, 156 Ill. 169.

[79] Flanner *v.* Fellows, 206 Ill. 136, 137.

[80] Cherry *v.* Greene, 115 Ill. 591. Winston *v.* Jones, 6 Ala. 550, seems to go very far in finding an express direction to treat a mixed fund as cash and so adduce a power of sale by implication. See also Dickson *v.* New York Biscuit Co., 211 Ill. 468, 482, for implication of power from direction to trustees to distribute what remains, (see *post*, § 252).

[81] Hale *v.* Hale, 125 Ill. 399, (direction to trustees to "divide"); Poulter *v.* Poulter, 193 Ill. 641, (direction to executors to divide equally); Gammon *v.* Gammon, 153 Ill. 41, (direction to executors to divide into parts and the parts to belong, etc.); Haward *v.* Peavey, 128 Ill. 430, 437. Cf, Hamilton *v.* Hamilton, 98 Ill. 254.

Stoff *v.* McGinn, 178 Ill. 46, at 55, is not *contra* because the only question there, was whether a decree construing the will and finding a power of sale from the direction to divide equally, and upon the allegation of the complainant that no such division could be

§ 251. Whether a life tenant has a power to dispose of the fee: It has several times been said by our supreme court, that "as a general rule, where a power of disposal accompanies a devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless the will contains words indicating that a larger power was intended."[82] What the court means when it refers to language indicating a "power of disposal," which has the effect only of giving the life tenant that which he has already —a power to dispose of the life estate—is indicated by the decision in *Boyd v. Strahan*.[83] There the gift was to the wife of the testator "to be at her own disposal and for her own proper use and benefit, during her natural life."[84] Here, the court held, and it is plain no other holding was possible, that the power of disposal mentioned, amounted to nothing more than cumulative words giving to the wife a life estate. The general run of cases where the court has held that the life tenant was given a power to dispose of the fee,[85] indicates that there is no arbitrary clinging to any rule of construction, that words indicating the conferring of a power of sale upon the life tenant without saying in terms that the life tenant shall have power to dispose of the fee, confines the right of the life tenant to sell only his life etsate.[86]

Taking the cases as a whole, there are, first of all, those where full power is given to the life tenant by a clause carefully drawn so as expressly to confer the power to convey the whole fee.[87] Then there are the cases where there is no

made without a sale, could not be impeached collaterally.

Casey *v.* Canavan, 93 Ill. App. 538, 541, 542, is supported on the special features of the will, though the main words of the devise were to divide and distribute.

[82] In re Cashman, 134 Ill. 88, 92; Henderson *v.* Blackburn, 104 Ill. 227, 231; Kaufman *v.* Breckinridge, 117 Ill. 305, 313; Metzen *v.* Schopp, 202 Ill. 275, 285, 286; Mansfield *v.* Mansfield, 203 Ill. 92, 97.

[83] 36 Ill. 355.

[84] See also Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 200.

[85] *Infra* notes 87, 89-94.

[86] But see Mansfield *v.* Mansfield, 203 Ill. 92, 97.

[87] See Butler *v.* Huestis, 68 Ill. 594; Funk *v.* Eggleston, 92 Ill. 515; Crozier *v.* Hoyt, 97 Ill. 23. See also Fairman *v.* Beal, 14 Ill. 244;

foundation for any power of sale.[88] The other cases have to do with the effect of such words as are contained in a gift after a life estate "of whatever is left."[89] These cases arrange themselves into three groups: (1) Those where the language is held to give the life tenant a right to enjoy personal property in specie,[90] even to consuming or using up perishable personal property,[91] or spending the principal for support.[92] In this view it confers no power of sale. (2) Cases where such an expression alone gave the life tenant power to dispose of the fee.[93] (3) Cases where there is express language giving a power of disposal of some sort to the life tenant and then a gift after the life estate of "what is left." Here it is held that the power to dispose of the fee or absolute interest is conferred upon the life tenant.[94]

§ 252. Cases involving the extent of a power of sale of an executor or trustee: The questions here are rather miscellaneous, since they arise from the very special context of par-

Christy *v.* Pulliam, 17 Ill. 59, 19 Ill. 331; Griffin *v.* Griffin, 141 Ill. 373; Bowerman *v.* Sessel, 191 Ill. 651; Griffiths *v.* Griffiths, 198 Ill. 632.

[88] Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350.

[89] Observe that the question here has nothing to do with the meaning of similar expressions when the first taker has a fee or an absolute interest in personalty. In the latter case the effect of words giving "what is left," makes an executory devise over upon condition that the first taker alienate by will or dies intestate. (See *ante*, §§ 168, 168 a.)

[90] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 202.

[91] Green *v.* Hewitt, 97 Ill. 113, 117; Siegwald *v.* Siegwald, 37 Ill. 430.

[92] Gaffield *v.* Plumber, 175 Ill. 521.

[93] In re Estate of Cashman, 134 Ill. 88; Saeger *v.* Bode, 181 Ill. 514, 519 (*semble*); Walker *v.* Pritchard, 121 Ill. 221, 229, 230; Skinner *v.* McDowell, 169 Ill. 365; Randolph *v.* Hamilton, 84 Ill. App. 399; Turner *v.* Wilson, 55 Ill. App. 543, (164 Ill. 398). Thompson *v.* Adams, 205 Ill. 552, 557, 558 seems to throw much doubt upon the implication of a power from such words alone. See also Dickson *v.* New York Biscuit Co., 211 Ill. 468, 482.

[94] Markillie *v.* Ragland, 77 Ill. 98; Henderson *v.* Blackburn, 104 Ill. 227; Hamlin *v.* U. S. Express Company, 107 Ill. 443; Kaufman *v.* Breckinridge, 117 Ill. 305; Griffin *v.* Griffin, 141 Ill. 373; Ducker *v.* Burnham, 146 Ill. 9; Skinner *v.* McDowell, 169 Ill. 365; Mann *v.* Martin, 172 Ill. 18, 21-22; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Dickson *v.* New York Biscuit Co., 211 Ill. 468; Spengler *v.* Kuhn, 212 Ill. 186, 196; Whittaker *v.* Gutheridge, 52 Ill. App. 460, 466.

ticular instruments.[95] The following cases only stand out as decisions of general utility. In *White v. Glover*,[96] it was held that the trustee can sell either at public or private sale if there is nothing in the creation of the power to the contrary. In *Franklin Savings Bank v. Taylor*,[97] the supreme court indicates the principle upon which the purchaser from a trustee need not look to the application of the purchase money when there is no express clause exempting him from that responsibility. The court there said: "Where it appears that the donor of the power confided the application of the purchase money to the judgment and discretion of a particular person or persons designated, it is conclusive that it was not intended to burden the purchaser with it."[1] Sometimes the question arises to whom is an express power given;[2] or whether the power is in an individual as executor or trustee,[3] or as executor or life tenant.[4]

§ 253. Extent of power of the life tenant: A usual difficulty in this class of cases is to determine whether the life tenant has an absolute unrestricted power or whether there can be a sale only for maintenance or what the donee needs. Under the *Cashman* case,[5] it would seem that when the words of a gift after the life estate of "what is left" alone confer a power of disposal by the life tenant, they give such power without restriction. In other cases, the context of the will has sometimes been held to cut down the unrestricted power,[6]

[95] Hamilton *v.* Hamilton, 98 Ill. 254; Kurtz *v.* Graybill, 192 Ill. 445; Hughes *v.* Washington, 72 Ill. 84; Pool *v.* Potter, 63 Ill. 533; Jenks *v.* Jackson, 127 Ill. 341; Longwith *v.* Riggs, 123 Ill. 258; Summers *v.* Higley, 191 Ill. 193; Starr *v.* Moulton, 97 Ill. 525; Taylor *v.* Walson, 177 Ill. 439; Skinner *v.* McDowell. 169 Ill. 365. On the construction of powers in marriage settlements see Swift *v.* Castle, 23 Ill. 209; Breit *v.* Yeaton, 101 Ill. 242.

[96] 59 Ill. 459. It was also held here that the trustee may sell for a debt or for cash to pay a debt, and that, so far as the construction of the power went, there was no distinction between mandatory and discretionary powers.

[97] 131 Ill. 376, 383.

[1] Dickson *v.* New York Biscuit Co., 211 Ill. 468, 487, 488 and cases there cited, *accord.*

[2] Rankin *v.* Rankin, 36 Ill. 293; Lash *v.* Lash, 209 Ill. 595, 602.

[3] Pahlman *v.* Smith, 23 Ill. 448.

[4] Clark *v.* Clark, 172 Ill. 355.

[5] 134 Ill. 88; Walker *v.* Pritchard, 121 Ill. 221.

[6] Kaufman *v.* Breckinridge, 117 Ill. 305; Griffin *v.* Griffin, 141 Ill. 373.

and sometimes not.[7] Sometimes the question is raised as to whether the power is to convey by deed or will, or both.[8]

[7] Markillie *v.* Ragland, 77 Ill. 98. See Spengler *v.* Kuhn, 212 Ill. 186, 196.

[8] Bowerman *v.* Sessel, 191 Ill. 651, 654; Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59, 19 Ill. 331; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 154. See *ante*, § 158 a, note on Life Interests with Power of Disposition or Appointment. See also Butler *v.* Heustis, 68 Ill. 594; Crozier *v.* Hoyt, 97 Ill. 23. In Fairman *v.* Beal, *supra*, the power could only affect the remainder after the donee's life estate, though it could be exercised by deed.

CHAPTER XII.

RULE AGAINST PERPETUITIES.

PART 1.

IN GENERAL.

§ 254. The rule as stated in Illinois: Our supreme court has clearly recognized, approved, and acted upon Professor Gray's statement of the rule[1] as follows: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."[2]

§ 255. Several of Professor Gray's corollaries to this rule[3] are supported by direct decisions in this state: The corollary to the rule most often repeated by our supreme court is that the future interest *must* vest in the proper time. It is not sufficient if it may so vest.[4]

[1] Rule against Perpetuities, § 201.

[2] Howe *v.* Hodge, 152 Ill. 252, 274; Lawrence *v.* Smith, 163 Ill. 149, 160; Owsley *v.* Harrison, 190 Ill. 235, 241; Chapman *v.* Cheney, 191 Ill. 574, 584; Pitzel *v.* Schneider, 216 Ill. 87, 97; Madison *v.* Larmon, 170 Ill. 65, 70; Nevitt *v.* Woodburn, 82 Ill. App. 649, (190 Ill. 283).

In Waldo *v.* Cummings, 45 Ill. 421, at pp. 426-427, the court quotes with approval Lewis' definition of a perpetuity: "Lewis in his treatise on perpetuities, defines it to be 'a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property, subject to future limitation, except with the concurrence of the individual interested under that limitation.' Lewis' Perpt. 164." See also Hart *v.* Seymour, 147 Ill. 598, 613-614; Flanner *v.* Fellows, 206 Ill. 136, 141; Schaefer *v.* Schaefer, 141 Ill. 337, 342; Schuknecht *v.* Schultz, 212 Ill. 43, 46; Reid *v.* Voorhees, 216 Ill. 236.

[3] Rule against Perpetuities, Ch. VI.

[4] Lawrence *v.* Smith, 163 Ill. 149, 160; Bigelow *v.* Cady, 171 Ill. 229; Owsley *v.* Harrison, 190 Ill. 235; Post *v.* Rohrbach, 142 Ill. 600, 606;

Our supreme court also seems clear that vested as distinguished from executory interests are not subject to the rule.[5] Thus, a devise subject to a term of 1,000 years is valid.[6] It is a vested interest at once upon its creation.[7] Remainders, which are vested under the view of the *Boatman* case[8] and *Chapin v. Nott*,[9] are, it is submitted, vested only in the sense of being transmissible,[10] and, perhaps, also, indestructible. They are not, therefore, outside the application of the Rule against Perpetuities simply because they are called vested. Observe, however, that if the ultimate limitation after the estate tail in *Chapin v. Nott* is vested only in the sense of being transmissible and is not destructible, it is void for remoteness.[11] Yet it was held valid. This means either that the contingent future interest was destructible or that "vested" was used in a sense which took it out of the Rule against Perpetuities.

The contingency may be postponed for a number of lives, provided they are all in being when the contingent interest is created.[12]

Schuknecht *v.* Schultz, 212 Ill. 43, 46; Pitzel *v.* Schneider, 216 Ill. 87, 97. See also Reid *v.* Voorhees, 216 Ill. 236, 243.

[5] Ingraham *v.* Ingraham, 169 Ill. 432, 451. Observe, however, the exception hereafter noted, *post*, § 269.

[6] Eldred *v.* Meek, 183 Ill. 26, 36 (*semble*); Marsh *v.* Reed, 184 Ill. 263, 274-275.

[7] It should be observed that the vesting here referred to is vesting in interest as distinguished from vesting in possession.

In Post *v.* Rohrbach, 142 Ill. 600, 606, the court said the gift was void because "it might not have taken effect in possession within a life or lives in being and twenty-one years thereafter." The error here is so clear that it may be laid to a slip of the pen. The Rule does not invalidate interests which vest in *possession* at too remote a period, but only those which vest in interest at a time beyond the prescribed limit. The difference between vesting in interest and vesting in possession is clearly recognized by our Supreme Court, and in fact correctly applied where the Rule against Perpetuities is involved. (Madison *v.* Larmon, 170 Ill. 65; Eldred *v.* Meek, 183 Ill. 26, 36; Marsh *v.* Reed, 184 Ill. 263, 275). Thus, the devise subject to a term of 1000 years cannot vest in possession till too remote a time, but it does not offend the rule because it vests in interest at once.

[8] 198 Ill. 414; *ante*, § 100.

[9] 203 Ill. 341; *ante*, § 101.

[10] *Ante*, § 107.

[11] *Ante*, § 101, note 3, § 271.

[12] Madison *v.* Larmon, 170 Ill. 65, 71; Smith *v.* McConnell, 17 Ill. 135, 140.

It was recognized, in *Smith v. McConnell*,[13] that the period of a life in being and twenty-one years may be extended by at least two periods of gestation.

It is clear, also, that the time within which the future interest must vest runs only from the testator's death.[14]

The effect of interests being too remote has been heretofore dealt with, *ante*, § 183.

§ 256. Two departures from the rule as expressed by Professor Gray: Our supreme court has recognized to an appreciable extent two departures from the rule as above formulated:

(1) It has given out with approval from time to time the following definition from Bouvier's Law Dictionary: "A perpetuity is defined to be a limitation, taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years beyond; and in case of a posthumous child, a few months more, allowing for the time of gestation."[15] The logical result of this definition would cause the Rule against Perpetuities to be a rule invalidating restraints on alienation. It is clear from Professor Gray's treatise that the true object of the Rule is to prevent the creation of future interests on too remote contingencies, and that its effect in removing practical restrictions on the immediate conveyance of property is only an incidental result. This position our supreme court now seems to recognize with entire approval.[16]

[13] 17 Ill. 135, 140, 141.

