ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS

with

An Historical Introduction and an Exposition of the Principles of Interpretation of Writings—More Especially Wills

BY

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DEDICATED TO THE MEMORY

OF

JOHN CHIPMAN GRAY

"He Was the Better Teacher for Being in Active Practice; He Was the Better Lawyer from the Learning Which Came from Teaching Law."

"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

The distinctions which must be taken in determining the legal attributes of Estates and Future Interests in the modern law are best appreciated and understood by considering their origin in the feudal land law and their development after the Statutes of Uses and Wills of Henry VIII. Some historical and introductory matter cannot, therefore, be avoided. It is, however, more advantageous to deal with the historical aspect of the subject by itself than to attempt to mingle with it a detailed analysis and exposition of the modern law. This volume, accordingly, commences with an historical introduction to the law of Estates and Future Interests.

Any reasonably complete exposition of the modern law of Estates and Future Interests will be found to involve a great many questions on the construction of wills and settlements *inter vivos*. These cannot be handled satisfactorily without first determining the general principles of interpretation applicable to unilateral writings. The second book of the present work, therefore, deals with the law relating to the interpretation of writings—more especially wills.

Then follows the main treatise on Estates and Future Interests. The former subject is new. The latter is a rewriting and enlargement of the author's earlier work on Future Interests, published in 1905. All the chapters have been enlarged and supplemented. The most considerable revision is in the chapter on Remainders. This has been entirely rewritten and many new topics added. The writer came to regard that chapter of the former work as quite inadequate. On the subjects of Estates and Future Interests all the cases decided by the Illinois Supreme Court and appearing in its reports up to and including the 287th volume, have been dealt with. A number of the author's law review articles, written originally with a view to the revision of the former work on Future Interests, have been incorporated into the text.[1] This will account for the fact that on some subjects the citation of cases is very complete and from many common law jurisdictions. On many

[1] For a full list of these, see *post*, p. liv.

other special problems leading English and American authorities have been used, especially those collected in the writer's Case Book on Future Interests.[2] It is possible that where a belief in expositions of the "general common law" still prevails, it might be thought that the present work had some claim to being a treatise on the general common law of Estates and Future Interests. Always, however, in the present work, as in the former, the object in the use of materials from many jurisdictions has been to make clear the present state of the law in Illinois.

The writer's work on Future Interests published in 1905 was undertaken for three reasons. *First:* Excellent as was the course on future interests, given by Professor Gray at the Harvard Law School, it was quite inadequate to prepare the writer to handle litigation in Illinois relating to the law of this subject until he had read, classified and arranged all the Illinois cases in regard to it, so that he knew at first hand what the Supreme Court of this state had been doing and where it stood.[3] *Second:* The writer was then teaching the subject of future interests and believed that a teacher of law should practice, at least in the courts of appellate jurisdiction and in cases involving the law on the subjects which he taught, and that there was no possibility of doing this unless he attempted to master the local law and submitted the results of his efforts to the consideration of lawyers and judges.[4] *Third:* It had begun to dawn upon the writer that so long as the administration of justice was left to each state to the extent that it had been and now is, it was vastly important that law teachers and practitioners should write about the local law and should criticize and analyze the decisions of a single jurisdiction on all important subjects, and that in time some law schools should teach the local law of the jurisdiction where they were located.

In the fifteen years which have elapsed since Future Interests was published, each of these reasons has been found to be not only sound but of constantly increasing force.

[2] Cases marked with an asterisk in the Table of Cases are reprinted in the author's Cases on Future Interests.

[3] "The Next Step in the Evolution of the Case Book," by Albert M. Kales, 21 Harv. Law Rev. 92. "A Further Word on the Next Step in the Evolution of the Case Book," by the same author, 4 Ill. Law Rev. 11. "An Unsolicited Report on Legal Education," by the same author, 18 Columbia Law Rev. 21.

[4] "Should the Law Teacher Practice Law?" 25 Harv. Law Rev. 253.

The inadequacy of law school courses—given today about as they were outlined (if not indeed perfected) by the great teachers of the Harvard Law School from the '80s to the 1900s —to enable the student to practice in a given jurisdiction like Illinois, has become each year more apparent. While teaching law and having little, if any, practice, it took the writer three years to complete the earlier work. William B. Hale, who wrote a book of the same sort on the Illinois law of corporations, spent at least the same amount of time spread over a greater number of years. Today similar efforts with other leading subjects of the law are no less difficult of accomplishment. The gulf between the law which the law schools teach and the local law, which the practitioner needs to know to use and to train his legal thinking on, grows each year a little wider and more impossible for the beginner in practice to bridge, without having had the aid of able scholars and teachers who are also masters of the local law.

It has always been apparent to the writer that practitioners (as we know them in this country) should not attempt to teach law. It has been equally apparent that the law teacher to be a first-class teacher must have (not have had) some practice. Not, however, a practice as a client caretaker, or even as a successful advocate engaged constantly in long and difficult trials. Excluding these lines of practice there is still room for the law teacher to engage in some activity at the bar. The work of the law teacher is closer to that of our judges in courts of appeal than is the work of the average lawyer. The teacher is accustomed to classify, arrange, analyze and criticize the opinions of courts of last resort. That brings his thinking very close to the thinking of the judges who are writing those opinions. The law teacher has a fair opportunity to practice before courts of appeal, particularly in cases involving such branches of the law as he makes his special field in teaching. In this line of practice his position should be that of an advocate employed by other lawyers. The *sine qua non* for a practice of this kind is that the teacher should not only be a master of the local law in some important subjects but should demonstrate his mastery to judges and lawyers by producing a text-book on the local law by which he may be judged. Such a practice would not only produce a substantial income and confer a standing at the bar among lawyers and judges, but it would make the difference between a somewhat colorless academic teacher and one

who knew the problems that were vital and could assume to speak with some authority. Contests with able counsel and the effort to persuade judges of ability and long experience on the bench regarding the very problems which were taken up in the class-room, would furnish a training for teaching which, in the writer's opinion, could not be excelled. That the writer is not alone in this opinion appears from the remarks made by Mr. Justice Loring, at a meeting of the Bar Association of Boston and of the Supreme Judicial Court of Massachusetts, to honor the memory of the late John Chipman Gray. "When Mr. Gray in 1875 accepted a professorship in the Harvard Law School he deliberately chose that as his career for life. He continued in active practice to be sure; but he continued in practice because he thought that if he was in touch with the realities of litigation and of affairs he would be a better teacher of law. So much I had from Mr. Gray himself. * * * He was the better teacher for being in active practice; he was the better lawyer from the learning which came from teaching law."

During the twelve years from 1905 to 1917 the writer spent at least one-third of his time in teaching law at Northwestern University and other law schools. He finally had the privilege of teaching at the Harvard Law School in the year 1916-1917. That entire experience, taken with his experience in practice, has only confirmed the belief that so long as our states administer justice as they now do, some law schools in some jurisdictions must soon begin to teach the local law. In the larger and older states the law teachers must do again what Langdell and his associates did. They must re-write and re-state the law for law students. Only this time the work must be done with reference to the decisions and statutes of two jurisdictions, the single state and the United States. This is a task which needs (and as yet has not secured) the same genius and industry that Langdell and his associates exhibited when they undertook to re-state and re-analyze the great subjects of the common law. No teacher of today need think his talents superior to the task of today.

The writer acknowledges the many and invaluable services of Miss Mary A. Howie, in the preparation of the manuscript for this book. He is indebted to Professor Joseph Warren for valuable suggestions and to Mr. Neil C. Head for a critical reading of the proofs.

A. M. K.

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Conditional and Future Interests
And
Illegal Conditions and Restraints in Illinois

BOOK I.

INTRODUCTION TO THE LAW OF ESTATES AND FUTURE INTERESTS.

Prefatory Statement: It will be assumed that the Roman occupation of Britain left no vestige of the Roman law there and that no remnants of the Anglo-Saxon law of property have so far survived in America as to make any reference to that law necessary. A beginning is made, then, with the feudal system of land law introduced into England by the Normans after the Conquest. The distinctly feudal land law flourished and developed between the time of William the Conqueror and that of Henry VIII. During the first half of this period, from 1066 to 1300, the more important and vital subjects of land law related to feudal tenure and its incidents. After 1300 the development of estates in land and conveyance became perhaps the predominant feature of the law. In the reign of Henry VIII. forces which had been gaining headway for more than a century laid the foundation for a freedom in conveying land and creating interests in it which had not before existed, and which made the beginning of our modern law of estates and conveyance. Within the last century legislation has taken steps in many directions to simplify and make more rational modes of conveyance, and to increase the liberty of the individual in creating interests in land. Thus, the general course of evolution

has been from a system of feudal land-law, in which the creation of estates in land and the modes of conveyance were restricted, to a modern freedom in both respects. It is the purpose of this introduction to set out the general outlines of this evolution, and more particularly to emphasize the way in which the modern law, permitting greater freedom in the creation of future interests in land, emerged from the restrictions and limitations of the feudal land law.

CHAPTER I.

THE FEUDAL LAND LAW.

TITLE I.

TENURE AND ITS INCIDENTS.

§ 1. **The feudal system of tenures:** It was an essential feature of the feudal system in England that all lands were held mediately, or immediately, of the king.[1] This condition of land holding was introduced into England after the Norman Conquest in two ways: *first,* by the confiscation of lands by the crown and the regranting of them by the crown; *second,* by the voluntary surrender of lands by owners, and the receiving of them back from the crown as feudal tenants, subject to the obligations which the feudal system imposed. By this means the king became the feudal lord paramount of all England.[2] The feudal tenants who held immediately of the king were the great feudal overlords, and were called tenants *in capite.* They in turn granted estates to feudal tenants who held under them, and these, in turn, might have feudal tenants under them. The tenant on the land was known as the tenant *paravail.* He was supposed to make avail, or profit, out of the land. The tenant between the king and the tenant *paravail,* was a *mesne,* or intermediate tenant.[3]

The existence of this system of tenures, or feudal holding, under another became universal. There were three kinds of tenures. Each fulfilled a different function in the feudal organization. There were *military* tenures, *socage* tenures, and *frankalmoigne* tenures. These tenures were, however, comparatively empty relations apart from the incidents and services attached to them. The vital and practical importance of tenure was not that it established an intangible relation between the

[1] Co. Lit. 65a; 2 Bl. Com. 59, 60; 1 Gray's Cases on Prop., 2nd ed. 307.

[2] 2 Bl. Com. 59.

[3] 2 Bl. Com. 59, 60; 1 Gray's Cases on Prop., 2nd ed. 307, 308.

lord and the tenant, but that it fixed the character of the services which the tenant rendered to the lord. When, therefore, the feudal system was in full life the determination of the tenure by which land was held was the same as a determination of the incidents and services which one holding by that tenure must render to the lord.

§ 2. **Military tenures—necessary services**: Military tenures existed where land was held by knight service. This was the most honorable tenure. Of this tenure Pollock and Maitland say:[4] "By far the greater part of England is held of the King by knight's service, (*per servitum militaire*). It is comparatively rare for the king's tenants in chief to hold any of the other tenures. In order to understand this tenure we must form the conception of a unit of military service. That unit seems to be the service of one knight, or fully armed horseman (*servitum unius militis*) to be done to the king in his army for forty days in the year, if it be called for. In what wars such service must be done, we need not here determine; nor would it be easy to do so, for from time to time the king and his barons have quarrelled about the extent of the obligation, and more than one crisis of constitutional history has this for its cause. It is a question, we may say, which has never received any legal answer." Other services which belonged to military tenures were *homage* and *fealty*.[5] The first was the formal oath which the tenant who had a fee simple rendered to his lord. Fealty was the less formal oath exacted from a life tenant.

§ 3. **Incidents of military tenure**: The incidents of military tenure were as follows: Aids, relief, primer seizin, fines, wardship, marriage, and *escheat*. All but the last are thus described by Pollock:[6] "First there were payments called *aids:*[7] in the theory of our earlier authors they were offered of the tenant's free will, to meet the costs incurred by the lord on particular occasions; but they settled into a fixed custom afterwards if they had not really done so when those authors

[4] 1 Pollock & Maitland's History, 2nd ed. 254; 1 Gray's Cases on Prop., 2nd ed. 312. See also, Lit. §§ 95, 97; Co. Lit. 72b; Lit. §§ 98, 100, 110-112; 1 Gray's Cases on Prop., 2nd ed. 312, 313.

[5] Lit. §§ 85, 90-93, 95, 97; 1 Gray's Cases on Prop., 2nd ed. 313, 314.