[14] Ingraham *v.* Ingraham, 169 Ill. 432, 460.

[15] Waldo *v.* Cummings, 45 Ill. 421, 426; Hale *v.* Hale, 125 Ill. 399, 409; Hart *v.* Seymour, 147 Ill. 598; Lunt *v.* Lunt, 108 Ill. 307; Howe *v.* Hodge, 152 Ill. 252; Bigelow *v.* Cady, 171 Ill. 229, 232; Flanner *v.* Fellows, 206 Ill. 136, 141; Henderson *v.* Virden Coal Co., 78 Ill. App. 437.

In Hart *v.* Seymour, *supra*, a definition to the same effect from Andrews' Law Dictionary was quoted with approval.

In Andrews *v.* Andrews, 110 Ill. 223, 230, the court stated the same idea in this way: "The law will not permit estates in land to be tied up longer than for a life or lives in being and twenty-one years, and in case of a posthumous birth, nine months more after the termination of the life estates."

[16] Howe *v.* Hodge, 152 Ill. 252, 274; Ingraham *v.* Ingraham, 169 Ill. 432, 451; Madison *v.* Larmon, 170 Ill. 65, 71.

(2) In two cases in this state the question has arisen whether a present absolute equitable interest, liable, so far as the terms of the trust go, to continue such beyond the period of a life in being and twenty-one years, is invalid. It would seem that the interest is a vested one. It is clearly alienable. An express direction, if there be one, to continue the trust indefinitely, is void as an improper restraint upon the control of an interest absolute in terms. It may, therefore, be disregarded[17] and the *cestui* may have the legal estate at any time.

In *Hart v. Seymour*[18] the validity of a real estate trust was involved. No precise trust term was created, and the obvious intent was that the land subject to the trust should be subdivided and sold at once. Still it was possible that this trust might have lasted beyond a life in being and twenty-one years. Nevertheless, the court took the view that the trust was unobjectionable. In *Bigelow v. Cady,*[19] the court's actual decision[20] seems to pronounce such a trust wholly bad.[21] In this case a trust was declared for the termination of which no explicitly expressed provision was made. The court, however, seems to have found an intent expressed by implication from the whole instrument, that the trust was to last forever. As in *Hart v. Seymour* the *cestuis'* interests, though equitable, were all absolute or vested in the proper time. In both cases the trust might last beyond a life in being and twenty-one years. The only difference appears to be that in *Hart v. Seymour* there was a general scheme that the trust should last but a short time, while in *Bigelow v. Cady* the testator was thought to have expressly intended that the trust should last forever. The proper effect, however, of such an expressed intention would seem to be that it might be disregarded as an improper restraint on the termination of the trust by the *cestui* having the absolute interest.[22]

[17] *Post*, § 293.

[18] 147 Ill. 598.

[19] 171 Ill. 229.

[20] For other possible explanations of this decision, see *ante*, § 127, note 1, and *post*, § 263, note 58, § 266, note 84.

[21] Lawrence *v.* Smith, 163 Ill. 149, contains a *dictum* to the same effect.

[22] *Post*, § 293.

A Maine case, *Slade v. Patten*,[23] reached the same result as *Bigelow v. Cady*. The supreme court of Maine has, however, recently exposed the fallacy upon which it went and it is now overruled.[24] Curiously enough the case which expressly overruled *Slade v. Patten* was one involving the validity of a real estate trust much like that involved in *Hart v. Seymour*. Had *Hart v. Seymour* come up subsequently to *Bigelow v. Cady*, it would not have been surprising if our court, like the supreme court of Maine, had perceived the difficulty of such a decision as was reached in *Bigelow v. Cady*.

§ 257. Interests subject to the rule—Legal interests: In *Madison v. Larmon*,[25] it seems to have been assumed that if the contingent future interest after the seventeen life estates had been too remote under the Rule it would have been void even though it were regarded as destructible.[26]

The right of entry for the breach of a condition subsequent might well have been held subject to the Rule, but in three cases,[27] at least, arising in this state where this contention, if sustained, would have changed the result, no mention of it was made, so far as the report of the case indicates, by court or counsel. In *Wakefield v. Van Tassell*,[28] however, our supreme court met, in terms, the contention that the condition that the grantee and those claiming under him would not build a grain elevator or handle grain upon the premises, violated "the spirit of the rule of perpetuities." It was held,

[23] 68 Maine 380, (5 Gray's Cases on Property 615); Gray's Rule against Perpetuities, § 235.

[24] Pulitzer *v.* Livingston, 89 Maine 359. Also Seamans *v.* Gibbs, 132 Mass. 239, *accord.*

[25] 170 Ill. 65. For the controversy which has occurred on this point see 14 L. Q. R. 133, 234; 15 L. Q. R. 71, 20 L. Q. R. 289; 49 Sol. J. 397; Gray's Rule against Perpetuities, §§ 285 *et seq.*; also *ante*, § 91, note 13.

[26] *Ante*, §§ 81-92a.

[27] Price *v.* School Directors, 58 Ill. 452; Gray *v.* Chicago, M. & St. P. Ry. Co., 189 Ill. 400; Lyman *v.* Suburban Railway Co., 190 Ill. 320; 20 Law Quart. Rev. 291.

In Normal School *v.* First Baptist church, 63 Ill. 204, the condition might have happened at too remote a time. The result was consistent with such a holding, but it went upon the ground that the condition had not been fulfilled. No mention was made of the Rule against Perpetuities.

In Voris *v.* Renshaw, 49 Ill. 425, the condition must have happened if at all in the proper time, so there was no occasion for considering the application of the Rule.

[28] 202 Ill. 41.

without, however, any consideration of the English authorities,[29] that such a position could not be sustained.

While possibilities of reverter have been recognized as valid in this state apart from the rule against remoteness,[30] it has never been contended or suggested that such possibilities are invalid as offending that rule. The success of such a contention would have changed the result in several cases.[31]

Springing and shifting future interests by way of use[32] or executory devise,[33] are, of course, subject to the Rule.

§ 258. Equitable interests: The Rule clearly enough applies to equitable interests as well as legal.[34]

§ 259. Contracts—Bauer v. Lumaghi Coal Co.[35] and London & S. W. Ry. v. Gomm:[36] It is believed that the recent case of *Bauer v. Lumaghi Coal Co.*, decided by our supreme court, affords an interesting contrast with the decision of the Court of Appeal in *London & S. W. Ry. Co. v. Gomm.* In both cases a bill for specific performance of a written contract for the sale of land was filed by the purchaser. In both cases the contract sought to be enforced was one which gave the purchaser, his heirs and assigns, a right to a conveyance at a possibly remote time in the future. In the Illinois case the contract provided that the seller should convey whenever the pur-

[29] Gray's Rule against Perpetuities, §§ 299-301.

[30] *Ante*, § 126.

[31] Mott *v.* Danville Seminary, 129 Ill. 403.

The result actually reached in Presbyterian Church *v.* Venable, 159 Ill. 215, might have gone upon the ground that the possibility of reverter was void for remoteness. In fact, however, this view was not suggested and the court found another ground for the result reached.

Observe, however, that in Gray's Rule against Perpetuities, § 312 the view is taken that if possibilities of reverter exist they are too remote.

[32] In Thomas *v.* Eckard, 88 Ill. 593 a conveyance was conditioned not to take effect till a town plat was recorded. In ejectment it was held simply that the condition precedent was not performed. If the interest created be regarded as a springing future interest then it might have been held that even if the condition had been performed the future interest was too remote.

[33] Post *v.* Rohrbach, 142 Ill. 600.

[34] Howe *v.* Hodge, 152 Ill. 252, 274; Bigelow *v.* Cady, 171 Ill. 229, 233; Lawrence *v.* Smith, 163 Ill. 149; Eldred *v.* Meek, 183 Ill. 26; Nevitt *v.* Woodburn, 190 Ill. 283; Owsley *v.* Harrison, 190 Ill. 235.

[35] 209 Ill. 316.

[36] 20 Ch. Div. 562 (5 Gray's Cases on Property, 579).

chaser, his heirs or assigns, should demand the same in writing and pay the purchase money. In the *Gomm* case the transfer was to be made whenever the land subject to the contract might be required for the railway works of the purchaser.

The reasons given for the decision in the two cases were widely divergent. The Court of Appeal, at that time led by Sir George Jessel M. R., rested its decision in the *Gomm* case upon the ground that the purchaser by the contract had a future interest in land which was as much subject to the Rule against Perpetuities as a springing limitation by way of devise or use, and that the interest was void because the contingency upon which it was to vest might happen at too remote a time. The Illinois supreme court placed its decision upon the ground that the contract was lacking in mutuality. By this it clearly meant that the contract was too unfair, too one-sided, too unconscionable for a court of equity to enforce.[37]

There certainly appears to be but a shade of difference in the cases. In both, the seller has a legal and beneficial ownership and in both the situation will be changed, *i. e.*, another will have the beneficial ownership and a right to call for the legal title—upon the happening of a contingency in the future. There is only this slight difference in the contingencies: In the *Gomm* case the purchaser has a little less control over its happening than in the Illinois case. In the former the land must become necessary to the business of the purchaser. In the latter only notice in writing need be given and the consideration tendered. It is not perceived, however, that to this difference legal consequences attach.[38]

§ 260. An option to purchase not necessarily subject to the Rule against Perpetuities: If the purchaser had paid the

[37] For another ground of decision the court declared that there was unexplained laches on the part of the purchaser. This is rather a remarkable position, because the contract was executed in October 1897 and suit was begun in September 1903. Six years delay seems hardly to amount to laches in the enforcement of such an option contract which was not enforcible at all till demand was made in writing. Then, too, the court speaking of the long delay, said: "The parties to the contract did nothing toward its enforcement until after the death of George Bauer, a year and a half after it was executed."

[38] Woodfall *v.* Clifton, 39 The Law Journal 644; 18 H. L. R. 379; 42 Sol. Jour'l, 628.

purchase price in advance and had, under his contract, a right to call for a conveyance at any time upon giving notice, it could hardly be contended that the Rule against Perpetuities would apply. You could, then, say that the purchaser was, in fact, the *dominus* of the property, so that the whole interest was practically in him at that time,—that he did not have, in substance, a future interest, but a present absolute interest.

Such is precisely the reasoning upon which a general power to appoint by deed or will, that may in fact be exercised at too remote a time, but which, in proper time comes into the hands of a donee *in esse* and is not subject to any condition precedent to its exercise other than the mere will of the donee, avoids the objection of remoteness.[39] The two cases are not unlike. In form at least, the exercise of the power creates a springing or shifting interest. So, according to Jessel's reasoning,[40] the contract to purchase gives to the purchaser in form, an interest in real estate, which, for the purpose of applying the Rule against Perpetuities, is not different from a springing future interest. If, then, attention be paid to the form alone, the fact that the power may be exercised at too remote a time means that the springing or shifting interest may vest at too remote a time. So with the contract for purchase. In substance, however, as soon as the right to exercise the general power becomes complete in the donee, he is in the same position as if he had the fee, and this is so although, until the appointment, the beneficial interest is enjoyed by another, who holds the legal or equitable title. In the case of a contract to purchase, therefore, is there any reason why the purchaser may not, in the same way, be substantially the owner, though the title be in another and another have the beneficial enjoyment of the land till the purchaser actually calls for the conveyance?[41]

[39] Bray *v.* Bree, 2 Cl. & F. 453, (1834), (5 Gray's Cases on Property, 711), In re Teague's Settlement, L. R. 10 Eq. 564, 1870, (5 Gray's Cases on Property, 722); Gray's Rule against Perpetuities. § 477.

[40] London & S. W. Ry. Co. *v.* Gomm, 20 Ch. Div. 562, (5 Gray's Cases on Property, 579).

[41] See Gray's Rule against Perpetuities, § 230, note 2 for citation of authorities. Also Blackmore *v.* Boardman, 28 Mo. 420. But see *contra* Morrison *v.* Rossignal, 5 Cal., 64, 65. For the construction

Whether, however, such a condition of substantial ownership in the purchaser actually exists, must depend entirely upon the terms and conditions of the contract. They may be such that the purchaser cannot be regarded as in substance at once the owner, or as becoming substantially the owner within the proper time. In such a case the right to call for a conveyance would be as objectionable as a special power which might be exercised at too remote a time. The real question, therefore, is: When does the purchaser become substantially the owner? This is purely a practical matter.

It is believed that the purchaser may well be substantially the owner, though there are some conditions precedent to perfecting his right to a conveyance. It is believed that the test of whether the condition precedent is one which prevents the purchaser from being in substance the owner, lies in the extent of the control which the purchaser has over the performance of the condition and the extent of the burden of the condition. Thus, it would appear clear that in the *Gomm* case, where the purchaser could only demand a conveyance when it needed the land in its busines, the happening of the condition precedent was too little within its absolute control to enable the court to say that the purchaser was at once *dominus*.[42] So, where the purchaser must tender the full cash purchase price, the burden is too great to enable one to say that he is to all practical purposes the present owner.[43] On the other hand, it seems to be conceded that when the right of renewal of a lease is limited to arise only on giving notice within a particular time and paying a specified fine, no question of remoteness arises. [44]

The difficulty, on principle, which at least one writer has had with this result [45] disappears when it is perceived that only a practical question of the extent of control of the lessee and the burden of the condition precedent are involved. Are these

of such covenants see article entitled Leases—Covenants of Perpetual Renewal, by I. Homer Sweetser, 13 Harv. Law Review, 472.

[42] The same may be said of the condition in Birmingham Canal Co. *v.* Cartwright, 11 Ch. 421, and the decision, therefore, in that case in favor of the purchaser is clearly wrong and properly overruled by the Gomm case.

[43] Bauer *v.* Lumaghi Coal Co., 209 Ill. 316, *ante*, § 259.

[44] 42 Sols. Journal, 628.

[45] Mr. T. Cyprian Williams, 42 Sols. Journal, 628.

such that the lessee can be regarded as now *dominus* of a long term? The performance of the condition is entirely in the control of the lessee, and the burden of the fine will depend upon its amount. It may conceivably be so small as not to prevent the lessee from being *dominus* of a present long term lease. In the same way, it is submitted, if the option contract of purchase calls for payment of a small part of the purchase price in cash, and a purchase money mortgage on the land conveyed to secure the balance of the price, the purchaser might still be regarded as at once *dominus* of the property purchased. The situation is not unlike, in substance, the case of the covenant for a renewal of a lease upon payment of a fine. In the latter case the lessee must enter into covenants to pay rent and pay a sum in cash. In the case of the option to purchase the purchaser gives notes and cash. [46]

PART 2.

SEPARABLE LIMITATIONS AND GIFTS TO CLASSES.

§ 261. **Separable limitations:** A gift to grandchildren when the youngest born in the testator's life time reaches twenty-five, is valid. A gift to grandchildren when the youngest born at any time reaches twenty-five is void for remoteness. If, in making a gift to grandchildren, the testator distinctly separates the two classes the gift to one will be valid and the gift to the other will be void. If, however, as in *Lawrence v. Smith,* [47] by the eighteenth clause of the will there involved, he merely devises to his grandchildren when the youngest born at any time reaches twenty-five, there is no separation of the classes to take and the whole gift must be void.

By clauses twelve, thirteen and fourteen of the will involved in *Lawrence v. Smith,* the testator directed his trustees "to pay over and deliver to each of the said children of my said daughter when he or she shall arrive at the age of twenty-five years, the sum of $10,000." At the time of the testator's death there

[46] Mr. T. Cyprian Williams' distinction, (42 Sol's. Journal, 628), between an option to purchase and a covenant for renewal seems unsatisfactory since it takes account only of the difference in form between the two and fails to observe that the true distinction is whether the purchaser has in substance complete control of the title.

[47] 163 Ill. 149.

were living five grandchildren coming within the gifts of the above clauses. The youngest was then nine years old. It is clear that since each member of the class got a specific sum the gifts to the grandchildren were separable and those to the grandchildren living at the testator's death were not too remote.[48] This position the court seems to have admitted the soundness of. It, however, held the gifts void on another ground.[49]

§ 262. Gifts to classes—Introductory: The Rule against Perpetuities, in its application to gifts to classes, may be restated in this way: The gift to the whole class is void if either the maximum or the minimum number of the class may possibly be ascertained at a period beyond a life or lives in being and twenty-one years.[50] Such was the rule established in England by *Leake v. Robinson.*[51] The authority of that case has been fully recognized by our supreme court in *Howe v. Hodge.*[52] The rule as above formulated has actually been applied in *Lawrence v. Smith*[53] and *Ingraham v. Ingraham*[54] to hold the gift to the class wholly void.

The correct result to be reached upon the application of the above rule is not always apparent to the practitioner whose acquaintance with the rule is only casual. It is believed that a somewhat utilitarian method of exposition can be adopted by working out the following series of problems—classifying the cases according as they support or depart from the results stated.[55]

[48] Gray's Rule against Perpetuities, §§ 355, 389 *et seq.*

[49] Viz: that the testator did not intend to make any difference between grandchildren living at his death and those born afterward, and that to hold the gift bad as to the latter and good as to the former "would be to make a different will from the one made by the testator." (*Ante*, § 183). The idea was also advanced that since the trust might last too long the whole trust was void. See *ante*, § 256, note 21.

[50] Observe that for the purpose of applying the above rule men and women are regarded as capable during their lives of having children: Pitzel *v.* Schneider, 216 Ill. 87, 97.

[51] 2 Mer. 363, (1817), (5 Gray's Cases on Property, 622).

[52] 152 Ill. 252, 275, *post*, § 263.

[53] 163 Ill. 149, *post*, § 269.

[54] 169 Ill. 432, 467-469, *post*, § 269. Also Schuknecht *v.* Schultz, 212 Ill. 43.

[55] The writer desires to say at this point that the following classification of results could not have been made by him had it not been

mum of the class must be ascertained at the death of the child or children of the testator who are lives in being at the testator's death, so that the entire gift to the class is not objectionable on any ground of remoteness.

The postponement clause is invalid because it may last for too long a time, since it is expressly intended to be operative for longer than a life in being and twenty-one years. This proceeds upon the assumption that under the doctrine of *Claflin v. Claflin* there must be some limits to the length of time that an absolute equitable fee may be made indestructible,[58] and that these limits may fairly be assumed to be the period of a life in being and twenty-one years.[59] If, therefore, the postponed enjoyment clause is expressed to be operative during a period which may last longer than a life in being and twenty-one years, it must be rejected as wholly void.[60]

In case (b), on the supposition that no child of A is *in esse* at the testator's death, the maximum and minimum of the class must be ascertained at the death of the life tenant. The entire gift is, therefore, unobjectionable on any ground of remoteness,[61] and the postponement clause is again bad because it may last for too long a time.[62] The class, however, may increase till the death of the life tenant.[63]

(y) If in case (a), a grandchild is *in esse* at the testator's

[58] Bigelow *v.* Cady, 171 Ill. 229, might be explained upon such a principle. See also Bartlett, Petitioner, 163 Mass. 509, 512.

[59] *Post*, § 293; Kohtz *v.* Eldred, 208 Ill. 60, 72; Shallcross's Estate, 200 Pa. St. 122 (1901), *semble*; Winsor *v.* Mills, 157 Mass. 362, *semble, accord.* See the statutory provision to the same effect in Kentucky: Ky. Stats. (1903) sec. 2360; Johnson's Trustee *v.* Johnson, 79 S. W. R. 293 (Ky. 1904). Conn. Trust & Safe Dep. Co. *v.* Hollister, 74 Conn. 228, is not necessarily *contra*, because it was recognized that no indestructible equitable fee could be created.

[60] In Lunt *v.* Lunt, 108 Ill. 307, the postponed enjoyment clause, as far as it affected the share of the youngest child, would last for too long a time unless by its proper construction it was operative only until the devisee actually reached thirty or died under that age, since the youngest child was only one year old at the testator's death. This point, however, received no consideration from the Court.

[61] Chapman *v.* Cheney, 191 Ill. 574.

[62] This is not contradicted by anything in Chapman *v.* Cheney, 191 Ill. 574.

[63] Chapman *v.* Cheney, 191 Ill. 574.

§ 263. Problem where the interest to the class is vested as distinguished from executory, but subject to a postponed enjoyment clause—Cases (a) and (b): (a) Suppose property is given in trust to the testator's grandchildren, but not to be paid to them until they reach the age of twenty-five years respectively. (b) Suppose property is given in trust to A for life and then to his children, but not to be paid to them until they reach the age of twenty-five years respectively. In both of the above cases it is assumed that the postponement clause is not invalid as an improper restraint on alienation, or as the attempted creation of an indestructible absolute equitable interest—*i. e.*, it is assumed that the doctrine of *Claflin v. Claflin* [56] prevails. [57]

Three questions arise with regard to the gift to the class in both of the above cases. *First,* when does the class determine according to the usual rules for the determination of classes? *Second,* is the gift to the class unobjectionable from the point of view of remoteness? *Third,* is the postponement clause objectionable on the ground that it may operate for too long a time? All of these questions must be considered with reference to case (a) on each of two hypotheses: That there are no grandchildren *in esse* at the testator's death, and that there are; and with reference to case (b) on the hypothesis that there are no children of A living at the testator's death, and that there are.

(x) If, then, in case (a) there are no grandchildren *in esse* at the testator's death, all grandchildren born at any time would be included in the gift to the class according to the usual rules for the determination of classes. But the maximum and mini-

for the very generous aid rendered by Professor Gray in discussing with him by letter the problems touched upon, and in submitting parts of the MSS. for the second edition of his Rule against Perpetuities.

[56] 149 Mass. 19, *post,* §§ 288 *et seq.*

[57] Such an assumption seems to be proper in Massachusetts: Claflin *v.* Claflin, 149 Mass. 19; Young *v.* Snow, 167 Mass. 287; Danahy *v.* Noonan, 176 Mass. 467. Illinois: *Post,* § 288. Kentucky: Smith *v.* Isaacs, 78 S. W. R. 434 (Ky.); see also Avery *v.* Avery, 90 Ky. 613 (*semble*); Pennsylvania: The Doctrine of Claflin *v.* Claflin must have been conceded when In re Rhodes' Estate, 147 Pa. St. 227, was decided, for see Barker's Estate, 159 Pa. St. 518; (Gray's Restraints on Alienation, p. 115, (2nd ed.).

death, then the minimum of the class is ascertained at that time and the maximum of the class must be ascertained at the death of the testator's child or children who are lives in being. There is no question, therefore, about the validity of the gift to the class so far as the question of remoteness is concerned.[64]

Whether the class determines when the eldest grandchild born actually reaches or would have reached the required age had he lived, or when the eldest grandchild born reaches the required age or dies, has been dealt with, *ante* § 230.

Is the postponement clause invalid on the ground that it may last too long? If it is to operate till each grandchild reaches twenty-five or dies under that age, then it is valid so far as it affects the share of each grandchild *in esse* at the testator's death.[65] If it is to last until each member of the class reaches twenty-five, or would have reached twenty-five in case he had lived,[66] then it is void as to every share except those of grandchildren who have attained the age of at least four years at the testator's death.[67]

If in case (b) a child of A is *in esse* at the testator's death, the gift to the class must be valid because the minimum is already ascertained and the maximum must be ascertained at the death of A.[68] By the ordinary rule for the determination of classes, the class will increase until the death of the life tenant, A.[69] If the postponement is to last until each child of A reaches twenty-five or dies under that age, then the postponement is valid as to the share of every member of the class *in*

[64] Howe *v.* Hodge, 152 Ill. 252.

[65] There was no decision upon this point in Howe *v.* Hodge, 152 Ill. 252. For authority that the postponed enjoyment clause stands valid as to every share upon which it will surely not last more than a life in being and twenty-one years, see the English cases holding a clause against anticipation, imposed by a general provision of a will upon all the shares of daughters of the testator's children, valid as to those members of the class *in esse* at the testator's death and void as to those born afterwards: In re Ferneley's Trusts [1902] 1 Ch. 543; Herbert *v.* Webster, 15 Ch. Div. 610 (1880). In re Ridley, 11 Ch. Div. 645 (1879), and In re Michaels' Trusts, 46 L. J. Ch. 651 (1877) *contra* not followed.

[66] *Ante*, § 230.

[67] There was no decision upon this point in Howe *v.* Hodge, 152 Ill. 252.

[68] Flanner *v.* Fellows, 206 Ill. 136; Johnson's Trustee *v.* Johnson, 79 S. W. R., 293 (Ky. 1904); In re Rhodes' Estate, 147 Pa. St. 227, (1892).

[69] *Supra*, cases cited in note 68.

esse at the testator's death, and bad as to all others. If the postponement is to last until a child of A reaches, or would have reached, twenty-five, it is void except as to the children of A *in esse* at the testator's death, who had at that time, at least, reached the age of four years, and void as to all others.[70]

§ 264. Cases (c) and (d): (c) Suppose property is given to trustees in trust for the grandchildren of A, but no grandchild shall be entitled to have his share paid to him until he reaches twenty-five. (d) Suppose property is given to trustees in trust to pay the income to A for life and on his death to turn over the principal to A's grandchildren, but no grandchild shall be entitled to have his share paid to him until he reaches twenty-five. Again assume in the above two cases that the doctrine of *Claflin v. Claflin*[71] prevails, so that the postponement clause is not objectionable as an improper restraint on alienation, or as the attempted creation of an indestructible equitable fee.

Three questions again arise with regard to the gift to the class in both the above cases. *First,* when does the class determine according to the usual rules for the determination of classes? *Second,* is the gift to the class unobjectionable from the point of view of remoteness? *Third,* Is the postponement clause objectionable on the ground that it may operate for too long a time? All of these questions must be answered upon two hypotheses with regard to the above two cases,—that A has no grandchildren *in esse* at the testator's death and that he has, but that such grandchild is over four years of age at the time of the testator's death.

(x) In cases (c) and (d), on the supposition that no grandchild of A is *in esse* at the testator's death, the gift to the whole class is clearly too remote because it remains executory till a grandchild of A is born, and that may not be until after the death of A and twenty-one years. Nor can the gift to the class be aided by getting rid of the postponement clause.

[70] There is no decision or *dictum* on this point in Flanner *v.* Fellows, 206 Ill. 136. What the opinion of the court may have been upon it in Johnson's Trustee *v.* Johnson, 79 S. W. R. 293 (Ky. 1904) seems uncertain. The court in Re Rhodes' Estate, 147 Pa. St. 227 (1892), particularly refused to decide the point.

[71] *Post,* § 288 *et seq.*

(y) Suppose now that in case (c) a grandchild of A be *in esse* at the testator's death and at least four years old. The minimum of the class is ascertained at once. The maximum will be ascertained, according to the usual rules for the determination of classes, when the first period of distribution arrives. If that is when the eldest reaches twenty-five or dies, or when the eldest reaches twenty-five or would have done so had he lived,[72] the gift to the class is valid so far as the question of remoteness is concerned.

As to the postponement clause, that can only be valid upon the shares of the grandchildren of A *in esse* at the testator's death who have reached four years at least, at the time of the testator's death. As to those not *in esse* at the time of the testator's death it is clearly bad. As to those *in esse*, but under four years, it is valid if the period of postponement lasts only until they reach twenty-five or die. It is bad if it is to last till they actually reach twenty-five or would have done so if they had lived.

In case (d), on the supposition that a grandchild of A is *in esse* at the testator's death and at least four years of age, the minimum of the class is ascertained, and if the maximum is ascertained at A's death, or when the eldest grandchild of A living at the testator's death, reaches twenty-five or dies under that age, which ever happens last, the gift to the class is valid and the postponement clause is good as to all the grandchildren of A who are *in esse* at the testator's death, and void as to all others. If the first period of distribution comes at the death of A or when the eldest grandchild of A reaches twenty-five or would have done so had he lived, which ever happens last, then the gift to the class is valid, but the postponed enjoyment clause is only valid as to grandchildren *in esse* at the testator's death who have reached the age of four years at least.

The gift in *Kevern v. Williams*,[73] to the grandchildren of the testator's living brother, to be paid when they reach twenty-five, must, therefore, have been perfectly valid as far as any question of remoteness was concerned, for the eldest grandchild *in esse* at the testator's death was ten years old. If the post-

[72] *Ante*, § 230.

[73] 5 Sim. 171 (5 Gray's Cas. on Prop. 756).

ponement clauses were valid at all, the class should have increased till the eldest did actually attain twenty-five, (which happened). The fact that the class was only allowed to increase till the death of the life tenant must be attributed to the rule of the English cases that the postponement clause must be rejected because it was an improper restraint on alienation and therefore the first period of distribution came, in fact, at the death of the life tenant. If this is wrong because the postponement clause should not be rejected when, to retain it, would allow the class to increase,[74] then we have a misapplication of the rule which rejects the postponed enjoyment clause. But that misapplication has nothing to do with the effect of the operation of the Rule against Perpetuities.[75]

§ 265. **Cases (e) and (f):** Suppose, now, that, we alter the above cases (c) and (d) so that applying the usual rule for the determination of classes, the maximum of the class may be ascertained at too remote a time. Thus suppose we put two further cases, (e) and (f), like (c) and (d) except that the grandchildren of A *in esse* at the death of the testator are only three years old. Now, if the rule for the determination of the class be that the class closes when the eldest grandchild of A born, actually reaches twenty-five or dies under that age, then the gift to the class is valid, and the postponed enjoyment clause stands valid on different shares according to the principle applied, *ante* § 264. Suppose, however, again assuming the doctrine of *Claflin v. Claflin*[76] to be law, that the first period of distribution arrives when the eldest grandchild born actually reaches twenty-five or *would have reached twenty-five if he had lived.*[77] Under these circumstances the maximum number of the class may, if the class increases until the first period of distribution, be ascertained at too remote a time.