[6] Pollock on Land Laws, 60, 61.

[7] 2 Bl. Com. 63; 1 Gray's Cases on Prop., 2nd ed. 315, 316.

wrote. The occasions in question were the ransoming of the lord from captivity; the knighting of his eldest son, 'a matter that was formerly attended with great ceremony, pomp, and expense,' and the marriage of his eldest daughter. The amounts payable for the two latter purposes were assessed at the fixed proportion of a twentieth of the assumed annual value of the holding by statutes of the thirteenth and fourteenth centuries. Then there was the *relief* [8] payable by an heir of full age on his entry, which likewise became fixed at an early time. In the case of land held of the crown, the king also took a year's profits, which was called *primer seisin*,[9] and a *fine* [10] was payable by the tenant on every alienation of the land. If the heir was under age, the king or other lord became the guardian of both the heir and estate, and rendered no account of the profits; on the heir's coming of age a fine was payable to the guardian for quitting the land. This privilege of the lord, in many cases a highly lucrative one, was called wardship; and incident to it was the right of disposing of the ward in marriage, which appears to have been commonly treated as a matter of sale and barter in the guardian's interest." [11] The return of the land to the lord when the tenant died without heirs, was termed *escheat*.[12] As lands during the feudal period could not, except in a few cases by special custom, be devised by will, escheat must have been a profitable incident for the lord. Furthermore, under the feudal law the failure of heirs could much more easily occur than at the present time. The tenant's heirs might fail by attainder. This occurred where the tenant was hung for crime, abjured the realm, or became an outlaw. So, if the tenant were illegitimate and died without heirs of his body, there was a real failure of heirs, for an illegitimate person could have no collateral heirs. So, if the tenant died leaving relatives who were aliens, there would be an escheat, for they could not be his heirs.

§ 4. **Socage tenures—Several kinds**: *Petit Serjeanty:* The tenant in socage held of the king, to whom he yielded a trifle in lieu of rent and services.[13] *Borough English:* The youngest

[8] 2 Bl. Com. 65; 1 Gray's Cases on Prop., 2nd ed. 316.

[9] *Id.* 317.

[10] *Id.* 320.

[11] *Id.* 317-320.

[12] *Id.* 320.

[13] Lit. § 159; 1 Gray's Cases on Prop., 2nd ed. 322.

son inherited the land upon the death of the tenant.[14] *Burgage:* Land in an ancient borough held of the king by a certain fixed rent.[15] *Gavel kind:* All the sons inherited equally. If there were no sons, all the daughters inherited equally. There was no *escheat* in case of felony. Lands held by this tenure could be disposed of by will.[16] *By Divine Service:* The religious services were definite and the incidents of this tenure limited.[17]

§ 5. Services and incidents: *Socage tenure* was adapted to the peaceful occupations of the feudal order. The feudal tenant in socage rendered to the overlord a certain or definite service, or a certain or fixed rent, in lieu of all services.[18] In this way the burden was precisely known and did not involve the departure of the tenant from the land to take part in military conflicts. *Homage* was seldom rendered by a tenant in socage. *Fealty* was the usual service.[19]

The regular incidents of socage tenure are thus described by Pollock:[20] "In the case of non-military free tenure, a *relief*[21] of a year's rent was payable where a rent in money or kind was reserved, and *primer seisin* if the land was immediately held of the crown;[22] and the *aids* for the knighthood of the lord's eldest son, or marriage of his eldest daughter, were also due. But the rules of guardianship were quite different; the guardian in socage was not the lord, but the nearest of kin to the heir among those to whom the land could not possibly descend, the wardship lasted only till the heir was fourteen years old (when he was free to chose his own guardian until full age), and, most important of all, the guardian was accountable. 'Such guardian in socage,' says Littleton, 'shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir, when it pleaseth the heir, after he accomplisheth

[14] *Id.* 323.

[15] Lit. §§ 162-164; 1 Gray's Cases on Prop., 2nd ed. 322, 323.

[16] Lit. § 265; 2 Bl. Com. 84; 1 Gray's Cases on Prop., 2nd ed. 324-325.

[17] Lit. § 137; 1 Gray's Cases on Prop., 2nd ed. 326.

[18] Lit. §§ 117, 120; 1 Gray's Cases on Prop., 2nd ed. 321.

[19] Lit. §§ 118-120, 130-132; 1 Gray's Cases on Prop., 2nd ed. 321, 322.

[20] Land Laws, 61.

[21] Lit. §§ 126-129; 1 Gray's Cases on Prop., 2nd ed. 323.

[22] Co. Lit. § 77a; 1 Gray's Cases on Prop., 2nd ed. 323-324.

the age of fourteen years.' "[23] There was no incident of *marriage*. Whether there were *aids* or not has been the subject of dispute. *Fines* and *escheat*,[24] however, existed as under military tenures.

§ 6. **Frankalmoigne tenure**: Land was held by frankalmoigne tenure when it was held in return for general religious services which were voluntary on the part of the tenant.[25] The tenant was a religious corporation. There were practically no incidents at all to frankalmoigne tenure.[26] There might possibly have been *aids*. Fines might have existed if the corporation were allowed to, or did in fact, alienate. *Escheat* it would seem clearly must have existed. Thus, upon the dissolution of a corporation still possessed and entitled to lands, it would seem that they would escheat to him of whom the land were held or his heirs. . It was said, however, by Coke that the land did not escheat to the lord, but that upon the dissolution of the corporation it passed to the donor.[27] The fact, however, was that since no new frankalmoigne tenures could be created after the Statute of *Quia Emptores* in 1290, all religious corporations held their lands of the donor or his heirs. Hence, when they were dissolved, an escheat was in fact to the donor. As the ecclesiastical corporations were practically the only corporations, Coke's general statement that upon the dissolution of a corporation the land returned to the donor, was in fact a statement that the land escheated. The English courts, in the time of Coke himself, so held.[28]

§ 7. **Effect of the Statute of Quia Emptores (1290)**: The Statute of *Quia Emptores* permitted free alienation by tenants in fee simple, prohibited the creation of any further frankalmoigne tenure except by the king and stopped subinfeudation. The effect of the Statute is thus described by Pollock:[29] "The Statute of *Quia Emptores* passed in 1290, and one of the great statutes of Edward I. was made in the interests of the great

[23] Lit. § 123; 1 Gray's Cases on Prop., 2nd ed. 324.

[24] 2 Bl. Com. 89; 1 Gray's Cases on Prop., 2nd ed. 324.

[25] Lit. § 135; 1 Gray's Cases on Prop., 2nd ed. 326.

[26] (No fealty.) Lit. § 131; 1 Gray's Cases on Prop., 2nd ed. 326.

[27] Co. Lit. 13b.

[28] Johnson *v.* Norway, Winch. 37 (1622); Gray's Rule against Perpetuities, § 50.

[29] Land Laws, 67-70.

feudal overlords. It dealt a heavy blow to the consistency and elegance of the feudal theory, but made the conditions of land tenure far more simple. It was the first approximation of feudal tenancy to the modern conception of full ownership. Before 1290 the feudal tenant who alienated the whole of his land put the new tenant in his place, as regards the lord; but, if he alienated a part only, the effect was to create a new and distinct tenure by *subinfeudation,* as it is called. Thus, if the king granted a manor to Bigod, and Bigod granted a part of it to Pateshull, Bigod was tenant as regards the king, and lord as regards Pateshull. Bigod remained answerable to the king for the services and dues to be rendered in respect of the whole manor, and Pateshull to Bigod in respect of the portion Bigod had granted him. Pateshull, again, might grant over to Spigornel a portion of what he had from Bigod, and as to that portion, would be Spigornel's lord, and Spigornel would be his tenant. A person who, being himself a tenant, is lord of under-tenants, is called a *mesne* lord. These under-tenants were constantly multiplying, and not only titles became complicated, but the interests of the superior lords were gravely affected. The lord's right to the services of his tenant were in themselves unchanged by *subinfeudation;* but his chance of getting them practically depended on the punctuality of the under-tenants, against whom he had no personal rights, in rendering their contributions to the immediate tenant. The profits coming to him by *escheat, marriage of wards,* and *wardship,* were also diminished. Many years before the statute in question the great lords had thought themselves ill-used in this matter. It was provided by Magna Charta that no free tenant should alienate more of his holding than would leave him enough to perform the services—this shows, by the way, that at the beginning of the thirteenth century feudal services and dues had ceased to represent anything like the full annual value of the land. But this was found inadequate by the superior lords, and in 1290 the law was fundamentally changed. It was enacted that every free man might thenceforth dispose at will of his tenement, or any part thereof, but, so that the taker should hold it from the same chief-lord and by the same services. The incomer became the direct tenant of the chief-lord, and liable to him, and to him only, for a pro-

portionate part of the services due in respect of the original holding."

§ 8. **Effect of the Statute of Charles II**: During the three centuries following the Statute of *Quia Emptores* there was a general tendency toward the commutation of services exacted from lands held by military tenure into such fixed escuage as parliament might assess, and the gradual disappearance of some of the incidents of tenure, especially of military tenure. Thus fealty and relief in socage tenure became obsolete. Military tenures themselves were, however, entirely swept away by the Statute of 12 Charles II., c. 24 (1660).[30] That abolished all military tenures and their incidents, except certain honorary services relating to grand serjeanty. It turned all military tenures into common socage tenures. The statute had no effect on socage tenures except to do away with socage fines and aids. Fealty and relief in socage tenures had become obsolete so that escheat was the only incident which remained. The guardianship in socage was developed and improved by permitting the father to appoint persons of his own choice to be his children's guardians after his death, if he left them under age. This is, indeed, the basis of the modern law of guardianship. The Statute of Charles II. prohibited even the king from granting land in frankalmoigne tenure. As far as there was any fine incident to frankalmoigne tenure it was abolished.

§ 9. **Tenure in the United States**: If there is in this country any tenure between the owner of lands in fee and another, that other is the state, for the Statute of *Quia Emptores* is in force prohibiting subinfeudation and the state has taken the place of the crown.[31] The single incident of tenure left is escheat. The statutes, however, are so general, providing for an escheat to the state, that land as a matter of fact might be held allodially—that is, without any tenure—and the escheat be the result of the statute.

[30] 1 Gray's Cases on Prop., 2nd ed. 327.

[31] Denio, J., in Van Rensselaer v. Hays, 19 N. Y. 68, 73; 1 Gray's Cases on Prop., 2nd ed. 330, 331.

TITLE II.

SEISIN IN ITS RELATION TO ESTATES.

§ 10. **Seisin defined in relation to estates:** Today ownership, as distinguished from possession, is the important matter in the law of real property. Ownership is protected. Ownership, and not possession, is what contributes to the state in the way of taxes. Social organization is built up upon ownership. Under the feudal system quite the reverse was the case. The feudal state depended upon the performance of services and the personal rendering of the feudal dues. The only practical way of determining who was responsible for these was to look to the physical possession of the land. Whoever was in possession, claiming an interest which carried with it the performance of the feudal dues, was the person from whom the feudal dues might be exacted. Since the maintenance of the state was based upon the rendering of the feudal services by the person in possession claiming the feudal estate, it was inevitable that such feudal possession should be protected in much the same way that we today protect ownership as distinguished from possession. This feudal possession was called *seisin*.

By the time of Edward I. the estates or interests to which the feudal dues attached had become, to a certain extent, differentiated so that there were three of them—the fee simple, the fee tail, and the estate for life. These were called *freehold* estates. They might with propriety be called feudal estates because they were the different sorts of estates which the feudal system recognized as carrying with them feudal services and dues, depending of course, upon the tenure under which they were held. The statement that *seisin* is "possession claiming a freehold," now becomes intelligible. Freeholds were feudal estates, the possession of which carried the feudal dues. *Seisin* is the possession which determines what feudal dues shall be rendered. Hence "possession claiming a freehold," is possession of a character which fixes the feudal dues.

In contrast with the freehold or feudal estates were the estates *less than freehold,* or non-feudal estates. These were terms for years and estates at will. Possession of these did not involve the payment of any feudal dues. In fact the feudal system did

not at first recognize any such estates, nor was the possession of the tenant for years, or tenant at will, protected in any way. Tenants for years, or at will, did not have any right of property at all until the thirteenth century.[32]

Topic 1.

Estates in Possession—Freehold, Less Than Freehold, and Joint Interests.