Is there, then, on this latter supposition, any way of saving the validity of the gift to the class? If such a way exists it must be because the class will determine at some earlier period —that is, in case (e) at the testator's death, and in case (f) at

[74] Oppenheim *v.* Henry, 10 Hare 441, (6 Gray's Cases on Property 132).

[75] Gray's Rule against Perpetuities, 2nd ed. § 639*aa*. (As seen by the writer prior to publication).

[76] *Post*, §§ 288 *et seq.*

[77] *Ante*, § 230.

the death of the life tenant. There are two grounds upon which this earlier determination of the class may be supported.

First: Since the postponed enjoyment clause is expressed to be operative during a period which may last longer than a life in being and twenty-one years,[78] it must be rejected as wholly void in cases (e) and (f). Therefore, the whole postponed enjoyment clause must be rejected and the class determined at the death of the testator in case (e), and at the death of the life tenant in case (f).

Second: The same result can be reached where the doctrine of *Claflin v. Claflin* is not law, but where the postponement is valid because the gift is to a class and so for the benefit of others than the devisee whose share is postponed.[79] The postponement is valid in such a case only out of favor to the other members of the class. It is a relaxation of the general rule that such postponements upon an absolute equitable interest are void. Hence, when, to apply such a relaxation of the general rule will make the gift to the whole class void for remoteness, it will not be applied. The usual rule that the whole postponement is void, therefore, prevails, and the gift to the restricted class is valid. In our case (e), therefore, the class will determine at the testator's death, and in our case (f), the class will determine at the death of the life tenant.

Such reasoning, it is submitted, cannot prevail where the doctrine of *Claflin v. Claflin* is law because there the general rule is that the postponement is valid because the intention of the testator or settlor must prevail.[80] To say, then, that the class shall determine at a different time because otherwise the gift to the whole class will be void for remoteness is to modify the expressed meaning of the testator, so that the Rule against Perpetuities shall not be allowed to apply.[81]

§ 266. Problem where the interest to the class is certain executory as distinguished from contingent executory—

[78] *Post*, § 293.

[79] Oppenheim *v.* Henry, 10 Hare 441, 6 Gray's Cas. on Prop. 132; Gray's Rule against Perpetuities, 2nd ed. § 639, (according to MSS. seen by the writer), *ante*, § 230, *post*, § 288.

[80] *Post*, §§ 289-294.

[81] Professor Gray in the 2nd ed. of his Rule against Perpetuities seems, (according to the MSS. which the writer has seen), to have reached a different conclusion.

Cases (a) and (b): Suppose that in cases (a) and (b), stated *ante* § 263, the gift to the class be regarded as vested only in the sense of being transmissible. Suppose it is, in reality, an executory interest. It must, then, be a certain executory interest as distinguished from a contingent executory interest.[82]

If no grandchildren or child of A is *in esse* at the testator's death it is clear that the maximum and minimum of the class must be ascertained in time, *i. e.*, in the life of the child of the testator in case (a), and in the life of A in case (b). But the gift to the members of the class being executory, must vest at too remote a time. Under these circumstances the gift to the class can only be saved upon the following reasoning: You have two things expressed—*first*, the gift of the absolute title with all the rights of ownership; *second*, the modification, in a subsequent clause, to what is really an executory interest. In short, the effect of the postponed enjoyment clause is to turn the absolute present gift into what is really an executory interest. The executory interest is clearly too remote and void. Rejecting, therefore, not the postponed enjoyment *clause*, but the entire executory interest contained in the postponed enjoyment clause,[83] we still have left the expressed absolute present interest.[84]

If in case (a), a grandchild of the testator is *in esse* at the testator's death, the maximum and the minimum of the class must be ascertained in time, but the gift being executory it will be void as to the shares of grandchildren, according as the gift is executory till the grandchildren actually reach twenty-five or die, or actually reach twenty-five or the time comes when they would have done so had they lived. In the former case the gift to grandchildren *in esse* at the testator's death might be valid, the shares being definitely ascertained in time

[82] *Ante*, § 223.

[83] For the rule regarding the rejection of modifying clauses containing a gift which is too remote, see Gray's Rule against Perpetuities, § 427.

[84] Bigelow *v.* Cady, 171 Ill. 229, dealing with it as the court did, may be explained as the gift of a certain executory interest which is too remote. There the gift being rejected, there is no separate expression of the gift of a present absolute interest to fall back upon. Therefore, the court held there was an intestacy. See aso Reid *v.* Voorhees, 216 Ill. 236.

and vesting in time. In the latter, the shares must be ascertained in time, but they may vest at too remote a period unless a grandchild be at least four years old at the time of the testator's death.

The holding of shares of grandchildren *in esse* not too remote must proceed upon the assumption that you can leave the limitation expressed alone as to some shares, and as to others, for instance those of grandchildren not *in esse* (or *in esse* and under four years old), you can reject the gift contained in the modifying clause and support the gift to such grandchildren as a direct limitation taking effect at the testator's death. Perhaps the proper view may be that the executory gift to the entire class contained in the modifying clause be rejected, leaving an absolute direct gift to the grandchildren to take effect on the testator's death.

If in case (b), a child of A is *in esse* at the testator's death, then the maximum and minimum of the class must be ascertained in time. But if the gift to a child of A is executory till he reaches twenty-five or dies under that age, it may conceivably be valid as to the share of such child of A *in esse* at the testator's death. If it be executory till a child of A reaches, or would have reached twenty-five, then it is only conceivably valid as to the share of a child *in esse* at the testator's death, if such child then be at least four years old. As to the shares of children which remain executory until too remote a period, the executory interest contained in the modifying clause might conceivably be rejected, leaving a direct gift to take effect upon the death of A. Here, also, it is a question whether the executory gift to the whole class contained in the modifying clause must not be rejected, leaving a direct gift to the class at the death of A.

§ 267. Cases (c) and (d): Suppose that in cases (c) and (d) stated *ante*, § 264, the gift to the class be regarded as a certain executory interest.

In cases (c) and (d), if no grandchild of A is *in esse* at the testator's death, then the gift to the whole class is bad, even if the executory interest contained in the modifying clause be rejected, leaving a direct gift to the grandchildren of A.

If a grandchild of A is *in esse* at the testator's death, and at least four years old, in case (c) the minimum of the class is

ascertained at the testator's death, and the maximum must be ascertained in time, viz., when the eldest reaches twenty-five or dies, or reaches twenty-five or would have reached twenty-five if he had lived. The future interest will remain executory for too long a time as to all members of the class not *in esse* at the testator's death. The future interest will remain executory for too long a time as to the shares of grandchildren *in esse* at the testator's death and not yet four years old, according as it does so remain executory till each grandchild reaches twenty-five or dies, or reaches twenty-five or would have done so had he lived. In the latter case the gift to such members of the class as have not yet reached at least four years at the testator's death, is too remote. In the former case the gift to the class is not too remote as regards those members who are *in esse* at the testator's death. It is too remote as regards all others. It still remains a question whether you can hold the shares which are not too remote valid as limited, and the others void as they stand, but supported, by rejecting for remoteness the executory interests contained in the modifying clause, and thus leaving a direct gift to the grandchildren of A living at the testator's death (except those whose shares are not too remote as limited); or must you say that because the gift of some shares must be too remote, all shall be invalid, so that the executory gift to the whole class, arising out of the modifying clause, shall be rejected for remoteness, and the gift stand as a direct gift to the grandchildren of A at the testator's death.

In case (d), on the supposition that grandchildren of A are *in esse* and at least four years old, the maximum and minimum of the class is bound to be ascertained in time. The minimum is already ascertained and the maximum must be ascertained at the death of A or when the eldest grandchild of A living at the testator's death reaches twenty-five or dies, whichever happens last, or at the death of A or when the eldest grandchild of A living at the testator's death reaches twenty-five or would have done so had he lived, whichever happens last.

The future interest will remain executory for too long a time as to all members of the class not *in esse* at the testator's death. The future interest will remain executory for too long a time as to the shares of the grandchildren of A *in esse* at the testator's death and not yet four years old, according as it

does so remain executory till each grandchild reaches twenty-five or dies, or reaches twenty-five or would have done so had he lived. In the latter case the gift to such members of the class as have not reached four years at the testator's death is too remote. In the former the gift to the class is not too remote as regards those members who are *in esse* at the testator's death, but is too remote as to all others. It still remains a question whether you can hold the shares which are not too remote valid as limited and the others void as they stand, but supported by rejecting for remoteness the executory interest contained in the modifying clause, leaving a direct gift to the grandchildren of A at the testator's death (except those whose shares are not too remote as limited), the class increasing until A's death; or must you say that because the gift of some shares must be too remote, all shall be invalid, so that the executory gift to the whole class arising out of the modifying clause shall be rejected for remoteness and the gift stand as a direct gift to the grandchildren of A, the class increasing till A's death.

Kevern v. Williams[1] is consistent with the view that the executory gift contained in the modifying clause, to the whole class is void and that the whole may be rejected, leaving a direct gift to the grandchildren of A to take effect after the death of the life tenant.

§ 268. **Cases (e) and (f):** Suppose that in cases (e) and (f), in § 265 *ante*, the gift to the class be regarded as a certain executory interest.

The only way to save the gift to the class is to reject the executory interest to the whole class as created by the modifying clause, and then to allow the direct gift to the class at the death of the life tenant, A, to stand.

§ 269. **Problem where the interest to the class is contingent upon their attaining twenty-five—Cases (a) and (b):** (a) Suppose property is given in trust to such of the testator's grandchildren as may reach the age of twenty-five. (b) Suppose property is given to A for life and then to such of his children as reach the age of twenty-five.

(x) If no grandchild of the testator and no child of A is

[1] 5 Sim. 171 (5 Gray's Cas. on Prop. 756).

in esse at the testator's death the gift is hopelessly bad for remoteness.

(y) Suppose a grandchild of the testator in case (a), or a child of A in case (b), is *in esse* at the testator's death, but has not reached the age of twenty-five. In both cases the maximum of the class is, under the usual rules for the determination of classes, ascertained in time, because the class can increase only until the death of the testator's children or until the death of A. In both cases, however, the minimum of the class may possibly not be ascertained till too remote a time because of the contingency that only those who reach twenty-five can take. In both cases, therefore, the gift to the whole class was void for remoteness.[2]

(z) Suppose a grandchild of the testator, or a child of A, has reached twenty-five at the testator's death. In case (a) the class would have closed and the grandchild or grandchildren *in esse* at the testator's death would take all. In case (b) the child of A who reached twenty-five has a vested interest in some share, but the maximum of the class is not determined until A's death, and the minimum perhaps not until twenty-four years after his death and after the death of the child who has reached twenty-five. Hence the gift to the whole class fails.[3]

[2] As to case (a): Ingraham v. Ingraham, 169 Ill. 432, 467-469, (gift to nephews and nieces). Is not the *dictum* of Howe *v.* Hodge, 152 Ill. 252, in accord with the text? There it was conceded that, omitting the last sentence of the residuary clause, the gift would have been to grandchildren contingent upon their reaching thirty. The preceding life estate was created only in part of the residuary estate. The limitation to the grandchildren should, therefore, be treated, for the purpose of applying the rule for the determination of classes, as if there were no preceding interest. *Ante*, § 228. The intimation of the court is very strong that, assuming the gift to the grandchildren to be contingent upon their attaining thirty, the gift to the whole class would be too remote. This conclusion must rest upon the ground that the class would not actually close till the first grandchild living at any time reached thirty, that is, there is no principle upon which you can save the gift to the class by not applying the usual rule for the determination of the class.

As to case (b): Lawrence *v.* Smith, 163 Ill. 149. See, also, approval of Leake *v.* Robinson, 2 Mer. 363, in Howe *v.* Hodge, 152 Ill. 252, 275 *et seq.* See, also, Schuknecht *v.* Schultz, 212 Ill. 43.

[3] Pitzel *v.* Schneider, 216 Ill. 87.

PART 3.

ESTATES TAIL.

§ 270. The remainder after an estate tail—Introductory: It was explained in § 203 that the remainder after an estate tail is a future interest limited to take effect upon an indefinite failure of issue, and that it still continues to be so although the estate tail is turned, by the statute,[4] into a life estate in the donee and a remainder in fee to certain lineal heirs of the donee.[5] How, then, is the future interest upon an indefinite failure of issue by way of remainder after an estate tail affected by the turning of the estate tail into the statutory estates for life and remainder in fee?[6]

§ 271. Where there has never been any issue of the donee in tail to take the statutory remainder: If at the time the estate tail is created no issue of the donee are in existence the statutory remainder is contingent.[7] Whether the ultimate interest is to take effect upon a definite or indefinite failure of issue, it will, upon the ground that the conditional element is incorporated with the gift to the remainder-man,[8] be a contingent future interest and the case will be one of what have usually been called contingent remainders in fee in double aspect. However, in the recent case of *Chapin v. Nott*[9] the ultimate interest was held to be a *vested* remainder.[10] This result was obtained by the application of the New York statutory definition of a vested remainder.[11]

Is the ultimate future interest valid? It was clearly assumed and held to be so in *Chapin v. Nott*. If it be regarded as a real vested remainder so that the Rule against Perpetuities can have no application[12] there is no doubt about its valid-

[4] *Ante*, § 114.

[5] *Ante*, §§ 116-120.

[6] In Blair *v.* Vanblarcum, 71 Ill. 290, 294, the court refused to deal with this question because the contingency which would make its consideration necessary had not arisen.

[7] *Ante*, § 116.

[8] *Ante*, § 102.

[9] 203 Ill. 341.

[10] This position, though squarely taken by the court, appears to have been unnecessary to the decision (*ante*, § 101). It is supported, however, by Boatman *v.* Boatman, 198 Ill. 414. See *ante*, § 100.

[11] *Ante*, § 95.

[12] *Ante*, § 255.

ity. If the ultimate interest be regarded as a contingent remainder upon a definite failure of issue it is not too remote. It is submitted, also, that it may be valid so far as any question of remoteness is concerned even though the ultimate gift be looked upon as limited to take effect upon an indefinite failure of issue. As a gift upon an indefinite failure of issue, it is still a contingent future interest after a particular estate of freehold limited to take effect upon an event which may happen either before or after, or at or after the termination of the preceding interest. Whether you call the future interest vested or contingent, it is precisely the sort of limitation which was subject to the rule of law that it must fail entirely unless the contingency upon which it was to take effect happened at or before the termination of the preceding life estate.[13] If this rule be in force in Illinois,[14] and applicable[15] in the case put,[16] it is clear that the ultimate interest after the estate tail must take effect in possession at the termination of the life estate or perish. It cannot, therefore, be objectionable on any ground of remoteness.[17]

§ 272. Suppose now that after the estate tail is created the donee's first child is born: If, in accordance with the proper definition of a contingent remainder, the statutory remainder was still contingent after the birth of the donee's first child,[18] then by the same definition of a contingent remainder the ultimate interest, whether upon a definite or indefinite failure of issue, would be a contingent remainder and both re-

[13] *Ante*, §§ 67, 82, 84, 86 *et seq.*

[14] *Ante*, §§ 81-92a.

[15] It is conceivable that calling the remainder vested might be an indirect way of saying that it was indestructible.

[16] The contingent future interest would in this view be "vested" only in the sense of being "transmissible." *Ante* §§ 107, 255.

[17] Evers *v.* Challis, 18 Q. B. 231; 7 H. L. C. 531 (5 Gray's Cases on Prop. 637); Gray's Rule against Perpetuities, §§ 338-340a.

Assuming, therefore, that in Healy *v.* Eastlake, 152 Ill. 424; Kellett *v.* Shepard, 139 Ill. 433; Seymour *v.* Bowles, 172 Ill. 521; and Johnson *v.* Askey, 190 Ill. 58, we have a gift after a life estate contingent upon an indefinite failure of issue in the life tenant, yet the future interest is not too remote.

The reasoning of the text does not, of course, apply, where the future interest is an *equitable* estate in realty: In re Bence, Smith *v.* Bence [1891], 3 Ch. 242.

[18] *Ante*, § 116.

mainders would take effect as contingent remainders in double aspect. If the rule that makes contingent future interests of this sort destructible be in force,[19] the future interest cannot be too remote.

If, however, upon the peculiar definition of a vested remainder toward which the Illinois court has inclined[20] the interest after the estate tail be held a vested remainder before the birth of issue to the donee, then, by the same definition, the issue of the donee upon birth take a vested remainder.[21] What, then, happens to the remainder of the ultimate taker which was also vested? It clearly loses its character as a *vested* future interest.[22] It as certainly becomes a contingent future interest. If it be recognized as destructible,[23] it is not void for remoteness, even though it be taken as limited upon an indefinite failure of issue. If the interest is indestructible, taking effect according to the expressed intention of the testator or settlor, it must violate the Rule against Perpetuities,[24] unless it be regarded as limited upon a definite failure of issue.

§ 273. Suppose now that at the time when the estate tail and remainder over are created the donee in tail has children: If you adopt the view that the donee's children take a contingent as distinguished from a vested future interest, then the observations *ante* § 272, respecting the case where the donee has children born after the creation of the estates and where the remainder to those children is regarded as contingent, apply. If you adopt the view that the children take at once a vested remainder in fee, the observations *ante*, § 272 in regard to the case where the donee has children born after the creation of the estates, and when the remainder to such children is regarded as vested, apply.[25]

[19] *Ante*, §§ 81-92a.

[20] *Ante*, §§ 100, 101.

[21] Why, then, if the limitations be created by deed, is not the vested interest in the donee's issue void as a fee on a fee under the doctrine of Palmer *v.* Cook, 159 Ill. 300, *ante*, § 139; and, if so, why must not the ultimate interest after the estate tail be void for the same reason, since, if it takes effect at all, it must divest the fee already vested in the donee's issue?

[22] *Ante*, § 105.

[23] *Ante*, § 271.

[24] *Ante*, § 91, note 13.

[25] With this exception, however, that it cannot be urged that the interest of the issue of the donee

In *Metzen v. Schopp*,[26] the future interest after an estate tail was limited by will upon a definite failure of issue. It was, therefore, valid so far as any question of remoteness was concerned, regardless of whether it was destructible or not. There the testator devised to his wife for life with a remainder to his son John Peter in tail, and "in case of the death of my son John Peter Metzen, without leaving issue and after the death of my wife" the property to be sold and the proceeds divided. It was held that the son did not get a fee simple but only a statutory life estate with a statutory remainder in fee "to the heirs of his body."[27] That was all that was involved, but the court, evidently to forestall further litigation, went out of its way to say that the interest after the estate tail was limited upon a definite failure of issue and intimated that it was a perfectly valid devise. The use of the word "leaving" in the phrase "without leaving issue" made it, upon the English cases respecting personalty[28] and the Illinois cases regarding realty as well,[29] a gift on a definite failure of issue. Then it appears that the son John Peter was married and had issue before the testator died, which issue may fairly be assumed to have been living at the testator's death. If, then, that child took a vested statutory remainder in fee upon the death of the testator the gift over upon trust to convert was valid even though it be regarded as an indestructible executory devise.

is void under the doctrine of Palmer *v.* Cook, 159 Ill. 300, *ante*, § 139.

[26] 202 Ill. 275.

[27] *Ante*, §§ 114 *et seq.*

[28] *Ante*, § 201.

[29] *Ante*, § 201.

PART 4.

CHARITIES.[30]

§ 274. Trusts for charitable purposes not void for remoteness though the trust must last indefinitely: In several Illinois cases,[31] it is suggested that a trust to charity is not void for remoteness though it is to last indefinitely, and that this is so, because of a particular exception in favor of charitable bequests. It should be observed that the Rule against Perpetuities has nothing whatever to do with the validity or invalidity of a gift on the ground merely that it may last indefinitely, provided it must become a vested interest within the proper time.[32]

§ 274a. Where charitable bequest is to a corporation or association not yet formed: Suppose the gift to a corporation or association be for a charitable object and not preceded by any gift to an individual, and suppose, also, the corporation or association is not in existence. It might be argued that the gift was subject to a condition prescribing that the corporation or association must come into existence, and that, as that event might happen at an indefinite time in the future, the whole gift

[30] *What is a charitable bequest:* Ingraham *v.* Ingraham, 169 Ill. 432; Crerar *v.* Williams, 145 Ill. 625, 643, 44 Ill. App. 497; Andrews *v.* Andrews, 110 Ill. 223; Heuser *v.* Harris, 42 Ill. 425; Hunt *v.* Fowler, 121 Ill. 269; Trafton *v.* Black, 187 Ill. 36; Garrison *v.* Little, 75 Ill. App. 402; Morgan *v.* Grand Prairie Seminary, 70 Ill. App. 575; Taylor *v.* Keep, 2 Ill. App. 368; Gilman *v.* Hamilton, 16 Ill. 225; Trustees *v.* Petefish, 181 Ill. 255; Abend *v.* Endowment Fund, 74 Ill. App. 654.

Charitable bequests valid although the cestui is indefinite: Heuser *v.* Harris, 42 Ill. 425; Andrews *v.* Andrews, 110 Ill. 223; Mills *v.* Newberry, 112 Ill. 123 (condition precedent that a selection be made); Trafton *v.* Black, 187 Ill. 36; Morgan *v.* Grand Prairie Seminary, 70 Ill. App. 575.

Trust for charity "or other purposes" void for uncertainty: Taylor *v.* Keep, 2 Ill. App. 368.

[31] Heuser *v.* Harris, 42 Ill. 425; Andrews *v.* Andrews, 110 Ill. 223; Abend *v.* Endowment Fund, 74 Ill. App. 654; Garrison *v.* Little, 75 Ill. App. 402.

[32] *Ante*, § 256. Note that in Kirkland *v.* Cox, 94 Ill. 401, 416, where there was a gift over to charity, if the first taker died without issue the court declined to pass upon whether the gift over was void for remoteness.

was void for remoteness. Courts, however, are quick to see an immediate gift for charity[33] and to hold that the corporation or association must be formed within a reasonable time and that if it cannot be formed at all, yet the gift to charity will be carried out *cy pres*.[34]

Crerar v. Williams,[35] seems to be a case where the charitable gift was a present one to a non-existing corporation or association. It was held valid. The testator directed a corporation to be formed. The formation of such a corporation was impossible under the Illinois laws as they stood at the time of the testator's death. Nevertheless, the court upheld the gift and said it should be enforced *cy pres*. *Ingraham v. Ingraham*,[36] sustained the validity of a gift to a hospital to be founded in the future, on the ground that it was an immediate gift to charity.[37]

Part 5.

Accumulations.

§ 275. Accumulations other than for charity: There is no statute against accumulations in Illinois. When, therefore, the future interest is executory and there is a provision for accumulation in the meantime, such accumulation may be provided for up to the most remote time at which the future interest can vest and still be valid.[38] If the executory interest does not vest within the time prescribed by the Rule against Perpetuities and the accumulation is to continue up to the time of the vesting of the future interest, then the future interest must be void, and the provision for accumulation, if it is part

[33] Ingraham *v.* Ingraham, 169 Ill. 432, 452 (quoting Gray's Rule against Perpetuities, § 607).

[34] This must be the ground upon which Morgan *v.* Grand Prairie Seminary, 70 Ill. App. 575, is to be supported. The charitable bequest there was held valid although the gift was on condition that the city donated a lot.

[35] 145 Ill. 625.

[36] 169 Ill. 432, 454-459.

[37] In Heuser *v.* Harris, 42 Ill. 425, and Andrews *v.* Andrews, 110 Ill. 223, the gift was an immediate one to charity. There was simply a failure to name trustees to administer the trust.

[38] Rhoads *v.* Rhoads, 43 Ill. 239; Hale *v.* Hale, 125 Ill. 399; Ingraham *v.* Ingraham, 169 Ill. 432, 450.

of the testator's scheme, in connection with the gift which is too remote, will also fail.

Suppose now, that the interest in the legatee is vested at once with a postponed enjoyment clause, valid under the doctrine of *Claflin v. Claflin*,[38a] or upon any other ground, with a provision for accumulation in the meantime. The accumulation, it is submitted, may continue up to the most remote time that the postponed enjoyment can last. If it is to continue beyond that time, then the whole postponement is void and the trust for accumulation is bad. This, however, it should be observed, is not an application of the Rule against Perpetuities, but of the rule which limits the length of time that a postponed enjoyment clause may be operative.[39]

§ 276. Accumulation for charitable purposes: Suppose there is an unconditional gift to charity with a direction for accumulation which may last longer than a life or lives in being and twenty-one years. It is not perceived upon what ground the clause for accumulation can be void for remoteness. If void at all, it must be because it is an improper restraint on alienation. The corporation, association or trustees directing the charity might disregard it and the attorney-general would not be allowed to enforce it on exactly the same ground that a postponed enjoyment upon the absolute equitable interest of an individual, which lasts for too long a time, might be disregarded by the *cestui* and by the trustees.[40] Whether such a provision for accumulation can be so disregarded, is, perhaps, not yet settled in this state.

Assuming, however, that the direction for accumulation may be disregarded, it is clear that the doing so cannot be of any advantage to the heirs at law of the testator, for as against them, the whole fund is at once payable to charity.[41]

[38a] *Post*, § 288. [39] *Post*, § 293.

[40] *Post*, § 293.

[41] Ingraham *v.* Ingraham, 169 Ill. 432.

NOTE ON TRUSTS—Devises contingent on payment of debts: Taken literally such devises would be void for remoteness, (Gray's Rule against Perpetuities, § 415), but these devises are apparently always construed as immediate gifts merely subject to the payment of debts in the usual course of administration. Hence, no question of their remoteness arises: Scofield *v.* Olcott, 120 Ill. 362; Ducker *v.* Burnham, 146 Ill. 9, 20; Hawkins *v.* Bohling, 168 Ill. 214, 220; Nevius *v.* Gourley, 95 Ill. 206.

TITLE II.

ILLEGAL CONDITIONS AND RESTRAINTS.

CHAPTER XIII.

ILLEGAL AND IMPOSSIBLE CONDITIONS.

§ 277. When the condition is subsequent and impossible of fulfilment or illegal: Under these circumstances the preceding estate is never divested.[1]

In three cases[2] in this state the event upon which the interest given was to cease, was not only not impossible, but it did actually happen. The only thing that was impossible, was the performance of the act required in order that the one vested with the estate might keep it. In all three cases this impossibility of performance arose because of the act of the person for whose benefit the performance was imposed. In all of them, therefore, the divesting of the interest was avoided.

§ 278. Where the condition is precedent and illegal or impossible: In such a case the future interest can never vest.[3]

In *Goff v. Pensenhafer,*[4] there is a suggestion of the recognition of the rule laid down in Jarman on Wills,[5] that when the condition precedent is impossible, the gift upon a condition precedent takes effect in spite of the non-fulfilment of the condition under certain circumstances. It should be observed that these circumstances according to Jarman are: *First,* That the impossibility exists at the time the future interest is limited, and, *second,* that the testator knows of the impossibility.

[1] St. Louis, J. & Ch. R. R. Co. *v.* Mathers, 71 Ill. 592; Chicago *v.* Chicago & W. Ind. R. R. Co., 105 Ill. 73, 78 (*semble*); Gray *v.* Chicago, Mil. & St. P. Ry., 189 Ill. 400, 409 (*semble*).

[2] Jones *v.* Bramblet, 2 Ill. 276; Jennings *v.* Jennings, 27 Ill. 518; Chicago *v.* Chicago & W. Ind. R. R. Co., 105 Ill. 73.

[3] Jennings *v.* Jennings, 27 Ill. 518, 522 (*semble*); Goff *v.* Pensenhafer, 190 Ill. 200, 210.

[4] 190 Ill. 200, 210.

[5] 6th ed. (Bigelow), vol. 2, star page 852.

This can hardly be an exception of any great practical importance.

Jarman states as a further exception to the general rule, that the fulfilment of a condition precedent which is illegal only because it is *malum prohibitum* as distinguished from *malum in se,* will not prevent the future interest from taking effect. Curiously enough, while the several English cases where this exception has been discussed have declared that a condition, illegal as tending to cause the separation of husband and wife, is merely *malum prohibitum,* yet they have strained, in order to avoid the alleged exception, to construe the condition subsequent, rather than precedent.[6] In *Ransdell v. Boston,*[7] our supreme court seems very sensibly to have construed the condition tending to separate husband and wife, as precedent. Accordingly, it was held that the gift to the son, to take effect upon the performance of the condition (viz: getting a divorce) could not be enforced. No reference is to be found countenancing any distinction between conditions *malum prohibitum* and *malum in se.*

§ 279. What conditions are illegal—Conditions in restraint of marriage: One case in our supreme court, *Shackelford v. Hall,*[8] has covered all of this subject that has been dealt with in this jurisdiction. That case affirmed, by way of *dictum,* the doctrine that conditions in total restraint of marriage were in general void, except in the case of a devise to the testator's widow.[9] The same case also affirmed by way of *dictum,* that in case of partial restraints on marriage where the gift is of personalty and there is no gift over, the condition is merely *in terrorem* and may be entirely disregarded. The actual decision in this case touched a most unusual point. It was conceded that a condition in restraint of marriage till the devisee reached twenty-one, was valid and would be enforced when attached to real estate. The logical result, however, of this admission was avoided because the condition was attached to a gift to all the heirs-at-law of the testator, and it was not proven that the complainant, who was attempting to take advantage of

[6] Brown *v.* Peck, 1 Ed. 140; Wren *v.* Bradley, 2 DeG. & S. 49; In re Moore, 39 Ch. Div. 116 (6 Gray's Cas. on Prop. 6, 10, 13).

[7] 172 Ill. 439.

[8] 19 Ill. 212.