§ 11. Freehold estates—fee simple: From the feudal point of view, this was an estate which passed upon the death of the one seized of it to whoever among his lineal, or collateral, relations was his heir at law, and when that person became seized in his turn of the fee simple and died, the land would pass by descent in the same way to his heir at law. The estate was created by this form of gift: "To *A* and his heirs." The phrase "and his heirs" expressed the intent that *A* and his heirs forever were to enjoy the land. In the feudal land law, when alienation *inter vivos* was restricted, *A* and his heirs could take, for the most part, only by the succession of inheritances. The words "and his heirs" were called words of limitation since they operated merely to define the character of *A's* interest.

It was the rule of the feudal land-law that the use of the word "heirs" was necessary to create a fee simple. Words which expressed the intent that *A* should have an "absolute estate," or a "fee simple," or an estate "forever," were insufficient to create an estate in fee simple when the word "heirs" was omitted. The use of any expression which did not contain the word "heirs," no matter how emphatic, resulted only in the creation of an estate for life.[33] The rule that the word "heirs" was necessary to the creation of a fee simple in a conveyance *inter vivos* has persisted down to modern times. In this country statutes, dating back now for a century or more, have abolished the rule, and usually provide, in substance, that a conveyance shall operate to transfer a fee simple unless a contrary intent expressly appears.

[32] *Post*, § 21.

[33] Lit. § 1; 1 Gray's Cases on Prop., 2nd ed. 332.

§ 12. **Fee simple subject to a condition subsequent:** It seems to have been permissible from the earliest period of the feudal land law to create a fee simple subject to a condition subsequent, upon the breach of which the fee simple would come to an end and the creator of the fee, or his heirs, would have a right to enter and effect a forfeiture. It was, of course, a necessary corollary to the validity of such a limited fee simple that the right of entry on the breach of the condition was a valid future interest in the land.[34]

§ 13. **The fee simple determinable or base fee:** Before the Statute of *Quia Emptores* stopped *subinfeudation* it is probable that a fee simple to last for an indefinite length of time—viz., till a certain tree should fall—might be created, leaving a right of reverter in the creator of the estate or his heirs. This resulted in a different situation from that where the fee was subject to a condition subsequent. There the fee was subject to be defeated by the breach of the condition subsequent. The fee did not *ipso facto* come to an end upon the happening of the condition, but did so upon the entry of the creator of the estate or his heirs. The fee simple determinable, however, came to an end *ipso facto* by the happening of the event which specified the ultimate limit of its existence. The right to create such a fee before the Statute of *Quia Emptores* was justified upon the ground that the transferee of such a fee held of the transferor. Some controversy has of late occurred among distinguished writers as to whether there could be created, since the Statute of *Quia Emptores,* such a determinable or base fee. Gray maintains that logically such a fee could not be created because there could be no tenure between the feofor and feofee. He produces some authority to that effect. On the other hand, less logic, but more alleged authority, is produced to show that the courts did actually permit such base or determinable fees to be created after the Statute of *Quia Emptores.*[35] In this country it has been assumed, and in some cases actually held, that when there has been a gift of land to a charitable corporation which dissolves without transferring its property, the fee of the corporation comes to an end upon the dissolution of the

[34] *Post,* § 23.

[35] Gray's Rule against Perpetuities, §§ 31-42, 744 *et seq.;* 1 Gray's Cases on Prop., 2nd ed. 339.

corporation, and in that event, *ipso facto,* reverts to the donor or to his heirs.[36]

§ 14. **Fee tail—Introductory**: There have been four stages in the history of the estate tail: *First,* its position before the Statute *De Donis,*[37] as a conditional fee simple; *second,* its origin under the Statute *De Donis* as an estate tail; *third,* the struggle to make the estate tail alienable in fee simple; *fourth,* modern legislation.

§ 15. **Before the Statute De Donis**: If, before the Statute *De Donis,* the landowner attempted to make a settlement of lands so that they could be enjoyed only by *A* and the heirs of his body, the effect was to permit the descent of the land from *A* to his lineal heirs *in infinitum* so long as they should last. When the line of lineal heirs ceased to exist, the fee would go to the original creator of the estate or his heirs. Before the Statute *De Donis* the estate so attempted to be created in *A* was a fee simple conditional. It was a fee simple in *A* which was subject, however, to be terminated when *A* ceased to have any lineal heirs. If the intent expressed had been fully carried out no alienation in fee simple of the land so limited would have been permitted to interfere with the ultimate return of the fee to the creator of the estate. But the courts did not enforce, to this extent, the expressed intent. They held that as soon as issue were born to *A*, *A* had a fee simple which he could alienate so as to deprive his issue and prevent any return of the fee to the donor.[38]

§ 16. **Origin of the estate tail under the Statute De Donis**: The law, as it existed before the Statute *De Donis,* was unsatisfactory to the landowner who wished to perpetuate the ownership of his lands in his lineal issue forever by making the land inalienable in the hands of successive lineal heirs. The Statute *De Donis* was secured for the purpose of effecting this object. It provided that where there was a conveyance "to *A* and the heirs of his body," the intent as expressed should be carried out, and that neither *A* nor his issue should have any power to alienate the land so as to prevent the continued descent to

[36] *Post,* § 302.

[37] Stat. 13 Edw. I. ch. I. 1285; 1 Gray's Cases on Prop., 2nd ed. 335.

[38] Co. Lit. § 19a; Leake, Digest of Land Law, 35; 1 Gray's Cases on Prop., 2nd ed. §§ 334, 335.

lineal heirs of *A*, or so as to defeat the rights of whoever would be ultimately entitled to the fee simple upon failure of *A's* issue. The issue were given an action to enforce their rights against any attempted alienation made by *A*, and the one ultimately entitled to the fee was given an action to enforce his rights upon the failure of issue. The former action was called a *formedon en le descender*, the latter, a *formedon en le reverter*. The estate thus created by statute became and has ever since been called an *estate tail*. It is improper to speak of the estate tail as a common law estate. It is a purely statutory estate. It was not an estate tail until the rights of the issue, and the one ultimately entitled to the fee, were protected by the Statute *De Donis*.

To the creation of an estate tail in a conveyance *inter vivos* it has always been necessary that the word "heirs" be used. No other word or phrase will do. In addition to the word "heirs" any formula may be used which shows that heirs are to be confined to lineal heirs, or heirs of the body. The donor may create an estate tail general,[39] *namely*, to *A* and the heirs of his body; or an estate tail special,[40] *namely*, to *A* and the heirs of his or her body by a particular wife or husband; or an estate tail male or female, *namely*, to *A* and the heirs male of his body; or to *A* and the heirs female of his body.[41]

§ 17. The struggle to make the estate tail alienable in fee simple: For almost a century the Statute *De Donis* was given full effect. The result must have been that a large portion of all the land in England became, or were in process of becoming, estates tail, and wholly inalienable by any one until there was a failure of issue and, by this means, a termination of the estate tail. This was an intolerable condition. Three ways were found by the courts to defeat the object of the statute and to make the estate tail alienable in fee.

First: It was held that if any one warranted an estate to a stranger, if the warrantor's heir was a tenant in tail, such tenant was barred from claiming the estate tail if assets had descended on him from the warrantor. Even where the war-

[39] Lit. §§ 14, 15; 1 Gray's Cases on Prop., 2nd ed. 336.

[40] Lit. §§ 16, 17; 1 Gray's Cases on Prop., 2nd ed. 337.

[41] Lit. §§ 21-24; 1 Gray's Cases on Prop., 2nd ed. 337, 338.

ranty had been given by one from whom the estate tail could not possibly have descended to the heir, the tenant in tail was held to be barred to claim the estate tail, even though no assets descended. This was known as the doctrine of collateral warranty.[42]

Second: The courts allowed a collusive suit to be brought by the one to whom the tenant in tail wished to convey the land in fee. This was called a common recovery. The judgment in this suit barred not only the issue in tail, but also all reversioners and remaindermen. The validity of common recoveries to disentail land was first judicially recognized about 1473. The common recovery is thus described by Blackstone:[43] "Edwards being tenant in tail in possession and being desirous of barring the entail and alienating in fee to Golding, proceeds as follows: Golding, who is called the demandant, is procured to bring a writ of *præcipe* against Edwards, who is called the tenant to the *præcipe*, alleging that Edwards came into possession after Hunt had turned the demandant out. The tenant appears and calls Jacob Moreland, who is supposed, at the original purchase by the tenant, to have warranted his title, and prays that Jacob Moreland be summoned to defend. This is known as the voucher, Moreland is the vouchee. Golding, the demandant, then demands leave to imparl with the vouchee in private, after which Moreland, the vouchee, makes default. Golding then has judgment against Edwards, the recoveree, and Edwards has judgment to recover of Jacob Moreland land of equal value." A recovery with double voucher occurred in this wise: Edwards first conveyed an estate of freehold to an indifferent person who becomes tenant to the *præcipe*. There is a writ of *præcipe* against such tenant who vouches Edwards, who in turn vouches Moreland. Golding recovers the land and the tenant recovers against Edwards, who recovers against Moreland. If Edwards is tenant in tail and is vouched, the recovery bars every latent right which Edwards may have in the lands recovered.[44]

[42] 1 Gray's Cases on Prop., 2nd ed. 338, note.

[43] 2 Bl. Com. 357.

[44] The warranty by Moreland was fictitious. In Blackstone's time one of the court officials was known as the common vouchee. It was customary to vouch him to warranty and judgments for lands of untold value stood against him.

Third: The Statutes of 4 Henry VII. ch. 24 (1490), and 32 Henry VIII. ch. 36 (1540), gave to fines the same general effect as had been given to common recoveries. A fine was another sort of collusive suit. In it the transferor was called the *conusor,* the transferee, the *conusee.* The fine was unlike a recovery, in that it ended with a concord, or compromise, instead of with a judgment. A fine levied with proclamations in accordance with the provisions of the statutes mentioned bound immediately all persons claiming under the *conusor,* and bound, unless claim was made within five years, all other persons.[45]

§ 18. The further effort to secure an inalienable estate tail: After fines and recoveries became effective to bar the entail, an attempt was made in creating the estate tail to impose a condition that upon the levying of a fine, or suffering a recovery, or taking any steps to either end, the estate tail should be forfeited, or go over to another. This effort failed because the condition was held to be an illegal ground for forfeiture, since it attempted the forfeiture of an estate upon a lawful alienation.[46] The word "perpetuity" was first used in the law in connection with this attempt to forfeit an estate tail if any steps were taken toward the levying of a fine, or suffering a recovery, by the tenant in tail.[47] It was said by the judges that this was an attempt to create a "perpetuity." Perpetuity in this sense meant the attempt to create an alienable and indestructible estate tail.

Still the English landowner did not give up the struggle to attain the practical objects of the inalienable and indestructible estate tail. By the end of the seventeenth century what is known as the strict settlement had been fairly well perfected in outline. This represents the landowner's final effort to achieve an inalienable and indestructible series of estates in the family. *A,* the landowner in fee, having a son *B,* conveys the property so that the legal title will vest in himself for life with a remainder to *B* for life; with a remainder to *B's*

[45] 1 Gray's Cases on Prop., 2nd ed. 338, note.

[46] Co. Lit. 223b, 224a; Kales' Cases on Future Interests, 1214, note 8.

[47] Mildmay's Case, 1 Co. 175 (1582); 6 Co. 40a (1605); 1 Gray's Cases on Prop., 2nd ed. 398; Kales' Cases on Future Interests, 1215, note.

first, and other sons successively in tail male; with other remainders to females in tail, and an ultimate gift to *A's* right heirs. *A* and *B* are tenants for life and the eldest son of *B* is the first tenant in tail. Upon *A's* death, *B* finds himself tenant for life in possession, and his infant son *C* is the first tenant in tail. *C*, even if he were of age, could not bar the entail without *B's* consent, because *C* is not the tenant in tail in possession. In order to give full effect to a fine, or recovery to bar the entail, the consent of the person in possession to be made a tenant to the *præcipe* must be obtained. *B* cannot bar the entail alone because he has only a life estate. When *C* comes of age, *B* proposes that *C*, in consideration of being well provided for during the remainder of *B's* life, shall join with *B* in the barring of the entail and making a new settlement of the estate so that *B* shall be tenant for life with a remainder to *C* for life, and a remainder to *C's* first and other sons successively in tail male, with estates tail to the females, and an ultimate gift over to *B's* right heirs. In well-regulated families *C* does not refuse. This process is repeated from generation to generation, and so long as it can be kept up, the land is never subject to alienation of the fee. In this manner the English conveyancers finally accomplished the practical objects of the estate tail as provided by the Statute *De Donis* with the one qualification that during each succeeding generation the new tenant in tail must consent to continuing the inalienability of the estate.[48]

§ 19. **Modern legislation**: In England the estate tail remains as under the Statute *De Donis*, with a practical power of alienation in fee by the tenant in tail by means of a fine or recovery. The principal change has been to provide simpler methods of docking entails. Thus, instead of a fine or recovery, a simple disentailing conveyance by the tenant in tail is all that is required.[49] But the rules applicable to fines and recoveries so far obtain that the tenant in tail can only dock the entail by a disentailing conveyance where he could do so

[48] "Changes in the English Law of Real Property in the Nineteenth Century," by Arthur Underhill. A Century of Law Reform, 280-340; Three Select Essays in Anglo-American Legal History, 675.