[9] Becker *v.* Becker, 206 Ill. 53 (gift over on widow's remarrying valid).

the breach of condition, had given to the particular heir, any notice of the condition. The case, therefore, fell within the rule of the English authorities as stated by Jarman,[10] "that where the devisee on whom a condition affecting real estate is imposed is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof; for as he has, independently of the will, a title by descent, it is not necessarily to be presumed from his entry on the land, that he is cognizant of the condition."[11]

[10] Jarman on Wills (6th ed. Bigelow), star page 853.

[11] The following interesting account of the way in which the decision in Shackleford *v.* Hall was reached, is told by John Dean Caton, ex-Justice and Chief Justice of the Supreme Court of Illinois, in a volume entitled "Early Bench and Bar of Illinois," at pages 200 to 203:

"The only other case to which I shall refer is that of Shackleford and wife *v.* Hall, 21 [19] Ill. 212. (A bad mistake was made by the reporter in this case; the position occupied by the several parties is misplaced.) In this a question was presented which had never before been considered in this country, and very rarely in England.

" 'The facts of the case show that all of the devisees of the estate in remainder, now in controversy, were the heirs at law of the testator, and as such heirs at law had an expectation of the estate. In the absence of the will each would have been entitled to his or her respect portions of it according to our statute of descent.' The testator having devised the estate in his will precisely as the statute would have cast it in the absence of a will, imposed the subsequent condition that if either of his children should marry before attaining the age of twenty-one years, he or she should forfeit the estate thus bequeathed. Mrs. Shackelford did not choose to wait until she was twenty-one years old, and so was married before that time. Her brother, Henry H. Hall, then filed a bill to declare the forfeiture, which, upon hearing in the Circuit Court, was dismissed, and thence was brought to the Supreme Court. Upon the arguments for the complainant, the plaintiff in error, the violation of the condition subsequent was relied upon, and really that was about all he had to say in the opening. For the defense it was claimed that the condition was in restraint of marriage, and therefore void; but to this a conclusive answer was given that a reasonable restraint was not only proper but commendable, and that a restraint to the age of twenty-one years, or even a greater age, was not unreasonable, and upon this the case was submitted. So soon as we reached the conference room with the record, Breese broke out and said: 'That brother is a mean fellow; yes, he's a great rascal, and we must beat him if possible. Now, Caton, how can

it be done?' I replied that the law referred to on the argument was certainly all in his favor, and I didn't remember any law to controvert that, and Judge Walker was equally at a loss to find any way to get around it. I then stated that during the argument there seemed to be, as if it were floating in the atmosphere, some intangible, undefined idea that I had seen something somewhere, some idea, derived from something I had read some time, probably when I was a student, when reading some text book, that might have some bearing on the case, but what it was I could not say. It was but a vague, indefinite impression, and seemed rather like a fleeting dream than a tangible idea; that I felt confident that I had never seen a case from which that thought had arisen, and that I felt no assurance that there was any principle laid down in the books, in any way qualifying the decisions which seemed to be so directly in point, holding that this condition subsequent was valid.

"Breese then picked up the record from my desk, placed it in my hands, and said: 'You take this record and hang on to the tail of that idea till you follow it up to its head, until you find some law to beat this unnatural rascal, who would cheat his sister out of her inheritance just because she wanted to get married a few months before the time fixed by the old man.'

"I took the record home with me, and after I had finished writing opinions in all my other cases I took up this. I examined carefully all the Digests in the library, and went through the English reports. I sought thoroughly, without finding a single word bearing in any way upon the case, still believing that there was something somewhere that would throw some light upon it on one side or the other. I took down Jarman on Wills, and went home determined to read every text book in the library on that subject before I would give up the search, and commenced reading at the very beginning, and then proceeded very deliberately page by page until I had got, perhaps, two-thirds of the way through the book, when I read a short paragraph which did not at first attract my attention particularly, and I passed on; but before I had finished the next paragraph the previous one began to impress itself upon me, and I looked back and read it again, and the more I studied it the more I thought it contained something to the purpose. It referred to several old English cases, the reference to which I took down, and made my way to the library as soon as possible, impatient to see what these references would develop. In less than an hour I found the law to be as well settled as any other well recognized principle of law, that where a testator devises an estate to his heir accompanied with a condition of forfeiture, a breach of that condition shall not work the forfeiture, unless its existence is brought home to the knowledge of the heir, and this rule applies as well to conveyances by deed as by devise. I still think it a little remarkable that these cases, al-

§ 280. Conditions to induce husband and wife to live apart or to get a divorce: Such conditions are illegal in general. This was the *dictum* of *Ransdell v. Boston.*[12] In that case, however, the court, having regard to competent extrinsic evidence (viz: that long before the testator's death, the husband and wife had lived apart and that divorce proceedings had been pending) construed the will as merely making "one provision for him [the son] in case they were not divorced, and another if they were." It may well be asked whether the distinction attempted in this case was sound. The will gave the son only the rents and profits for life if he were not divorced, and the fee if he were. Is the condition to be considered void or not, according to the motive of the testator, so that if he makes a condition with no motive to separate the husband and wife, it is valid? Is not the true principle, that the condition is void or not according to its nature and probable effect? If so, it would seem that the condition involved in *Ransdell v. Boston,* was illegal.[13]

though few and most of them very old, are not found referred to in any of the Digests which I have consulted, and that no such case appears ever to have arisen in any of the courts of the United States, or in later times in England, and it is probable that to-day this case stands alone in the American reports.

"When I read my opinion at the next conference Judge Breese especially manifested great satisfaction at the result of my investigations, and walked across the room and patted me on the back, saying, 'Well done, my good boy,' and seemed not less pleased at the strictures I had expressed in the latter part of the opinion upon the conduct of the hard-hearted brother, as he termed him, and in this expression we all concurred."

[12] 172 Ill. 439, 445.

[13] See the following cases where the question arose as to the illegality of conditions precedent and subsequent: St. Louis, J. & Chi. R. R. Co. *v.* Mather's, 71 Ill. 592; Gray *v.* Chicago, Mil. & St. P. Ry., 189 Ill. 400; Lyman *v.* Suburban R. R. Co. 190 Ill. 320; Wakefield *v.* Van Tassell, 202 Ill. 41.

CHAPTER XIV.

FORFEITURE AND RESTRAINTS ON ALIENATION.

Part 1.

Forfeiture on Alienation.[1]

§ 281. Forfeiture on alienation as distinguished from restraints on alienation: The cases of forfeiture on alienation deal with those limitations where it is provided that upon alienation the estate shall come to an end or that a gift over shall take effect. The operation of the provision is to deprive the person holding the estate subject to it and also his alienee. A restraint on alienation, on the other hand, simply endeavors to make an attempted alienation inoperative, leaving the title still in the person holding subject to the restraint. Its operation is merely to deprive the alienee.

§ 282. Forfeiture upon the alienation of a fee simple: The doctrine is recognized in this state that a provision of forfeiture upon the alienation of the fee simple is in general void.[2] The validity of gifts over upon alienation in a particular manner, as gifts over on alienation by deed or will, or gifts over on intestacy, have been heretofore fully dealt with in connection with future uses[3] and executory devises.[4] The logical and proper place to treat of these limitations is here, but, owing to an apparent confusion between the principles applicable to gifts over by way of forfeiture upon alienation and those governing the validity of shifting interests by deed or will, it seemed absolutely necessary to treat of both together.

[1] *Attitude of the court in regard to the construction of clauses of forfeiture:* Henderson *v.* Harness, 176 Ill. 302.

[2] Henderson *v.* Harness, 176 Ill. 302, 308 (*semble*). In Voris *v.* Renshaw, 49 Ill. 425, the court seems to have assumed that the clause of forfeiture of the fee upon alienation, except by lease during a certain number of years, was valid, merely for the sake of argument, since it went on to hold that it had not been violated.

[3] *Ante*, § 139.

[4] *Ante*, §§ 168-177.

§ 283. Forfeiture upon the alienation of an estate tail: Suppose a limitation, which would, under the statute *de donis,* produce an estate tail, is expressly made subject to forfeiture on alienation. Apart from our Statute on Entails[5] the provision for forfeiture is void.[6] Applying, however, the statute you must resolve the estate tail into a life estate to the donee in tail, with a remainder in fee to certain of his issue. The question in this state, therefore, becomes: Will the provision for forfeiture upon alienation be discharged as to both the life estate and the remainder, or will you regard the life estate and the remainder in fee as both subject to the restraint, and hold the latter void and the former valid according to the general rule in regard to provisions for forfeiture on alienation attached to a life estate?[7]

This question becomes important in dealing with *Henderson v. Harness.*[8] There the limitations of real estate were to A for life with a remainder to the heirs of his body. A's life estate was subject to be forfeited before his death and the remainder took effect if alienation by the life tenant should occur. If you could apply the Rule in Shelley's case,[9] A would have a fee tail with a restraint on alienation going to the whole estate. If, then, you could say that the provision of forfeiture, being attached to the fee tail, is wholly void, the life estate, into which our Statute on Entails would resolve the estate tail, must be discharged of the restraint. This would be consistent with the holding of the court, that the life estate was not subject to the provisions of forfeiture. The difficulty here, is that our statute turns the limitations to A for life and the remainder to the heirs of his body, into the same limitations as existed before, so far as A's life estate is concerned. It will, therefore, be urged that you cannot say that A has ever had a fee tail with a restraint on alienation. He only has the fee tail for the purpose of the mental operation of applying the Statute on Entails. He never in fact has anything but a life estate. This reasoning, however, would seem to be met by the doctrine of *Spencer v. Spruell,*[10] that before the statute

[5] *Ante,* § 114.

[6] Gray's Restraints on Alienation, 2nd ed. §§ 75-77.

[7] *Post,* § 284.

[8] 176 Ill. 302.

[9] *Ante,* § 131.

[10] 196 Ill. 119, *ante,* § 115.

operates, the donee must become actually seized of an estate tail.

§ 284. Forfeiture upon the alienation of a life estate: *Waldo v. Cummings,*[11] seems to have assumed that a provision in a gift of a life estate providing for forfeiture upon alienation is valid. The gift in that case was of a legal life estate in personal property upon the condition that the life tenant should have no power to sell or encumber the fund, and that it should not be subject to sale on legal process or for the life tenant's debts; and that if this provision was violated the subject matter of the gift should pass to the next person in remainder. In *Henderson v. Harness,*[12] however, the court seems to have intended squarely to hold that such a provision of forfeiture, attached to a life estate, was invalid.[13] In that case a legal life estate was created by will in M. H., with the proviso that "he shall not sell nor in any way encumber said realty during his lifetime. * * * In case my son, M. H., during his lifetime * * * shall sell or in any way encumber the same, that his life estate therein shall terminate," and the remainder-men may enter at once. M. H.'s interest was sold upon execution. He filed a bill to construe the will and set aside these sales. The decree was in his favor. This was reversed.

It is hard to perceive how the decree could have been sustained, even assuming that the gift over by way of forfeiture on alienation, was valid. Under such circumstances the life tenant would have had no standing in court, either to construe the will or to set aside the sales as against the creditor, since he would have lost his estate by the taking effect of the gift over. Our supreme court, however, puts its decision upon the ground that there was no distinction to be taken between a proviso by way of forfeiture on the alienation of the fee and one attached to a legal life estate. In the former case, they say, the clause of forfeiture is void for repugnancy, and it is just as repugnant to the legal life estate as to the fee simple.[14] But observe where this reasoning takes one. Every right of

[11] 45 Ill. 421.

[12] 176 Ill. 302; *ante,* § 283.

[13] Walker *v.* Shepard, 210 Ill. 100, 111, 112 *semble, accord.*

[14] Same reasoning approved in Walker *v.* Shepard, 210 Ill. 100, 111, 112.

re-entry attached to fee ought to be void for repugnancy. Every forfeiture of a life estate ought to be void for the same reason. Every gift over cutting short a fee simple, whether by deed or by way of executory devise, must be void for repugnancy. A second thought must make it plain that there is absolutely nothing in this reason of repugnancy,[15] except so far as it contains the suggestion that gifts over upon forfeiture for alienation, are void on grounds of public policy.

When the forfeiture, which it is provided shall occur upon alienation, is void, it is not so because of any technical grounds of repugnancy, but because a sound reason of public policy in favor of freedom of alienation is contravened. The real question is whether any public policy forbids the carrying out of the provision of forfeiture upon alienation. It has become clearly settled that the forfeiture of a fee upon alienation is void.[16] It is equally well settled that the provision for forfeiture of a term for years imposed at the time the term is created, is valid.[17] The reason for this latter result is clear. There is no public policy against it, for it is proper that landlords should be able to protect themselves from the occupancy of the premises by others than the original tenant. Exactly the same reason prevails in the case where a tenancy for life is created. No reason of policy forbids the reversioner after a life estate to dictate who shall have possession. It is equally proper that, in the creating of a life estate with a remainder, the remainder-man should be protected in the same way by restricting the possession of the life estate to the original life tenant. The overwhelming weight of authority, as well as principle, is, therefore, in accord with the rule that "a provision in the gift of a life estate or interest that the estate or interest shall cease or shall go over to a third person upon alienation, voluntary or involuntary, of the life estate or interest, is good."[18] *Henderson v. Harness* seems to stand alone as a decision contrary to such a rule. It is another sacrifice of what is overwhelmingly right upon principle and authority, to the bugaboo of repugnancy.[19]

[15] *Ante*, §§ 141, 172; *post*, §291.

[16] *Ante*, § 282.

[17] *Post*, § 285.

[18] Gray's Restraints on Alienation (2nd ed.), § 78.

[19] It should be observed that

§ 285. Forfeiture upon the alienation of a term for years: It is a matter of common practice to insert in leases a covenant against assignment or sub-letting without the consent in writing of the landlord, and to make the breach of such a covenant a ground of forfeiture. It is hardly necessary to observe that these are valid.[20]

PART 2.

RESTRAINTS ON ALIENATION.[21]

§ 286. Restraints on the alienation of a fee simple estate—General rule: There can be no doubt in this state that, in the language of Gray's Restraints on Alienation[22] "any provision restraining the alienation, voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels, real or personal, whether legal or equitable, is void."[23]

the *dictum* of the court confines the operation of Henderson *v.* Harness to a case of legal life estates. The court says, (page 309): "The rule would be different where the legal title to the property has been vested in a trustee for the use of the beneficiary under specific conditions. That is the most appropriate, if not the only way of accomplishing the protection of the subject of a devise from creditors."

[20] *Ante*, §§ 15a, 21-28 *et seq.*

[21] On the attitude of the court toward construction of clauses imposing such restraints, see Postal Tel. Co. *v.* Western U. Tel. Co., 155 Ill. 335.

[22] §§ 105-124.