[49] 3 and 4 Wm. IV. ch. 74; 1 Gray's Cases on Prop., 2nd ed. 338, note.

by a fine or recovery. Hence, if he is merely the tenant in tail in remainder and a life tenant is in possession, the life tenant must join with him in the disentailing conveyance, precisely as he must join with him in the levying of a fine or suffering a recovery.

In Massachusetts the entailment is apparently good so long as the estate is not conveyed. The statute provides that "a person actually seized of lands as tenant in tail may convey such lands in fee simple by a deed in common form, in like manner as if he were seized thereof in fee simple, and such conveyance shall bar the estate tail, and all reversions and remainders expectant thereon."[50] The Massachusetts statute also provides that where lands are held by one person for life, with a vested remainder in tail to another, the tenant for life and the remainderman may convey such lands in fee simple by the ordinary form of deed in like manner, as if the remainder had been limited in fee simple, and that such deed shall bar the estate tail and all reversions and remainders expectant thereon.[51]

In many American jurisdictions, estates tail are in terms abolished and turned into estates in fee simple. In a few states the estate tail is made a life estate in the first taker, with a remainder in fee simple absolute to the children of the first taker, or to the person or persons to whom the estate would first pass according to the course of the common law at the death of the first taker.[52]

In a considerable number of American states, however, the statutes are silent as to estates tail. What is the state of the law in such jurisdictions? If the Statute *De Donis* be regarded as in force, under the general rule that in this country we brought with us the common law as modified by English statutes passed prior to the first settlement, we should have in these jurisdictions the estate tail as it existed in England just after the Statute *De Donis*. It would logically follow, that the force and effect given to fines and recoveries, must also be adopted and that the whole law of barring estates tail, by means of fines and recoveries, must be incorporated into the law of these states. As a practical matter, however, fines and recoveries

[50] Public Stats. Mass. 1882, ch. 120, § 115.

[51] *Id.* § 116.

[52] *Post*, §402 *et seq.*

are regarded as obsolete in these states, and the learning with respect to them is unknown. Yet, if these states recognized the estate tail, as it was created by the Statute *De Donis*, without fines and recoveries, or some other method to bar the estate tail, we should have the extraordinary condition that inalienable and indestructible estates tail would still be flourishing at the present day in an American jurisdiction, where they are utterly inconsistent with the manners and customs of the people.

In Iowa, where the court had to face the problem of what the law was when the statutes were silent with regard to estates tail, it was held that the Statute *De Donis* was utterly inconsistent with the manners and customs of the people of that state, and so far inapplicable that it could not be considered as brought into that state with the common law. That left the attempted estate tail in Iowa in the same position that an attempted estate tail was in England prior to the Statute *De Donis*. It was a fee simple conditional, and the fee was alienable, so as to become indefeasible as soon as issue had been born. Such seems to be the law in Iowa.[53] As a specimen of a legal antiquity it is certainly entitled to first place.

§ 20. **Estates for life**: An estate for any uncertain period, and not an estate at will, is a life estate. An estate at will is an estate at the will of both the lessor and the lessee.[54] The fact that the estate is expressed to be at the will of one of the parties usually raises the inference that it is at the will of both.[55] If, however, an estate be at the will of the lessee alone, or of the lessor alone, it must be classed as a life estate and consequently as a freehold estate.[56] Usually, however, life estates are expressly limited to continue during the life of the person taking the estate, or during his and other lives, or during the lives of other persons alone.[57]

There are a number of life estates which arise by operation of law. The tenant in fee tail, after possibility of issue extinct, has but a life estate. The extinction of the possibility of

[53] Kepler *v.* Larson, 131 Ia. 438.

[54] Co. Lit. 55a; 3 Gray's Cases on Prop., 2nd ed. 315.

[55] *Id.*

[56] Beeson v. Burton, 12 C. B. 647; 3 Gray's Cases on Prop., 2nd ed. 311.

[57] Lit. §§ 56, 57; 1 Gray's Cases on Prop., 2nd ed. 341, 342.

issue occurs when there is an estate tail special to *A*, and the heirs of his body by *B*, and *B* dies without issue.[58] When a man married a woman who was seized of land, he became seized by operation of law of an estate in the marital right for the joint lives of himself and his wife in all the land of the wife. Upon the birth of issue, if the wife had been seized in fee, he became entitled at her death to an estate for his life in the whole. This last was called the tenancy by curtesy.[59] A wife upon the death of her husband became entitled to a life estate in one-third of all the real estate of which her husband was seized in fee in his lifetime. It was not necessary that any issue be born of the marriage. The wife's life estate was called dower.[60] In determining whether the wife had dower, or the husband had curtesy, the actual *seisin* of the husband or wife was necessary. A remainderman or reversioner after a freehold had no *seisin*, and hence there could be no dower, or curtesy, in such a remainder or reversion.[61]

§ 21. **Estates less than freehold:** These were terms for years, at will, and at sufferance. A term for years is one which continues until a day certain.[62] An estate at will is one which is terminated at the will of *both* the lessor and the lessee.[63] There is, however, a well-recognized rule of construction, that an estate at the will of the lessor is also an estate at the will of the lessee.[64] Perhaps an estate at the will of the lessor may be construed to be at the will of the lessee also. An estate, however, at the express will of one party, is an estate at will only because, by a process of construction, it is at the will of both parties. If it were in fact an estate at the will of one party alone it would not be an estate at will, but a life estate.[65] An estate at sufferance was not really an estate at all. It was the name given to the possession of one who had entered lawfully but continuel to hold unlawfully.[66]

From the present day point of view it is plain that a term

[58] Lit. §§ 32, 33; 1 Gray's Cases on Prop., 2nd ed. 340.

[59] §§ 34, 35; Co. Lit. 29b, 30a; 1 Gray's Cases on Prop., 2nd ed. 341.

[60] Lit. §§ 36, 53; 1 Gray's Cases on Prop., 2nd ed. 341.

[61] *Post*, § 30.

[62] Lit. § 58; 1 Gray's Cases on Prop., 2nd ed. 342.

[63] *Ante*, § 20.

[64] *Id.*

[65] *Id.*

[66] Lit. § 68; 1 Gray's Cases on Prop., 2nd ed. 342.

for years—let us say, one hundred and ninety-eight years—is as much an interest in land as an estate in *A* for his life. Both estates give a right of possession which the law protects to the same extent and by the same remedies. Yet the fact remains that the term for years has all the attributes of an interest in personal property, and is called personal property, or a chattel real, while the life estate has the attributes of an interest in land and is called real property. The explanation of this difference is to be found in the way in which the feudal law treated terms for years. In the feudal scheme of society the term for years seems to have had no place. No feudal dues or services were exacted from tenants for years. The possession did not count for anything from the feudal point of view. The relation between the landlord and tenant was only that produced by a personal contract. The feudal tenant was the one who had the freehold estate, while the tenant for years was in possession simply by reason of the personal contract he had with the freeholder. The freeholder was from the feudal point of view in possession. He was actually seized in spite of the presence of the tenant upon the land. From the feudal point of view the tenant for years had no estate at all, but only a personal claim against the freeholder to occupy according to the agreement. The tenant only came to have an estate, or right of property, when the law began to give him a remedy whereby he might specifically enforce the contract by securing and retaining the possession which was promised. "Originally he [the tenant] had no remedy in case of his ejectment, unless he held under a covenant with his landlord. If so, he might have an action of covenant against his landlord in case he had been ejected by the landlord himself or any one claiming the land by superior title and might recover, in the former case, possession of his holding for the rest of his term, if unexpired, but otherwise damages only. But afterwards special actions were given to a tenant for years against any person, who had wrongfully ousted him or acquired possession of his land from a wrongful ejector. And though at first it was doubted whether these actions enabled him to recover anything but damages, in the reign of Edward the Fourth it was established that he should therein recover possession of his holding as well."[67] At

[67] Williams on Real Property, 18th ed., 17; 1 Gray's Cases on

this point the possession of the tenant for years became legally secure. In time it became as secure as that of the freeholder. The tenant for years then had a right of property in addition to his personal contract. But this right of property was not a feudal property-right. It did not involve the rendering of feudal dues or services. It was, and it has remained to this day, a non-feudal estate essentially different from the feudal estates of freehold.

§ 22. **Joint ownership**: The feudal law recognized four sorts of joint ownership as follows:

Coparceners:[68] Under the common-law rule of descent where females were entitled, they took altogether as one male heir. There was no such thing as a descent to heirs in the plural. Where several females held by descent as one male heir they held as coparceners. If one coparcener died leaving a son, her undivided interest passed by descent to that son and he became a coparcener with his mother's sisters. The coparcenery continued so long as the descents kept up. But if one coparcener aliened her share, the alienee and the remaining coparcener were tenants in common.[69]

Joint Tenants:[70] Several might hold as joint tenants. They also were regarded as holding by a single title. When one died the others took the entire property, but a joint tenant might transfer his undivided interest to a third party, who would then hold as a tenant in common with the others.[71] Upon his death the share would descend as his own property. The third party might re-convey to the joint tenant who had conveyed to him, and the joint tenant would then hold as tenant in common with the other joint tenants, and upon his death his interest, so held as tenant in common, would pass to his heir. This process was known as severing the joint tenancy.

Estates by the entirety: When there was a conveyance to a man and his wife, both held by the entirety. Upon the death

Prop., 2nd ed. 1; Pollock on Land Laws, 137, 138; Kales' Cases on Future Interests, 241.

[68] Lit. §§ 241, 242, 254, 265; 1 Gray's Cases on Prop., 2nd ed. 343.

[69] Lit. § 309; 1 Gray's Cases on Prop., 2nd ed. 345.

[70] Lit. §§ 277, 280-282, 287, 291; 1 Gray's Cases on Prop., 2nd ed. 344.

[71] Lit. §§ 292, 294; 1 Gray's Cases on Prop., 2nd ed. 345.

of one, the other took the whole estate. This estate by entirety could not be severed by the alienation of one spouse alone.[72]

Tenants in common: These held undivided interests by separate titles[73] and upon the death of any one his undivided interest passed by descent in the same manner as property held by him alone.

The common-law rule was that when land was conveyed to several persons a joint tenancy was meant and not a tenancy in common.[74] In this may be seen the feudal purpose of keeping the land always in a single owner as far as possible, so that the responsibility for the feudal dues might be the more easily ascertained and enforced. Of course, today the rule that a joint tenancy is meant would be contrary to the fact and the common-law rule has, therefore, been generally abolished by statute, and in its place has been established the rule that a tenancy in common is meant unless the joint tenancy be expressly provided for.[75]

TOPIC 2.

FUTURE INTERESTS.

§ 23. Possibilities of reverter and rights of entry upon condition broken: These have already been dealt with in considering the propriety of determinable fees and fees subject to a condition subsequent.[76] It follows that if you may have a fee, subject to a condition subsequent, the right of entry which accrues to the creator of the estate, or his heirs, upon the breach of the condition, is a valid future interest. So, if a determinable fee is valid, and determines upon the event specified happening, there exists a valid future interest by way of a possibility of reverter in the creator of the determinable fee or his heirs.

§ 24. Reversions after a particular estate of freehold: Whenever one seized in fee created out of his fee a lesser estate of freehold—as an estate tail, or a life estate—after the ex-

[72] Lit. § 291; Challis on Real Property, 2nd ed. 344, note; 1 Gray's Cases on Prop., 2nd ed. 344, note.

[73] Lit. § 292; 1 Gray's Cases on Prop., 2nd ed. 345.

[74] Lit. § 277; 1 Gray's Cases on Prop., 2nd ed. 344.

[75] *Post*, §§ 210, *et seq.*

[76] *Ante*, §§ 12, 13.

piration of the less estate, the owner in fee would have the fee which he had not wholly parted with. The less estate is called the *particular estate,* and what is left in the owner in fee is called, during the continuance of the particular estate, the *reversion.*[77] Clearly the reversion arises by operation of law. Under the feudal law, and ever since, it has been a valid future interest. Its existence and validity were, in reality, corollaries to the permitting of estates less than a fee simple. The reversion was clearly unobjectionable from the point of view of the feudal requirement that someone must always be in possession claiming a freehold, so that he might be responsible for the feudal dues. If the lesser estate were a freehold there was such a tenant in possession. There was clearly no chance for a gap between the time when the particular estate terminated and the time when the reversioner could enter. The reversioner, or his heir by descent from him, stood ready during the continuance of the reversion to take possession whenever and however the particular estate might determine.[78]

§ 25. Remainders after a particular estate of freehold: Suppose under the feudal law an attempt was made to create by the act of the parties a future estate in a third party, having precisely the same attributes as the reversion already described. Thus, land is conveyed to *A* for life, and by the same instrument a future interest is limited to *B* and his heirs. *B* and his heirs here stand ready at all times during the continuance of *A's* estate to take possession whenever and however *A's* life estate terminates. If *A* forfeits his life estate before his death, *B* or his heirs may at once step in. There will be no gap in the feudal possession. There will always be a tenant seized of the freehold to answer for the feudal dues. Such a future interest was clearly unobjectionable. It was held valid in all probability long before the fifteenth century. It was called a *remainder,*[79] and more recently, a *vested remainder.* From the

[77] 2 Pollock & Maitland's History, 21, 22; Williams on Real Property, 21st ed. 332, 333; Kales' Cases on Future Interests, 56.

[78] Gray, Rule Against Perpetuities, § 113; Kales' Cases on Future Interests, 57.

[79] Williams on Real Property, 21st ed. 333, 342; Kales' Cases on Future Interests, 57; 1 Gray's Cases on Prop., 2nd ed. 316.

feudal point of view it was vested because it stood ready at all times to take effect in possession, whenever and however the particular estate determined.

This was the vital characteristic because it precluded the possibility of any gap between the time when the particular estate ended and the time when the person to whom the future interest was limited, would have a right to enter. Such a gap would leave the *seisin* in abeyance and interrupt the continuity of the feudal services and dues. It would, therefore, have been highly objectionable. In fact the mere possibility that such a gap might occur was originally so objectionable that its existence would have caused the future interest to be wholly void.[80] When, therefore, the future interest was so limited by the same instrument which created the particular estate, that it stood ready, during its continuance, to take effect in possession whenever and however the preceding estate determines, the possibility of a gap was eliminated and the future interest was unobjectionable and valid.

§ 26. Springing and shifting future interests and limitations to classes: When the future interest is limited to take effect upon an event which will certainly leave a gap unfilled by any estate expressly limited, it is said to be a springing future interest. Thus, a conveyance to *A* for life and one year after *A's* death to *B* and his heirs, insures the gap of one year between the termination of *A's* life estate and the taking effect of *B's* future interest. So, if an estate be limited to *A*, beginning one year hence, there is a gap of one year before *A's* estate begins. Such future interests were highly objectionable from the feudal point of view. If there could be a gap for one year, there could be a gap for longer. During the gap no person would be seized of the freehold and none would be liable for the feudal dues and services. It was of no avail to argue that there would be a reversion by operation of law to fill the gap for the year, or that where the estate was to begin in *A* one year from the date of the conveyance, the transferor would retain the fee until the year was up. From the feudal point of view it was not to be expected that any one would undertake the burden of performing the feudal dues

[80] *Post*, § 28.

attaching to a fee simple for the brief space of a year. From the feudal point of view the fact that there would be no inducement to any one to remain in possession of the fee for one year was enough to justify the assertion that the fee would be in abeyance or *in nubibus*. The springing future interest was wholly void under the feudal land law.[81]

When the future interest is limited upon an event which would terminate prematurely the preceding freehold, it is called a shifting future interest. Thus, if the conveyance be to *A* in fee and if *A* die without issue surviving, to *B* in fee, *B* has a shifting future interest. *B's* interest is said to lap over upon *A's*. A shifting future interest has been defined as one which laps over on the preceding estate. It is thus distinguished from a springing future interest which takes effect after a gap. The shifting future interest was also objectionable from the feudal point of view. The first taker who had the fee could not be expected to perform the feudal dues attaching to a fee when he might be obliged to give it up at his death. If the first taker did retain the *seisin* and perform the feudal dues, upon his death his heir might be expected to take advantage of the situation to continue in the actual *seisin*, and if *B* then attempted to enforce a right of possession, disorder and strife would be engendered. The shifting future interest was held wholly void under the feudal land law.[82]

Suppose a freehold were attempted to be limited to the children of *A*, who had no children at the time. Clearly the attempt would be to create a springing future interest and the limitation to the class would be void. If, however, one child of *A* were *in esse* the conveyance would take effect as to that child. As to the other children, if they were expressly included in the conveyance, the attempt would be to create a shifting future interest divesting *pro tanto* the fee of the child *in esse*. Hence the conveyance as far as the afterborn children were concerned would fail. The net result was that in a conveyance to a class or to *A* and a class, such as his children, the conveyance was valid to *A* and any members of the class *in esse* when the conveyance took effect, and invalid as to all others.[83]

[81] Leake, Digest of Land Law, 2nd ed. 230, 231; *id.*, 33; 1 Gray's Cases on Prop., 2nd ed. 347; Kales' Cases on Future Interests, 58, 59.

[82] *Id.*

[83] Co. Lit. 9a; Sheppard's Touch-

This must have been the rule under the feudal land law, no matter how clearly it was expressed that the afterborn members of the class were to share.

§ 27. **Contingent remainders—defined:** If, after the creation of a freehold, there is limited in the same instrument a future interest which stands ready during its continuance to take effect in possession whenever and however the preceding estate determines, so that there is no possibility of a gap in the *seizin* between the particular estate and the future interest, the future interest is valid by the feudal law. But if the future interest is limited so that it is sure to take effect after a gap between the termination of the preceding estate and the taking effect of the future interest, it is void. Now, suppose the future interest be so limited that it may take effect by coming into possession immediately upon the termination of the preceding estate of freehold, whenever and however that may occur, or as limited, it may take effect in possession some time *after* the termination of the preceding estate of freehold. Suppose, for instance, the limitations are to *A* for life, remainder to *B* in fee if he survive *A*. Here, if *A's* life estate continues till *A's* death, *B* will take in possession, if he takes at all, at once on the termination of *A's* life estate. There will be no gap. If, however, *A's* life estate terminates prematurely before *A's* death, the fatal gap will occur, because it will not be ascertained at that time whether *B* will survive *A's* death. Take another case: Suppose the limitations are to *A* for life, then to the heir of *B*, *B* cannot have an heir till his death, so that it cannot be determined who is to take after the life estate until *B's* death. If *B* outlive *A* there will again be the fatal gap, but of *B* die before *A's* life estate terminates, no gap can possibly occur. It cannot be foretold in advance whether the objectionable gap will occur or not. Suppose estates are limited to *A* for life, then to such children of *A* as reach twenty-one. If at *A's* death no children have reached twenty-one then the objectionable gap will have occurred. If they have all reached twenty-one it will not. It cannot be foretold in advance whether the gap will occur or not. The essential characteristic of all these cases is that, taking the estates according to the expressed in-

stone, 436; Kales' Cases on Future Interests, 229.

tention, the fatal gap may or may not occur. To put it another way, the event upon which the future interest is to take effect in possession is one which may happen before or after, or at the time of or after, the termination of the preceding particular estate of freehold. If the event happens before, or at the time of the termination of the preceding particular estate, no gap occurs. If it happens afterwards, the gap does occur.[84] Future interests which answer this description, are common-law contingent remainders. Their essential characteristic is the possibility of a gap.

§ 28. **Is the contingent remainder valid or invalid under the feudal law?** It may be confidently asserted that before 1430 the contingent remainder was wholly void.[85] The possibility that there would be a gap in the *seizin* between the termination of the particular estate and the taking effect in possession of the future interest caused the future interest to be discarded as void. It must, however, ultimately have been perceived that these contingent future interests might take effect without any gap; 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 were not objectionable under the feudal system of land laws. It is not surprising, therefore, to find that about 1430, such a future interest was allowed to take effect provided it did so in this unobjectionable manner.[86] When this happened the contingent remainder of the common law commenced its existence. The rule became this: If the event upon which the future interest was limited to take effect in possession happened before, or at the time of the termination of the preceding estate, so that there would be no gap, the future interest took effect as a remainder and was valid. If, however, the event upon which the future interest was limited to take effect in possession happened after the termination of the preceding estate, so that the gap occurred, the future interest was void. This way of stating the matter was ultimately translated into the rule that the

[84] Fearne, Contingent Remainders, 3, 4; *id.* Butler's note (g); Leake on Property in Land, 2nd ed. 233; Kales' Cases on Future Interests, 82.

[85] Williams on Real Property, 21st ed. 356, 358; Kales' Cases on Future Interests, 80, 81.

[86] *Id.*

contingent remainder was destroyed unless it vested before the termination of the preceding interest. The word "vest" here meant no more than that the future interest must come into a position where it stood ready to take effect whenever and however the preceding estate determined, so that there could be no gap. It is entirely immaterial whether it be said that the future interest must vest at, or before, the termination of the preceding estate, or else be destroyed; or whether it is stated that the future interest is void unless the event upon which it is to take effect in possession happens at or before, and not after, the termination of the preceding estate. Both ways of putting the rule amount to the same thing. Both formulæ state what is known as the rule of destructibility of contingent remainders.

The full force of this doctrine of destructibility of contingent remainders cannot be appreciated unless it be perceived that the particular estate may be prematurely terminated by the act of the one seized of it. The life estate may be forfeited by a tortious conveyance, as by levying a fine, or suffering a recovery, or making a *feoffment* in fee.[87] The life estate may also terminate prematurely by merger. Thus if *A* create an estate in *B* for life with remainder to *B's* unborn son, there will be a reversion in *A* by operation of law pending the birth of the son. If, then, *B* convey his life estate to *A*, *B's* life estate will terminate by merger in the reversion in fee of *A*, and by this means the life estate will come to an end before *B's* death. Hence where *A* has a life estate with a remainder to *B* in fee if he survive *A*, there is the chance of a gap because *A*, by forfeiture or merger, may prematurely terminate his life estate before his death. Common law conveyancing is full of examples where, by prematurely terminating the life estate by forfeiture or merger, the contingent remainder is destroyed.[88]

§ 29. Distinction between vested and contingent remainders: The common-law distinction between a vested and a contingent remainder, and the reason for the distinction, ought now to be plain. The feudal law singled out remainders which throughout their continuance stood ready at all times to take effect in possession whenever and however the preceding estate came ot an end, as unobjectionable because there was no possi-

[87] *Post*, § 46.

[88] *Post*, §§ 311, 312.

bility of a gap. Remainders having these essential characteristics were called "vested." A vested remainder is, therefore, very properly defined by Professor Gray as follows:[89] "A remainder is vested in *A*, when, throughout its continuance *A*, or *A* and his heirs, have the right to the immediate possession, whenever and however the preceding estates may determine." On the other hand a remainder limited to take effect in possession upon an event which may not happen till after the termination of the particular estate, presents the possibility of a gap. Remainders having this essential characteristic are properly called contingent remainders. A contingent remainder is thus perfectly defined by Butler:[90] "All contingent remainders appear to be so far reducible under one head that they depend for their vesting on the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination."

§ 30. Seisin of future interests after estates of freehold: Not even the vested remainderman had any actual *seisin*. After mentioning that the reversioner had a sort of *seisin* because of the services rendered by him, the learned authors of Pollock and Maitland's History say:[91] "On the other hand, we cannot find that any sort or kind of seisin was as yet attributed to the remainderman. He was not seized of the land in desmene, and he was not, like the reversioner, seized of it in service, for no service was due him." The absence of *seisin* in the remainderman seems always to have continued, for Hargrave says (the italics are his):[92] "But, in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion the tenant in possession is said to have the *actual* seisin of the lands." It followed, from the fact that the remainderman had no seisin that he did not render feudal services.[93] He could not bring a writ of right.[94] In order to transfer a remainder the co-operation by attornment of the tenant was necessary, so that the actual *seisin* of the freehold in possession might be held for

[89] Gray's Rule Against Perpetuities, 2nd ed. § 101.

[90] Fearne, Contingent Remainders, 9 Butler's note (g); Challis on Real Property, 3rd ed. 125, 126; Leake, Digest of Land Law, 2nd ed. 233.

[91] 2 Pollock & Maitland's History, 39.