[23] Jones *v.* Port Huron Engine Company, 171 Ill. 502; Steib *v.* Whitehead, 111 Ill. 247, 251 (*semble*); Henderson *v.* Harness, 176 Ill. 302 (*semble*); Bowen *v.* John, 201 Ill. 292, 296; Potter *v.* Couch, 141 U. S. 296, 315-318. In Muhlke *v.* Tiedemann, 177 Ill., 606, 614-615, Hageman *v.* Hageman, 129 Ill. 164, and Carpenter *v.* Van Olinder, 127 Ill. 42, the question involved was whether the devisee took a fee or a life estate. It was argued in the first two cases at least, that a restraint on alienation by the devisee indicated that he had only a life estate. In all three cases, however, it was held that he took a fee simple. In Muhlke *v.* Tiedemann, there was an express *dictum* that the restraint on alienation was void.

Gallagher *v.* Herbert, 117 Ill. 160, is not in conflict with the principle of the text. There the grantor conveyed in consideration of the payment of $200 a year by the grantee during the grantor's life, and the further consideration that the grantee should not during the grantor's life sell or convey the premises. The provision against alienation was given effect by the court as charging the an-

In *Smith v. Kenny*,[24] it was held that a restraint upon the alienation of a fee simple limited in time till a certain child attains, or would have attained, the age of twenty-one, was invalid.[25]

§ 287. As modified by Illinois Revised Statutes, chap. 22, sec. 49:[26] This statute provides for the maintenance by a creditor of a bill to discover and reach equitable interests in personal property of the debtor. It applies generally, "except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." As construed at the present time this exception completely frustrates, independently of any restraint on alienation, all effort of a creditor to reach an absolute equitable interest in personal property settled upon the *cestui* by one other than the *cestui* himself.[27] Sec. 49 takes away all remedy by a bill in equity. Perhaps no other remedy is open to the creditor, since he cannot levy execution upon an equitable interest in personalty,[28] and it must be doubtful whether he can garnishee the trustee.[29]

§ 288. The doctrine of Claflin v. Claflin,[30]**—How far recognized in this state:** How far does our supreme court recog-

nuity upon the land and not strictly as a restraint on alienation.

Observe, however, Dee *v.* Dee, 212 Ill. 338, 354, where it was held that one who had a vested remainder in fee could not have partition against the express restriction of the creator of the remainder that there should be no division until a time not yet arrived.

[24] 89 Ill. App. 293.

[25] Renaud *v.* Tourangeau, L. R. 2 P. C. 4, 18 (Gray's Restraints on Alienation, § 105), *accord.*

[26] R. S. 1845, page 97, § 36; Laws 1871-2, p. 329, § 49; R. S. 1874, chap. 22, § 49. This statute is copied from a New York act and is to receive the same construction as had been given to the New York act by the New York courts before our legislature adopted it: Requa *v.* Graham, 187 Ill. 67, 71.

[27] Potter *v.* Couch, 141 U. S. 296, 315-318; Binns *v.* La Forge, 191 Ill. 598; Gray's Restraints on Alienation (2nd ed.), § 124r. It is clear however that under R. S. ch. 22, sec. 49, the creditor can reach the fund by a creditor's bill when the *cestui* has made a settlement upon himself: Requa *v.* Graham, 187 Ill. 67.

[28] R. S. 1845, p. 301, § 5; Laws 1871-2, p. 505, § 4; R. S. 1874, chap. 77, § 4.

[29] McKindrey *v.* Armstrong, 10 Ont. App. 17; Gray's Restraints on Alienation (2nd ed.), §§ 124q, 114 a, n. 1.

[30] 149 Mass. 19; Young *v.* Snow, 167 Mass. 287; Danahy v. Noonan, 176 Mass. 467, *accord.*

nize the doctrine of *Claflin v. Claflin*, that a proviso declaring that an absolute equitable owner shall not receive the principal of his gift from the hands of the trustee until a certain future time beyond the period of the *cestui's* minority, is valid?

Professor Gray in his Restraints on Alienation has dealt with the case of *Rhoads v. Rhoads*,[31] as supporting the same holding as *Claflin v. Claflin*. The language of the Illinois court may be open to the strictures which the learned author has put upon it. It is not so clear, however, that the result reached is not correct upon the ground that the children had a certain executory interest after fifteen years—*i. e.*, that they took an interest which was neither vested nor contingent, but still executory.[32] If so, the decision that the children, although they were of age, could not compel a division of the estate before the end of the fifteen years, must be sound. In fact, the court seems to assume the rule of the English cases, which are opposed to *Claflin v. Claflin*, to be the law.

Howe v. Hodge,[33] *Chapman v. Cheney*,[34] and *Flanner v. Fellows*,[35] might be mentioned as tending to support the rule of *Claflin v. Claflin*. It is clear, however, that the two latter cases do not in any way involve the validity of a postponement clause and the result reached is perfectly consistent with the view that the postponement clause is void. *Howe v. Hodge*, is equally indecisive as far as any support of *Claflin v. Claflin* is concerned. We may suppose the gift, in that case, to be unpreceded by any life estate,[36] so that it is a direct vested gift in the testator's grandchildren with a postponed enjoyment till each grandchild respectively reaches the age of twenty-five. We may even assume that the court was of the opinion that the class would be allowed to increase until the eldest grandchild actually reached thirty, because the postponed enjoyment clause was valid. Nevertheless, the doctrine of *Claflin v. Claflin* is not supported, because, even where *Claflin v. Claflin* is not law,

[31] 43 Ill. 239, Gray's Restraints on Alienation (2nd ed.), § 124.
[32] *Ante*, § 178.
[33] 152 Ill. 252.
[34] 191 Ill. 574.
[35] 206 Ill. 136.
[36] *Ante*, § 228.

the postponed enjoyment clause is valid where its existence is for the benefit of other members of a class.[37]

It is believed that the only case in this state actually supporting the holding of *Claflin v. Claflin*, is *Lunt v. Lunt*.[38] There the testator made certain provisions for his children (two daughters) when they or the survivor of them arrived at the age of thirty years, if his wife *still* survived. Then he provided "and in case my said wife shall die within thirty years from the birth of my youngest child, then at the expiration of said thirty years my whole property shall go to my heirs-at-law." The wife died before the youngest child attained thirty, and the two daughters, being then over twenty-one, claimed to be entitled at once upon the ground that the said clause quoted was void for remoteness, being executory after thirty years. The validity of this contention the court denied upon the ground that, at least, upon the widow's death while the youngest child was under thirty (the event which happened), the children took a vested interest subject to a postponed enjoyment until the youngest reached thirty. That at once raised the question of whether the postponed enjoyment clause was not void as an improper restraint upon alienation, so that the daughters would be at once entitled. This point was not elaborately discussed but the court seems to have been perfectly clear that the intent of the testator must prevail. "By the plain terms of the will," the court said, "the property * * * would remain in the hands of the trustees until the youngest daughter arrived at the age of thirty." Accordingly, the daughters were denied any relief.[39]

[37] Oppenheim *v.* Henry, 10 Hare, 441 (6 Gray's Cases on Prop. 132); Gray's Rule against Perpetuities (2nd ed.), § 639aa.

[38] 108 Ill. 307.

[39] Allen *v.* McFarland 150 Ill. 455 ought to be read in connection with Lunt *v.* Lunt. It is, however, almost impossible to state what view the court took of the limitations in that case. They seem to have regarded the gift to the children as a present vested interest subject to a postponed enjoyment till the wife's death and to have actually held that the heirs of the child of the testator dying after the testator, could not maintain a bill to compel a distribution before the death of the wife. If the court also regarded the will as containing no gift over of the shares of children dying before the death of the wife to those children who survived the wife, then the court's position

In considering whether the rule of *Claflin v. Claflin* is law in this state, the attitude of our supreme court upon the validity of spendthrift trusts should not be overlooked. While it does not follow that, because a postponed enjoyment attached to an absolute equitable interest is valid, spendthrift trusts must be recognized, the converse proposition is more or less sound. If, therefore, *Steib v. Whitehead,*[40] recognizing the validity of spendthrift trusts, be regarded as law, there can be little doubt but that the rule of *Claflin v. Claflin* applied in *Lunt v. Lunt,* will be followed.

§ 289. How far sound on principle—The authorities at large: Should the rule of *Claflin v. Claflin* be simply tolerated as something bad that exists, or should it be supported as sound on principle? If one looked simply at the result of the authorities, they would doubtless take the first alternative, for the English cases have long since settled the law for that jurisdiction, that the postponement is void.[41] It may be conceded, also, that the great deference which we pay to the long settled rules of the English equity judges on questions of this sort would make the weight of authority preponderate against *Claflin v. Claflin,* even though the other American jurisdictions had, so far, more frequently followed the Massachusetts rule than that of the English cases.[42]

would seem to be in *accord* with the rule of Claflin *v.* Claflin. If such gift over is properly derived from the words "or as many of them [testator's children] as may be living at that time [wife's death]", then the rule of Claflin *v.* Claflin is not involved, for the plaintiff would have no standing in court and the postponement would be valid even where Claflin *v.* Claflin is not law, on account of the gift over.

[40] 111 Ill. 247.

[41] Saunders *v.* Vautier, 4 Beav. 115, s. c. Cr. & Ph. 240, (Lord Cottenham, C.); Weatherall *v.* Thornburgh, 8 Ch. Div. 261 (Court of Appeal); Harbin *v.* Masterman [1894], 2 Ch. 184, affirmed in the House of Lords, *sub nom.* Wharton *v.* Masterman [1895], A. C. 186. For other cases decided by single equity judges, see Gray's Restraints on Alienation (2nd ed.), §§ 105-112, and also the recent case of In re Thompson, 44 W. R. 582.

[42] There is a *dictum* in a recent Pennsylvania case in accord with the long line of English authorities: Shallcross's Estate, 200 Pa. St. 122; also one in Connecticut: Conn. Trust & Safe Dep. Co. *v.* Hollister, 74 Conn. 228. (Cf., however, Gray's Restraints on Alienation (2nd ed.), §§ 124c and 124d for reference to some Pennsylva-

§ 290. **Reasoning of the English cases:** When we come to ask what are the reasons in support of the view that the postponement is void, we naturally turn to those given by the English equity judges. Here we find an extraordinary situation. There is a curious paucity of reasons given. *Saunders v. Vautier,*[43] which is the foundation of the whole doctrine in the English courts, gives no reason at all. Similarly a great mass of English cases decided since, follow the rule without the slightest suggestion of the reasons upon which it is based.[44] Lord Hershel in *Wharton v. Masterman,*[45] said, speaking of the foundation of the rule of *Saunders v. Vautier:* "The point seems in the first instance to have been rather assumed than decided." In *Curtis v. Lukin,*[46] Lord Langdale, M. R., after stating the grounds upon which he supposed Lord Cottenham's decision in *Saunders v. Vautier* rested, plainly queried whether the rule was based on sufficient grounds. So in *Peard v. Kekewich,*[47] where the postponement was actually held good, the Master of the Rolls, Sir John Romilly, plainly declares he sees no reason against it. In the few cases where reasons have been given for the rule, they are of a somewhat varied and uncertain nature. In *Gosling v. Gosling,*[48] Sir W. P. Wood, V. C., page 272, said in supporting the rule of *Saunders v. Vautier:* "If the property is once theirs, [the *cestuis*] it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one." This is merely a reiteration of the rule.

nia decisions looking the other way.)

The rule of Claflin *v.* Claflin seems to be law in Kentucky as well as Illinois: Smith *v.* Isaacs, 78 S. W. R. 434 (Ky.); Avery *v.* Avery, 90 Ky. 613 (*semble*). For the Illinois cases, see *ante*, § 288.

[43] 4 Beav. 115, s. c. Cr. & Ph. 240.

[44] Josselyn *v.* Josselyn, 9 Sim. 63; Rocke *v.* Rocke, 9 Beav. 66; Swaffield *v.* Orton, 1 DeG. & Sm. 326 (Knight Bruce, V.-C., said of postponements: "Precarious and uneffectual.") Re Young's Settlement, 18 Beav. 199; Coventry *v.* Coventry, 2 Dr. & Sm. 470; Re Jacob's Will, 29 Beav. 402; McGrath *v.* Morehead, L. R. 12 Eq. 491; Snow *v.* Poulden, 1 Keen 186; Hilton *v.* Hilton, L. R. 14 Eq. 468, 475; Talbot *v.* Jevers, L. R. 20 Eq. 255; Re Cameron, 26 Ch. Div. 19; Re FitzGerald's Settlement, 37 Ch. Div. 18; Re Parry, 60 L. T. N. S. 489; Lazarus *v.* Lazarus, 14 Vict. L. R. 806n.

[45] [1895], A. C. 186, 193.

[46] 5 Beav. 147.

[47] 15 Beav. 166.

[48] H. R. V. Johns 265.

It contains no reason upon which the rule is founded. Lord Langdale, M. R., in *Curtis v. Lukin*,[49] in an opinion rendered a year and a half after *Saunders v. Vautier*, said, speaking of the case of an absolute vested interest in a legatee, subject to a provision that he is not to have possession until a time subsequent to his attaining twenty-one: "The court, therefore, has thought fit (I do not know whether satisfactorily or not) to say, that since the legatee has such the [a] legal right and power over the property and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own at the very moment." More recently, the court of appeal has put forward such reasons as inconsistency or repugnancy in the postponement, and that it is a necessary consequence of making an absolute gift that there can be no postponement of enjoyment.[50] Such reasons have even been half-heartedly urged by the Law Lords.[51]

§ 291. **The reason of repugnancy unsound:** It is believed that the last of the reasons above mentioned is the most easily disposed of. You can hardly say that the postponement is void for repugnancy or because you cannot make an absolute gift and then direct how it shall be enjoyed. If such arguments are to prevail or be conceded as of general validity, you will be in accord with the Illinois supreme court, when it holds all shifting interests by deed and shifting executory devises void for repugnancy. You must applaud the same court's holding that a provision for forfeiture on alienation attached to a legal life estate, is void on grounds of repugnancy, and, also, that gifts over on intestacy are void for the same reason. You must stand willing, on the ground of repugnancy alone, to violate that modern fundamental principle of all conveyances and especially of conveyances by will, that, in the absence of any ground of public policy embodied in a rule to the contrary, the intent of the transferor shall be carried out. It is the freedom founded upon this rule which has distinguished the development of conveyancing since the time of Henry the VIII,

[49] 5 Beav. 147, 156.

[50] Weatherall *v.* Thornburgh, 8 Ch. Div. 261; Harbin *v.* Masterman [1894], 2 Ch. 184.

[51] Wharton *v.* Masterman [1895], A. C. 186.

and it is the constant gain in force of this principle which enables Professor Gray, at the end of his chapter on future interests, in his Rule against Perpetuities,[52] to declare that "originally the creation of future interests at law was greatly restricted, but now, either by the Statutes of Uses and Wills or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away."

It may be argued that if you proceed upon the principle of allowing the testator to do what he wants with his own, you do so in obedience to a principle which declares that dominion over an absolute interest should not be interfered with. Why, then, where you have an absolute equitable interest, does not the application of the same principle require the rule that the *cestui* can require the termination of the trust regardless of the postponement? To this it must be answered that the very question at issue is whether the *cestui* has the whole interest or merely an interest hampered with an indestructible trust. The principle in favor of permitting one to do what he pleases with his own cannot be invoked to make the trust destructible until you have decided the very point in issue. On the other hand, all are agreed that the settlor or testator is the absolute owner without restriction. All must, therefore, agree that the principle conceded applies when we come to consider what he may do with his own. He should be able to settle it with what restrictions he pleases so long as no principle of public policy is violated.

§ 292. **Reasoning based upon public policy—Preliminary:** Lord Langdale[53] was certainly on the only line of reasoning open to one endeavoring to support the decision of *Saunders v. Vautier,* when he attempted to justify the rule of that case upon some ground of public policy. It is clear, however, that the public policy which makes void restraints an alienation of absolute interests, is inapplicable, for in the case of a postponed enjoyment merely, no alienation is prohibited and no creditor is deprived.[54] The *cestui* whose interest is subject

[52] § 98.

[53] Curtis *v.* Lukin, 5 Beav. 147, 156.

[54] Piercy *v.* Roberts, 1 Myl. & K. 4 (Gray's Restraints on Alienation (2nd ed.), § 106); Sears *v.* Putnam, 102 Mass. 5 (*semble*), (Gray's Restraints on Alienation

to a postponed enjoyment, may alienate with perfect freedom. The whole effect of the postponed enjoyment clause is simply to provide that the trust shall continue. The narrower question, therefore, becomes: is there any reason of public policy against the making of a trust indestructible, so insistent that it warrants the introduction of a rule which defeats the settlor's intention?

§ 293. The duration of the postponement must be limited in time: At the outset of this discussion it must be conceded that the duration of the postponement must be limited in time. The allowance of postponements calculated to make trusts indestructible forever, or for a great length of time, is not to be sustained under any consideration. Fortunately for our argument, the length of time that a postponed enjoyment may last, assuming it to be valid, has been settled by the English cases themselves. In England the restraint upon alienation of an absolute equitable interest has been permitted only when imposed for the benefit of married women and to be effective during coverture. With regard to such a restraint on alienation, it has now become the settled rule of the English cases, that it is wholly void if it may possibly last longer than a life in being and twenty-one years.[55] Nothing ought to be more certain than that the postponed enjoyment clause, valid under the doctrine of *Claflin v. Claflin*, must be subject to the same qualification. It is, therefore, wholly void if it may possibly continue longer than a life in being and twenty-one years.[56] It should be observed, however, that the above qualification is not necessarily an application of the Rule against Perpetuities. So long as it is assumed that the *cestui* has a present absolute interest subject only to a postponed enjoyment, and not a cer-

(2nd ed.) § 114a); Sanford *v.* Lackland, 2 Dil. 6, (Gray's Restraints on Alienation (2nd ed.) § 114); Havens *v.* Healy, 15 Barb. 296, (Gray's Restraints on Alienation (2nd ed.), § 116).

[55] In re Ridley, 11 Ch. Div. 645 (1879); Gray's Restraints on Alienation (2nd ed.), §§ 272b-272c.

[56] Kohtz *v.* Eldred, 208 Ill. 60, 72 (*semble*). See also Sadler *v.* Pratt, 5 Sim. 632; Jackson *v.* Marjoribanks, 12 Sim. 93; Shallcross's Estate, 200 Pa. St. 122 (1901) *semble*; Winsor *v.* Mills, 157 Mass. 362, *semble, accord.* In Kentucky there is a statutory provision to the same effect: Ky. Stats. (1903), sec. 2360; Johnson's Trustee *v.* Johnson, 79 S. W. R. 293 (Ky. 1904).

tain executory interest, there is no future limitation involved. There can, therefore, be no question of the application of the Rule against Perpetuities.[57] The rule governing the creation of postponements is a separate one which limits the time during which a trust may be rendered indestructible.

§ 294. Consideration of the precise issue involved: Our precise question has then become: what reason of public policy is there against a postponed enjoyment, properly limited as to its duration in time, of an absolute equitable interest?

It seems not to have been decided whether a creditor or a grantee of the *cestui* would be entitled to immediate possession of the property, or would take only the *cestui's* title *sub modo.* Professor Gray makes the point, that "if a creditor or grantee can get immediate possession of the fund, the restraint is a mere form. The *cestui que trust* can by the simple ceremony of making a deed of his interest to a third person and taking a deed back, hold the property free from all fetters."[58] But if the postponement is a mere form how can it do any harm to anybody? The testator's harmless whim ought to be allowed to prevail in the interest of supporting his expressed intention. Who ever heard of its being a ground of public policy, upon

[57] Professor Gray, in the first edition of his Rule against Perpetuities § 432, attempted to support the result of the English cases, making void restraints on anticipation in married women's settlements which lasted too long, upon the ground that the Rule against Perpetuities was violated. It was there argued that it was a condition precedent to the payment of each dividend that the time for its payment should arrive. But even under such a view there was the difficulty that the whole restraint was void and not merely so much as extended beyond the life or lives in being and twenty-one years. But what condition precedent can be imagined where there is only a postponement as in Claflin *v.* Claflin? The reasoning proposed by Professor Gray to support the rule of the English cases cannot, it is believed, apply where you come to the rule of Claflin *v.* Claflin. In the MSS. of the second edition of Gray's Rule against Perpetuities, which the writer has seen, we find the learned author suggesting the validity on principle of the married women's clause against anticipation (§ 121 f) and placing the invalidity of the postponed enjoyment clause, not on the ground that the Rule against Perpetuities is violated, but upon the ground that the restraint lasts too long (§ 121i).

[58] Gray's Restraints on Alienation (2nd ed.), § 124n.

which a testator's object was to be completely frustrated, that what he desired to accomplish might be avoided? Such an argument would defeat the very rule which Professor Gray contends for, since it is perfectly clear that even under the English cases all the results of *Claflin v. Claflin* can be obtained by making the trustee a beneficiary to a small extent. Equity, then, acting according to the general rule, will not decree a conveyance to the beneficiaries unless all join in the request.[59]

"If, on the other hand," Professor Gray continues, "the creditor or grantee can take possession of the property only at the time when the settlor or testator has directed, for example when the *cestui que trust* reaches forty years, then any sale or taking from the *cestui que trust* will be under the circumstances, highly disadvantageous to him." Obviously, the learned author's idea, is, that if the *cestui* be a spendthrift, the position for him is the very worst, since he will sell at a ruinous discount. If he is not a spendthrift, then there is no use in such a clause. It is submitted, however, that there is nothing in these considerations which arises to the dignity of a ground of public policy strong enough to frustrate the settlor's or testator's intention, as expressed. The two extreme cases put, indicate no more than the settlor's or testator's lack of wisdom in inserting the provision which he has expressed. It may, perhaps, be admitted that lack of wisdom is clearly shown where the *cestui* is a spendthrift.

Lord Langdale, M. R.[60] suggested that there might be a perfectly legitimate reason for a well conducted legatee to turn his interest into cash, and that it would be unwise to enforce the testator's intention so as to "subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own at this very moment." Nevertheless, in giving this reason, the Master of the Rolls seems to be in doubt whether it is a satisfactory one or not. It certainly has never been repeated in any court since. It does not, it is believed come up to a reason of public policy of sufficient strength to overturn the testator's intention. At most it shows merely a lack of wisdom on the part of the testator. If the

[59] Gott *v.* Nairne, 3 Ch. Div. 278; Ames' Cases on Trusts (2nd ed.), p. 455.

[60] Curtis *v.* Lukin, 5 Beav. 147, 156.

testator's intention is to fail because the provision which he has made is unwise, there would be no end of breaking wills. It is submitted, however, that it is by no means clear that the postponed enjoyment clause is, in the long run, even an unwise provision where the *cestui* is not a spendthrift. Is it such a foolish thing for a testator, even when he has perfect confidence in his grown children, to direct that property left them shall remain in the hands of trustees until the children reach a more mature age than that of twenty-one years? Is it such a foolish thing to encourage *cestuis* to leave the personal care of their property in the hands of trustees of the testator's selection until after the age of twenty-one?

The worst charge that can be made against holding these postponed enjoyment clauses valid, seems to be that they are either harmless, or in an extreme case, viz: where the *cestui* is a spendthrift and insists on selling his equitable interest for cash, unwise. To defeat the testator's intention wholly upon so trivial a ground ought not to be thought of. The attitude of the court in *Claflin v. Claflin* is in favor of carrying out the settlor's intention and the result reached is, it is submitted, sound.

It is believed that Professor Gray's violent dislike for the rule of *Claflin v. Claflin*, is due to his abhorrence of spendthrift trusts. Thus, he suggests[61] that, if twenty-one is too young for a person to come of age, the legislature extend the period of minority, and that holding valid postponed enjoyment clauses, is a species of paternalism without the advantages of paternalism and with only its irritating and demoralizing features retained. All this points to the fact that an overflow of animosity towards spendthrift trusts has been leveled at the validity of postponed enjoyment clauses. There is, however, no reason why the repulsion, however excessive, for the former, should include the latter. It is conceived that the only connection between the doctrine of spendthrift trusts and the doctrine of *Claflin v. Claflin*, is that both rest fundamentally upon the rule that a testator or settlor can do what he likes with his property so long as no rule founded on public policy is contravened. Hence, where spendthrift trusts are allowed, of

[61] Restraints on Alienation (2nd ed.), § 124o.

course it may be expected that *Claflin v. Claflin* will be followed. It by no means follows, however, that because there is no reason of public policy against such a postponement as was sustained in *Claflin v. Claflin*, that there is none against spendthrift trusts. The writer believes, therefore, that while spendthrift trusts are entitled to all the abhorrence which Professor Gray has given them, yet it does not follow that the postponement clause, limited properly as to the time of its duration, is not entirely harmless and proper.

§ 295. Restraints on alienation of a life estate—When the interest is legal: It has been pointed out above,[62] that this jurisdiction is unique in probably having the only case squarely holding that a provision for the forfeiture on alienation of a legal life estate, was void—the general current of authority, on the soundest reasoning, holding it valid. Strangely enough, probably the only case in any jurisdiction in which a legal life estate has been held entirely subject to an absolute restraint on alienation, is the product of the supreme court of this state. Professor Gray gives a full and complete analysis of this case,[63] or rather series of cases, because litigation involving the same questions was three times before our supreme court.[64] More recently one of the appellate courts of this state, in *Emerson v. Marks*,[65] held the same way, without, however, relying upon the earlier series of cases in the supreme court. The appellate court assumed that the restraint on alienation was valid where the life estate was equitable, *i. e.*, it assumed the existence of the validity of spendthrift trusts, and then went on to say that there was no difference

[62] *Ante*, § 284.

[63] Gray's Restraints on Alienation (2nd ed.), §§ 135, 138.

[64] Christy *v.* Pulliam, 17 Ill. 59; Pulliam *v.* Christy, 19 Ill. 331; Christy *v.* Ogle, 33 Ill. 295. The above cases arose shortly after the enactment of the first Homestead Exemption Law of 1851 (Laws 1851, page 25). The property subject to the life estate had been the homestead of the deceased, and the life estate created was for the benefit of the deceased's widow. It is believed that the result reached by our Supreme Court was an evidence of its willingness, at that time, to inaugurate a doctrine that a life estate created by will in homestead property might be made inalienable by the life tenant.

[65] 24 Ill. App. 642; see also, Springer *v.* Savage, 143 Ill. 301.

in the case of a restraint on alienation attached to a legal life estate, and one attached to an equitable life estate.

§ 296. **Where the life interest is equitable**: Under *Brandon v. Robinson*,[66] which settled the law in England against the spendthrift trust or restraint on alienation of an equitable life estate, it was still possible to protect a fund from the creditors of one who might be enjoying the income. This was accomplished by giving the trustees an absolute discretion to cease paying anything to the beneficiary and to accumulate the income, or to pay the income, in the discretion of the trustees, among such one or more of several beneficiaries as they might see fit.[67] In framing up a trust on these lines it is very important to observe a distinction between a discretion in the trustees to apply anything at all, and a discretion as to the mode of applying. A discretion in the latter respect only, will not save the *cestui's* life interest from his creditors.[68] The distinction referred to was very clearly recognized in *Ingraham v. Ingraham*.[69]

Steib v. Whitehead,[70] seems, however, to be a square decision in favor of the spendthrift trust doctrine, which permits equitable life estates to be made inalienable. As, however, that was an attempt by a creditor to garnishee funds in the hands of a trustee under an express and active trust, it might have gone off on the ground that the trust money in the hands of the trustee, was not, under the proper construction of the Garnishment Act, subject to that process.[71]

In estimating the immunity, apart from any restraint on alienation, of equitable life estates from actions by creditors,

[66] 1 Rose, 197 (6 Gray's Cases on Prop. 145).

[67] Lord *v.* Bunn, 2 Y. & C. C. C. 98, 6 Gray's Cases on Prop. 155. One case at least in this state indicates that this form of settlement is in use in Illinois: King *v.* King, 168 Ill. 273.

[68] Green *v.* Spicer, 1 Russ. & M. 395 (6 Gray's Cases on Prop. 153); Younghusband *v.* Gisborne, 1 Coll. 400 (6 Gray's Cases on Prop. 158). But see In re Coleman, 39 Ch. Div. 443 (6 Gray's Cases on Prop. 159).

[69] 169 Ill. 432, 471.

[70] 111 Ill. 247. See also Jones *v.* Port Huron Co., 171 Ill. 502, 507; Henderson *v.* Harness, 176 Ill. 302, 309; Bennett *v.* Bennett, 66 Ill. App. 28.

[71] McKindrey *v.* Armstrong, 10 Ont. App. 17, Gray's Restraints on Alienation (2nd ed.), § 124a, § 114a, note 1.

the effect of Ill. R. S. 1874, chap. 22, sec. 49, must not be overlooked.[72] In the two recent cases of *Binns v. LaForge*,[73] and *Requa v. Graham*,[74] the operation of that section is fully brought out. In the former case it was clearly held that a creditor could not by a bill in chancery, reach the income settled upon the debtor for his life. In the latter case it was held that if the income was settled by the *cestui* upon himself the bill would lie. Under this statute, therefore, you reach the most extraordinary result, that a *cestui* can convey his interest, but his creditors cannot get it.[75]

[72] *Ante*, § 287.

[73] 191 Ill. 598, at page 608, court queries whether the New York statutory rule, which exempts so much income as may be necessary for the *cestui's* support, can be grafted on to our statute.

[74] 187 Ill. 67.

[75] See also Linn *v.* Downing, 216 Ill. 64, which seems to deny the creditor any right upon a new ground, viz., that where there are several beneficiaries to a common or blended fund, the creditor of one cannot reach his debtor's share. If the court had found, by construction, an expressed intent to protect the property from creditors and enforced the spendthrift trust doctrine its decision could be readily understood. On the reason given it is inexplicable.

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