[92] Co. Lit., Hargrave's note, 217.

[93] 2 Pollock & Maitland's History, 39.

[94] Lit. § 481.

the grantee of the remainderman.[95] A remainderman, other than one who was an original purchaser, did not constitute a new stock of descent.[96] The consequences arising from the fact that the remainderman had no *seisin* have come down to us in the rule that there can be no dower or courtesy in a remainder.[97]

§ 31. Future interests after an estate less than a freehold—By operation of law: Suppose *A*, being the owner in fee, enters into an agreement with *B* by which *B* is allowed possession for three years. When this was merely a personal contract,[98] and *B* had no right of property which he could enforce, it is plain that from the feudal point of view *A* was still in actual possession of the freehold. *B's* possession was not recognized by the feudal law. When, however, *B* came to have a right of property as against *A*, and against *A's* transferee, it is clear that *A* actually had only a future interest. He was not in possession. He had no right to possession till the three years were up. Nevertheless *B*, having only a term for years, was not seized. *A* was still regarded as the feudal tenant having the actual *seisin*. This *seisin* was no doubt somewhat fictitious but, historically, it was the continuance as a fictitious *seisin* of what had been (before the tenant's possession was protected), an actual *seisin*. In more recent times it has been openly called a reversion, as if there were no difference between the reversion after a term and the reversion after a life estate. In fact, however, there is this great difference: the reversion after a term is in one who has an actual *seisin* of a freehold in possession, while the reversioner after a life estate has no actual *seisin* at all, and is not put upon the footing of one who has.[99] This difference becomes of practical importance when it is to be determined whether a widow has dower. She has no dower

[95] "Mystery of Seisin," by F. W. Maitland, 2 Law Quart. Rev., 481, 490-493.

[96] 4 Kent Com. 387. In this respect also the remainder was on the footing of a mere right of entry by one disseised. The "Mystery of Seisin," by F. W. Maitland, 2 Law Quart. Rev. 481, 485.

[97] Co. Lit. 29a, 32a; Scribner on Dower, 2nd ed. 233, 321. In this respect the remainder was on the footing of a mere right of entry by one disseised. "The Mystery of Seisin," 2 Law Quart. Rev. 481, 485, *et seq.*; Kellett *v.* Shepard, 139 Ill. 433, 449.

[98] *Ante*, § 21.

[99] Challis on Real Property, 3rd ed. 99; Kales' Cases on Future Interests, 242; 1 Gray's Cases on Prop., 2nd ed. 350.

except in lands of which her husband was actually seized during coverture. Hence, she has dower in his so-called reversion after a term for years, but not in a reversion after a life estate.[1]

§ 32. **By act of the parties — Non-contingent interests:** Suppose that a term for ten years is limited to *A* with a so-called remainder after that to *B* in fee. Here the estate of *B* is exactly like the so-called reversion after the term, except that it is an interest attempted to be created by express words. It might be assumed that before the tenant had any property right, his presence on the land did not at all prevent the transfer of the fee to *B*, so that *B* would actually be seized of a freehold. When the tenant came to have a right of property, *B's* interest was really a future interest exactly as where one had a reversion after a life estate. Nevertheless, *B's* interest continued to be valid, and what had perhaps before been a real *seizin*, was continued in *B* as a fictitious *seizin*. The reality of *B's seizin* was approximated as nearly as possible by requiring *livery of seizin* to be made to *A*, the tenant for years, for *B*.[2] The theory still was that *B* received the actual *seisin*, and the tenant became his tenant. Hence *B's* widow was entitled to dower in *B's* interest after the term.

§ 33. **Contingent future interests after a term:** Suppose that after a term for ten years limited to *A*, an interest is limited to *B* provided he survive the term. Here the condition upon which *B* is to take makes it impossible that *B* should receive anything approaching actual *seisin* at once. There can be no tenant to the freehold until it is determined that *B* has outlived the ten years. Since the term for years is a non-feudal estate, the fatal gap in the *seisin* has occurred, and the interest of *B* must be void. Such was the feudal law.[3]

Topic 3.

Rule in Shelley's Case.

§ 34. **Statement of the Rule:** This Rule deals with the legal effect of limitations to *A* for life (or in tail) with a remainder

[1] Scribner on Dower, 2nd ed. § 233.

[2] Lit. § 60; 1 Gray's Cases on Prop., 2nd ed. 352.

[3] Leake on Property in Land, 2nd ed. 35; Kales' Cases on Future Interests, 242; 1 Gray's Cases on Prop., 2nd ed. 351.

to the heirs of *A* or to the heirs of the body of *A*. Where the remainder is thus limited to the "heirs" of *A*, the Rule requires that *A* take the fee simple. If the remainder be to the "heirs of the body" of *A*, the Rule places the fee tail in *A*. The Rule may be thus stated: Wherever an estate of freehold is limited to *A*, followed by a remainder to *A's* heirs, or the heirs of the body of *A*, *A* will take a fee simple, or a fee tail, as the case may be.

This rule dates back at least as far as 1324,[4] although Shelley's Case appears not to have been decided until about 1581.[5]

§ 35. The reasoning upon which the Rule was established: This is admittedly conjectural only. It has been insisted[6] that because, under the feudal law, there could be only one heir, "heirs" in the plural was not used as a word of purchase but as a word of limitation, meaning the indefinite line of inheritable succession. An intent that the whole line of inheritable succession should take could only be given effect by holding that *A* took the fee simple or fee tail as the case might be so that the line of inheritable succession would take by descent from *A*.[7] On the other hand it might well be urged[8] that the remainder to the "heirs" of *A*, means that a remainder is attempted to be limited to the person or persons who would be the life tenant's heir or heirs at the time of his death—heirs being used in the context as a word of purchase; that such a remainder would have been a contingent remainder and therefore wholly void before 1430;[9] that the result of the invalidity of the remainder would be to give *A* a life estate with a reversion in fee to the settlor, which would disappoint the expectations of *A's* family and destroy the settlement; that to avoid this the law simply and directly decreed that *A* should have the fee or the fee tail, as the case might be, and that *A's* heirs or the heirs of *A's* body would take by descent from *A* instead of by pur-

[4] Abel's Case, Y. B. 18 Ed. II, 577 (1324), translated in 7 M. & G. 941 note (a); Provost of Beverley's Case, Y. B. 40 Edw. III, fol. 9 a. b. [1366]; Williams on Real Property, 21st ed. 350, 351; 5 Gray's Cases on Prop., 2nd ed. 83; Kales' Cases on Future Interests, 250.

[5] 1 Co. Lit. 93b.

[6] Goodeve, Law of Real Prop., 4th ed. by Elphinstone, Clark and Dickson, 239, 240; Kales' Cases on Future Interests, 251.

[7] *Post*, § 423.

[8] *Compare*, Challis on Real Property, 3rd ed. 152, 166, 167; Kales' Cases on Future Interests, 252, 253.

[9] *Ante*, § 28.

chase from the settlor. In this view the Rule applied where the word "heirs" was used as a word of purchase and just because when so used the remainder would fail. The often repeated statement that "heirs" is used as a word of limitation is not so much the basis for the application of the Rule as a description of the situation after the Rule has been applied.[10] Both lines of reasoning come to the same result but, as will hereafter appear, it may make a difference in determining the application of the Rule which view is emphasized.[11]

§ 36. Persistence of the Rule: The Rule in Shelley's Case has exhibited great vitality. It has been applied to equitable [12] as well as legal estates in land. Some courts have (without justification, it is believed) applied it by analogy to interests in personal property.[13] The Rule is still in force in England and in many states of this country. Sometimes repeated efforts in a state legislature to dislodge it have met with failure. Thus, a product of feudalism without a vestige of feudal reasoning left to support it, has come down to us and though the rule today clearly upsets testators' and settlors' intentions by giving to the life tenant more than was expressly allowed him, yet legislatures are to be found which will not, or have not, abolished it.

§ 37. Operation of the Rule: The older view was that the Rule in Shelley's Case was sufficient by its own force to place the whole fee in *A*, the life tenant, and eliminate the life estate. It was assumed that the limitation to the heirs by virtue of some force of attraction united and coalesced with the limitation of the freehold to the ancestor and thus operated to vest in him a fee simple, or a fee tail, as the case might be. The later view is, that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him a new and larger estate in which the particular estate of freehold merges when there is no intervening estate.[14] In this view the Rule operates not at all on the life estate in *A*, but only on the remainder. It turns the remainder to heirs into a remainder to *A* himself, so that in the usual case, when the Rule has operated,

[10] *Post*, § 424.
[11] *Post*, §§ 421-428.
[12] *Post*, §§ 429 *et seq.*
[13] *Post*, § 438.
[14] *Per* Lord MacNaughton in Van Grutten *v.* Foxwell, [1897] A. C. 658, 668; Kales' Cases on Future Interests, 285; *post*, § 440.

A has a life estate with a remainder in fee to himself. Then, *A's* life estate merges in *A's* fee and the only estate in *A* is a fee. It therefore, makes no difference how emphatically it be stated that *A* is to have only a life estate, the rule will apply. That is settled.[15] If, between the life estate to *A*, and the remainder to *A's* heirs, a life estate to *B* be inserted, it is settled that, upon the application of the rule, *A* has a life estate, *B* has a life estate, and *A* has a remainder in fee. No merger can occur because of the intermediate estate.

TITLE III.

SEISIN IN ITS RELATION TO CONVEYANCE.

§ 38. Distinction between descent and purchase:[16] The feudal, or common-law distinction between title by descent and title by purchase was this: Title came by descent when it passed by operation of law as by inheritance, by *escheat* or where the tenant became seized of an estate of curtesy or dower. Title came by purchase where it passed by act of the parties. A title was acquired by purchase if it came by act of the transferor, although no consideration whatever was paid. Therefore, where title came by devise, it came by purchase. In speaking hereafter of title by descent, or of title by purchase, it should be observed that these terms are used in this feudal or common-law sense.

§ 39. Descent—From whom traced: Today the rule is believed to be universal in this country that descent is traced from the person last entitled.[17] This is the logical result of the fact that ownership is the vital thing at the present day. The feudal law, however, was intent rather upon the *seisin* or feudal possession, and, therefore, required that descent be traced from the person last seized. Suppose *X*, being seized in fee has, by his first marriage, *A*, a son, and *B*, a daughter, and by his second marriage, *D*, a son, and then dies. *A* the son is the heir at law. If *A* in fact entered and became seized and died, *B* would inherit from him because the half blood was excluded,[18]

[15] Perrin *v.* Blake, 1 W. Bl. 672 (1769); 5 Gray's Cases on Prop., 2nd ed. 89; Kales' Cases on Future Interests, 260; *post*, § 441.

[16] Lit. § 12; Co. Lit. 18b; 1 Gray's Cases on Prop., 2nd ed. 351.

[17] *Post*, §§ 380-382.

[18] Lit. § 8; 4 Gray's Cases on Prop., 2nd ed. 8.

but if *A* died before being actually seized, then descent would be traced from *X*, and *D* the son by the second marriage would be the heir at law.[19] The feudal rule that descent must be traced from the person last seized made a practical difference where the descent of reversions and remainders was being traced. For instance, if subject to a life estate in *A*, *B* had a remainder in fee and died before *A*, *B* was not actually seized. Nevertheless, descent was traced from him because he was the first purchaser. The feudal law allowed this much relaxation in favor of the remainderman named. If, in the above case, *B* died before *A*, leaving as his heir *C*, and *C* thereupon died before *A*, on *A's* death descent was traced from *B*, and not from *C*.[20]

In the case of an estate tail, however, descent is traced from the first purchaser—the first donee in tail. The issue in tail take, not one from another, but one after another. Thus, if *A* having an estate tail, has a son *X* and daughter *Y*, by his first wife, and a son *Z* by his second wife, and dies, the son by the first wife takes the estate tail. If he dies without issue, then the son by the second wife takes, for *Z* takes from *A*.[21] If descent were traced from *X*, *Y* would take, and the property would *escheat*, rather than that the half blood, *Z*, should inherit.

§ 40. Feudal rules for descent of property:[22] When the person last seized, or the person from whom we are to trace descent has been found, we have either one of two cases: *first*, where the person last seized has issue; or *second*, where the person last seized has no lineal descendants. In the former case, descent was traced according to the following feudal rules: (1) The male issue must be admitted before the female. (2) Where there were two or more males in equal degree the eldest inherited, but the females all together. (3) The lineal descendants *in infinitum* of any person represented their ancestor.

Where there were no lineal descendants, it is first necessary to observe that descent among collaterals could only be to those who were of the blood of the first purchaser. This meant that

[19] *Id.*

[20] *Post*, §§ 380-382.

[21] Co. Lit. 26b (Mandeville's Case); 4 Gray's Cases on Prop., 2nd ed. 9.

[22] Canons of Descent, 2 Bl. Com. c. 14, 201-240; 4 Gray's Cases on Prop. 2nd ed. 9.

land which descended from the father to the deceased must go to the collateral heir on the father's side. It would *escheat* rather than go to the collateral heir on the mother's side. Lands which descended from the mother to the deceased must go to the collateral heir on the mother's side. It would *escheat* rather than go to the collateral heir on the father's side. If the deceased were himself the first purchaser, the heir might be found from among the collateral relations on either side. Thus, it was first necessary in all cases of collateral descent to ascertain from among what class of collateral relations the heir might be found. When this had been ascertained the following rules applied: (1) The inheritance cannot ascend—that is to say, neither the father nor mother could take by descent from the deceased. An uncle would inherit before the father. (2) The male issue shall be admitted before the female—that is, the male collateral relations shall be preferred to the female. (3) When there are two or more males in equal degree the eldest only shall inherit, but the females all together. (4) The lineal descendants *in infinitum* of any persons deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living. (5) The collateral heir of the person last seized must be his next collateral kinsman of the whole blood. (6) In collateral inheritances the male stock shall be preferred to the female, that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near; unless where lands have in fact descended from a female.

In this country these rules of descent have been replaced by statutory provisions of descent based upon the equal division of property amongst children or issue *per stirpes,* or amongst collaterals standing in the same degree of relationship to the deceased.

§ 41. **Devise**: Devises of land are here noticed for the purpose of emphasizing that they were not permitted by the feudal, or common law of land. In some localities by custom, devises were permitted and the devisee after the death of the devisor might enter and hold without *livery of seisin.*[23]

[23] Lit. § 167; 1 Gray's Cases on Prop. 2nd ed. 357.

§ 42. **Livery of seisin**: Since it was of vital importance to the maintenance of the feudal system that it always be clear who had possession of a freehold, so that it might be known who was liable for the feudal dues, it was natural that, so far as the transfer of interests were permitted at all, they should be effected by a livery or transfer of the *seizin* or feudal possession. Relying upon some picturesque phrases of the old books one is apt at the present day to exaggerate the importance of the delivery by the *feoffor* of a ring of the door, or a turf, or twig, upon the land to the *feoffe* in the name of *seisin*.[24] The really important thing was that the *feoffor* actually hand over the possession to the *feoffee*, so that as the *feoffor* moved off the land the *feoffee* moved on. A ceremonial *livery* where this did not occur was of extremely doubtful and precarious effect. Where the actual possession changed hands the *livery* was said to be a *livery* in deed or in fact.[25] There was also *livery in law*. This occurred where the *feoffor* or *feoffee* being in view of the land, but not on it, the *feoffor* directed the *feoffee* to take possession of a freehold and the *feoffee* did so. But the *livery* was only complete on the actual transfer of possession, and, if either the *feoffor* or *forffee* died before that occurred, the attempted *livery* was ineffective.[26]

The rule was that all freehold interests which possibly could, must be transferred by *livery of seizin*. Practically, that meant that when the *feoffor* had a present freehold interest in possession which he desired to transfer he was obliged to do it by *livery of seisin*.[27] If the *feoffor* had a tenant at will in possession, he must determine the estate at will and make *livery of seisin*.

§ 43. **Grant and attornment—Release**: Some freehold interests, however, could not be transferred by *livery of seisin*. That was so where a tenant for life, or in tail, was in possession, or where a tenant for years was in possession, and the one desiring to make the transfer had a reversion or remainder only. The holder of the interest by way of reversion or remainder,

[24] Co. Lit. 48a; 1 Gray's Cases on Prop. 2nd ed. 352.

[25] *Id.*

[26] Co. Lit. 48b; 1 Gray's Cases on Prop. 2nd ed. 352.

[27] Lit. § 59; 1 Gray's Cases on Prop. 2nd ed. 352.

had no immediate right of possession. He could not enter upon the possession of his tenant and make any lawful *livery*. Hence he could not transfer at all unless some method other than *livery* were adopted.[28] As a matter of fact the transfer of a future interest was permitted by grant, that is to say, an instrument under seal, called a grant.[29] To supply the place of *livery of seisin* or transfer of the feudal possession, the tenant in possession was obliged to attorn,[30] or assent to the grant, thereby becoming the tenant of the grantee and holding of him. The grant was wholly void and ineffective if no attornment occurred. To be effective, attornment must occur in the life of the grantor.[31] A grant by the king, or to the king, however, was good without an attornment.[32] No attornment was necessary where the reversion was transferred by descent, *escheat* or devise.[33] The Act of 4 Anne, c. 16, § 9 (1705), abolished the requirement of attornment in all cases.[34] That Act has been reenacted in this country;[35] or else is in force by reason of our adoption of the English common law and English statutes passed prior to the Revolution; or else because attornment is regarded as so far inconsistent with our manners and customs that it was never incorporated into our law.[36] In one instance, however, where the common law and statutes of England in force prior to 1609 were expressly made part of the state law, the court said that the Statute of Anne was not in force and that attornment was necessary.[37]

Release was the special name given to a conveyance by grant by a reversioner or remainderman, when out of possession, to

[28] Williams on Real Property, 18th ed. 309; 1 Gray's Cases on Prop., 2nd ed. 353.

[29] Co. Lit. 172a; 1 Gray's Cases on Prop., 2nd ed. 353.

[30] Lit. § 551; Co. Lit. 309a, b; 1 Gray's Cases on Prop., 2nd ed. 353, 354.

[31] Co. Lit. 309a; Lit. §§ 567-569; 1 Gray's Cases on Prop., 2nd ed. 354, 355.

[32] Co. Lit. 309a, b; 1 Gray's Cases on Prop., 2nd ed., 354.

[33] 2 Shep. Touch. (Preston's ed.), 256, 257; 1 Gray's Cases on Prop., 2nd ed. 354, note.

[34] 1 Gray's Cases on Prop., 2nd ed. 355.

[35] Stimson, American Statute Law, § 2009.

[36] *Per* Shaw, C. J., in Burden *v.* Thayer, 3 Met. 76, 78; 1 Gray's Cases on Prop., 2nd ed. 355, note 2.

[37] Fisher *v.* Deering, 60 Ill. 114; 1 Gray's Cases on Prop., 1st ed. 446. For the law in Illinois, see *post*, § 379.

the tenant who was in possession.[38] It operated without any further formality to invest the tenant at once with the estate of the releasor.

§ 44. **Conveyances by record:** These were fines and recoveries. The form of these collusive suits has been already sufficiently described.[39]

§ 45. **Conveyance of estates less than freehold:** Terms for years are non-feudal estates. They have the attributes of personal property. So far as they are concerned *seisin* is of no importance. Hence in their creation and transfer, *livery of seisin,* or its equivalent, was unnecessary. Terms for years could be created by *parol.* But they were not fully launched as estates until the tenant had entered.[40] Before entry he had but an *interesse termini.*[41] The tenant might surrender his interest by *parol* and this extinguished the term without any other formality. It was essential, however, to such a surrender by *parol* that it be made to the person having the next estate in reversion or remainder, so that the estate surrendered would merge in the estate of the surrenderee and thereby become extinguished.[42] This Statute of Frauds of Charles II. required surrenders, except those by operation of law, to be in writing.

§ 46. **Disseisin and tortious conveyance:** *Disseisin* was the wrongful entry upon the land and dispossession of the freeholder.[43] Today we regard the *disseisor* as the wrongdoer, and the *disseisee* is still the owner; but so important was the fact of *seisin* to the feudal system that *seisin* unlawfully obtained, but nevertheless maintained, was favored in one way at least, which is unknown today. The *disseisee* was reduced to a mere right of entry which was barred if the *disseisor's* heir succeeded by inheritance before the *disseisee* recovered the *seisin.* The right of entry of the *disseisee* was said to be tolled by descent cast. Thereupon the *disseisee* was put to his real action. His right of entry was gone.[44]

[38] Lit. §§ 444, 445, 459, 460; 1 Gray's Cases on Prop., 2nd ed. 356.

[39] *Ante,* § 17.

[40] Lit. § 58; Co. Lit. 46b; 1 Gray's Cases on Prop., 2nd ed. 342.

[41] *Id.*

[42] Co. Lit. 337b; 1 Gray's Cases on Prop., 2nd ed. 356.

[43] Leake, Digest of Land Law, Part I, 56; 1 Gray's Cases on Prop., 2nd ed. 357.

[44] Challis on Real Property, 2nd

Any person having actual possession could by *feoffment* invest another with the *seisin* of an estate of freehold in fee, fee tail, or for life. It made no difference that the *feoffor* had no right to possession and no *seisin* and no estate. It made no difference whether the *feoffor* of the fee had an estate for years, or for life. In any case the *feoffment* operated to invest the *feoffee* with a feudal estate as designated. In short, one could by *livery of seisin* create in another a greater estate than he had. The *feoffment* was in that case called a tortious *feoffment,* or tortious conveyance.[45] When a tenant for life made a tortious *feoffment* in fee, it operated to forfeit the life estate and at once *disseise* the reversioner or remainderman. Such was taken to be the law until Lord Mansfield determined in *Taylor v. Horde,*[46] that the *disseisin* of the remainderman or reversioner should be considered a *disseisin* at his election. He might elect to treat it as a *disseisin* and enter, or he might elect to treat the life estate as still outstanding in the tortious *feoffee.* This was an innovation, but it was also a blow at the tortious operation of *feoffments.* An Act of 8 & 9 Victoria, chapter 106, section 4, abolished all tortious operation of *feoffments.*

In this country the common-law doctrine of *disseizin* and tortious conveyance was in force to some extent in the colonies and States on the Atlantic seaboard, but the tortious effect of such conveyances has been abolished directly by statute, or ceased because the conveyance by *livery* has itself fallen into disuse.

§ 47. **Inalienability of mere rights of entry:** Today, when we regard ownership as the important thing, it would seem absurd to say that one whose land was in the possession of a *disseisor* had nothing which he could alienate. Indeed, no such rule now exists, but the person *disseised* may alienate his rights or his so-called title with entire freedom. Not so in the feudal law. Professor Maitland suggests that the feudal holder did not conceive of the *disseisee* having anything which he could convey. He had a right to repossess himself of the *seisin,* but if he did not do that, he had nothing which could be made the subject of transfer.[47]

ed. 371-374; 1 Gray's Cases on Prop., 2nd ed., 357, 358.

[45] *Id.*

[46] 1 Burr. 60.

[47] "Mystery of Seisin," 2 Law Quar. Rev. 481.

§ 48. **Inalienability of contingent future interests:** Contingent future interests which were valid under the feudal land law, such as rights of entry for condition broken, possibilities of reverter, and contingent remainders, were inalienable. The contingent remainder in particular was void till it vested. The rule of inalienability *inter vivos* of such interests has come down to the present time.[48]

[48] *Post*, § 320.

CHAPTER II.

LAND LAW UNDER THE STATUTE OF USES.

TITLE I.

USES BEFORE THE STATUTE.

§ 49. **Uses defined**: There is nothing mysterious or difficult about the conception of a use. "Use" is simply the name for what today we call a trust when speaking about the relation created where *A* holds the legal title of property as trustee for *B*. Thus, when before the time of Henry VIII., *A* was seized in fee of land for the use of *B* and his heirs, *A* had the *seisin* as trustee for *B*. *A* was called the *feoffee* to uses. *B* was the *cestui que use*. The difficulty in understanding the law of uses arises largely in determining the origin, following out the development, and observing the purposes of uses, and in perceiving the evolution which, under the Statute of Uses, went on in modes of conveying land and the estates which might be validly created.

§ 50. **Origin of uses**:[1] From the time of the Norman Conquest large amounts of land were given to religious houses. The crown and the feudal overlords became jealous of such gifts, for by them a new tenure was created, that is, *frankalmoigne* tenure. The only services required were general prayers for the donor's soul. The religious house was a corporation and the incidents of the tenure were insignificant. The Statutes of Edward I. attempted to stop these gifts in *frankalmoigne* tenure to religious houses. The Statute of *Quia Emptores* prohibited the creation of any new *frankalmoigne* tenures except by the king. The Statute of *Mortmain* prohibited the acquisition of lands by religious corporations. To avoid the Statute of *Mortmain* the religious corporations resorted to common recoveries, already described,[2] by which they pretended to recover back lands of which

[1] The description here given of the origin of uses is taken largely from Pollock on Land Laws, 89.

[2] *Ante*, § 17.

they had already been possessed and seized. In the same session of Parliament that the Statute *De Donis* was passed this device was stopped. Again the religious houses evaded the law by a conveyance to a third party for their use. This again was stopped by a Statute of 15 Richard II. (1391). The idea of taking title to land in *A* for the use of *B* survived, however, for it was found to serve a useful purpose for laymen. Thus, where the *cestui que use* was attainted, a forfeiture was avoided.[3] There was no payment to the lord on the death of the *cestui*. A number of *feoffees que use* were kept seized so that there could never be a succession of the legal *seisin* by death. The incidents of wardship and marriage were avoided, but wardship and relief were restored by a Statute of 4 Henry VII. in spite of the use.[4] The *cestui que use* practically, had power to make a will since he might by testamentary declarations direct for whose use the *feoffees que use* should hold.[5] The device of a use was also employed to avoid the payment of debts.

Uses represented a distinct movement against the feudal land law. They provided a means for mitigating the burden of the incidents of feudal tenure and of achieving a greater liberty on the part of the real owner—that is, the one who held the use —in dealing with his land as he pleased, and without the formalities of conveyancing required by the feudal law.

§ 51. **Enforcement of the use by the cestui:** At first the *cestui que use* had no standing in any court for the enforcement of the use. The *feoffees* did their duty in carrying out the provisions of the use solely by reason of the power of the church over the consciences of the *feoffees*. About the time of Edward III., however, the chancery began to enforce the use of the *cestui* against the *feoffee* by specifically requiring the *feoffee* to perform the trust.[6] At first the use was enforced only against the original *feoffees*. It was not enforced against any one who had a conveyance from the *feoffees*, even though such transferee paid no value and had full notice of the use. Later, however, the rights of the *cestui* were enforced against every one who took

[3] Anonymous, Jenk. 190 (22 H. VII.); 1 Gray's Cases on Prop., 2nd ed. 369.

[4] 1 Gray's Cases on Prop., 2nd ed. 370, note.

[5] Gilbert on Uses, 35; Bacon on Uses, 16, 20; 1 Gray's Cases on Prop., 2nd ed. 368, 369.

[6] Keilw. 42, pl. 7 (1502); 1 Gray's Cases on Prop., 2nd ed. 368.

from the *feoffees* unless he were a *bona fide* purchaser for value. In that case the *cestui* had his remedy against the *feoffees* for breach of trust. At first the heir of the surviving *feoffee* to uses was not bound by the use. Later the chancery enforced the use against him. This occurred as early as the time of Henry VI.[7] The chancery would compel the *feoffee* to uses to add to their number if the *cestui que use* so desired. The *cestui que use* could assign his use without *feoffment*, deed, attornment, or any other common-law formality, and the chancery would enforce such assignment.[8] An estate of inheritance in the use descended according to the rules of the common law or special custom.[9]

§ 52. **Position of the feoffee and cestui que use at law as distinguished from their position in the chancery:** Outside of chancery the use received no recognition in any court. Outside of chancery the *cestui* who was in possession of land was a mere tenant at will. The *feoffee* to uses held the feudal or legal title. He had the seisin and was liable for all the services and incidents of the feudal tenure.[10]

TITLE II.

THE STATUTE OF USES.

§ 53. **The Statute of Uses:** Of all the statutes affecting the law of real property the Statute of Uses is the most famous and in its effect upon the land laws the most far-reaching. The statute revolutionized the law of conveyancing and greatly increased the freedom of creating future interests in land. Nevertheless, the forces which secured the statute were reactionary. The statute was passed in the interests of the feudal lords who took alarm at the inroads upon feudal tenures which were effected by means of uses. It was their purpose by the Statute of Uses: (1) To abolish wills of real estate; (2) To prevent any conveyance which would not have been good at common law; (3) To prevent the existence of any use apart from the *seisin;*

[7] *Id.*

[8] Bacon on Uses, 16; 1 Gray's Cases on Prop., 2nd ed. 368, note.

[9] 2 Roll. Ab. 780; 1 Gray's Cases on Prop., 2nd ed. 368.

[10] Anonymous, Jenk. 190 (22 H. VII.); 1 Gray's Cases on Prop., 2nd ed., 369, 370.

(4) To destroy the secrecy of conveyances by requiring all conveyances to be effected by the common-law modes.

For accomplishing these results it was provided [11] that "where any person or persons stand or be seised, or at any time hereafter shall happen to be seised * * * to the use, confidence or trust of any other person or persons, * * * that in every such case, all and every such person and persons, * * * shall from henceforth stand and be seised, deemed and adjudged in lawful seisin * * * of and in such like estates as they had or shall have in use, trust or confidence * * *." Thus if an estate in fee were transferred to *A* and his heirs, to the use of *B* and his heirs, *A* stood seized of an estate in fee, to the use of *B* and his heirs, and *B* became at once seized of a fee by operation of the statute.

The statute only applied where one was "seized" of land to the use of another. Hence the statute only operated when a use was raised of a *freehold,* since only of a freehold was one seized. Thus, if *A* had a term for years and assigned it to *B,* for the use of *C*, the statute had no operation.[12] So long, however, as the estate held to the use of another was an alienable freehold it was not necessary that it be a freehold of which there was actual seisin. Thus, a vested remainderman, or a reversioner after a freehold, had no actual seisin [13] and yet such reversions and remainders could be transferred to uses and the statute operated.[14] This may fairly have rested upon the terms of the statute which refers to persons standing seized of "rents, services, reversions, remainders," to the use of another. But

[11] 27 Hen. VIII. c. 10 (1536); 1 Gray's Cases on Prop., 2nd ed. 372.

[12] The statute does not execute a use of personalty; Smith *v.* Smith, 254 Ill. 488.

[13] *Post,* § 30.

[14] Saunders on Uses, 5th ed. 106; 1 Gray's Cases on Prop., 2nd ed. 397. So if a rent charge is granted to A and his heirs, A was in by the common law and had no possession or seisin of the rent till the first payment was made. Orme's Case (1872) L. R. 8 C. P. 281; 1 Gray's Cases on Prop., 1st ed. 524. Nevertheless, if the same rent charge were granted to A and his heirs to the use of B and his heirs, B was in actual possession or seisin of the rent at once by the Statute of Uses. Heelis *v.* Blain (1864), 18 C. B. N. S. 90; 1 Gray's Cases on Property, 2nd ed. 404. If before the Statute of Uses would execute the use to B, A must have had an actual seisin, B could have had no actual possession or seisin by way of use till A was seized or possessed, according to the common law. It is, there-

no use could be raised by the attempted transfer of an inalienable future interest, such as a contingent remainder.[15]

TITLE III.

USES AFTER THE STATUTE.

TOPIC 1.

USES RAISED ON TRANSMUTATION OF POSSESSION.

§ 54. Defined: This rather formidable phraseology contains a simple idea. Uses are raised upon transmutation of possession when there is a transfer of the *seisin*, according to the requirements of the feudal law, to *A*, with a use raised in favor of another—let us say, *B*. The phrase "transmutation of possession" means merely that there has been a transfer of the seisin according to the requirements of the feudal land law. When such a transfer is made to *A* and his heirs, and a use is raised in any way in favor of *B*, we have a use raised on transmutation of possession.

§ 55. Transmutation of possession and an express declaration of the use: Assuming then that there is a transfer of seisin according to the requirements of the feudal land law to *A* and his heirs, what are the different ways in which a use may be raised in favor of another? The easiest method of raising the use is by an express declaration of it. Thus, if upon the conveyance to *A* and his heirs, a use be expressly declared in favor of *B* and his heirs, the use in fee is raised in *B* which the statute executes, and *B* becomes seized in fee simple.[16] Until the Statute of Frauds there was no requirement that this use should be evidenced by a writing. It could be declared orally upon the making of *livery of seisin* to *A*. But since the Statute of Frauds,[17] the declaration must be evidenced by some writing signed by the party declaring the use.

fore, plain that the statute executes all uses of freeholds which are alienable, whether there is any actual standing seized to uses or not.

[15] Saunders on Uses, 5th ed. 106; 1 Gray's Cases on Prop., 2nd ed. 397.

[16] Broughton *v.* Langley, 2 Salk. 679 (1703); 1 Gray's Cases on Prop., 2nd ed. 377.

[17] 29 Charles II. c. 3, § 7 (1676).

§ 56. **Transmutation of possession and the payment of a consideration:** If, upon the *feoffment* to *A* and his heirs, the consideration were paid by *B*, it was said that a use was raised in favor of *B*. After the Statute of Uses, however, the statute did not execute any use in favor of *B*, so that *B* would have the legal estate. When *B's* interest was enforced by the courts, it seems to have been as a trust or a use, which the statute did not execute, and not as a use which it did execute. Today it is believed to be almost universally the fact that the person paying the consideration, and taking title in the name of another, has no standing to claim the legal title. In New Hampshire, however, the court saw the logic of the position which gave *B*, the party paying the consideration, the legal title, because he had a use before the Statute of Uses and after the Statute of Uses that use must have been executed.[18]

§ 57. **Transmutation of possession, declaration of the use by one and payment of the consideration by another:** Suppose, upon a *feoffment* to *A* and his heirs, there is a use declared in favor of *B* and his heirs, but as a matter of fact *C* pays the consideration. Here there is a conflict between the declaration of the use and the payment of the consideration. Assuming that a use is raised by the payment of a consideration alone yet where the consideration is paid by one, and there is a declaration of use for another, the declaration of the use prevails over the payment of the consideration and the use will be in favor of *B* in the case put.[19]

§ 58. **Resulting uses:** There might be a resulting use, or use by operation of law, without any declaration of use or payment of any consideration. Thus, where there was a *feoffment* to *A* and his heirs for the use of *B* for life, there would be a *resulting use of reversion on partial use* in favor of the *feoffor*.[20] So, where there was a *feoffment* to *A* and his heirs, but no consideration was paid by *A* or any one else, and no declaration of the use, and no evidence indicating that *A* was intended

[18] Hutchins *v.* Heywood, 50 N. H. 491; Osgood *v.* Eaton, 62 N. H. 512; Fellows *v.* Ripley, 69 N. H. 410.

[19] Same's Case, 2 Roll. Ab. 791 (1609); 1 Gray's Cases on Prop., 2nd. ed. 376.

[20] Leake, Digest of Land Law, 107, 108; 1 Gray's Cases on Prop., 2nd ed. 381, 382.

to have the beneficial ownership, there was a resulting use of the fee in favor of the *feoffor*. There was, in short, an inference that the *feoffor* intended a secret use for himself. No doubt this inference was justified prior to the Statute of Uses. It was then no doubt extremely common to make *feoffments* upon secret resulting uses for the *feoffor*. But it has been suggested that at the present day no such inference ought to be made. It was held as late as 1756 in England that there would be a resulting use to the *conusor* of a fine.[21] There is no resulting use, however, where upon a *feoffment* to *A* a use is declared to *A*, or *A* pays the consideration. Upon such a transaction *A* did not take because the use was declared to him, or because he paid the consideration. He took by force of the common-law conveyance. The rule was that where he could take the legal title by the common law, he did so and did not take it by the Statute of Uses. The declaration of the use in favor of *A*, or the payment of a consideration by *A*, was in that case merely rebutted the resulting use. A consideration paid by *A*, however slight, was sufficient by itself to rebut any possible resulting use. Thus, where *A* was the owner in fee, subject to a term for years, and, by release, granted the reversion to the tenant for years, without any declaration of the use, or any payment of consideration, the resulting use was held to be rebutted by the fact that the releasee, the tenant for years, paid a consideration by the extinguishment of the lease.[22] So where a *feoffment* was made to *A* for life, or to *A* in tail, or where *A* was given a term for years, the tenure created between *A* and the *feoffor*, rebutted any resulting use of the estate actually attempted to be created.[23]

Where a *feoffment* was made to *A* and his heirs for the use of the *feoffor* for life, the resulting use of reversion on partial use was to *A*, for, if it had been to the *feoffor*, then the whole transaction would have resulted in the *feoffor's* having the fee as if he had made no conveyance.[24] On the other hand, if a

[21] Armstrong *v.* Wholesey, 2 Wils. 19; 1 Gray's Cases on Prop., 2nd ed. 378.

[22] Shortridge *v.* Lamplugh, 2 Salk. 678; 1 Gray's Cases on Prop., 2nd ed. 376.

[23] Leake, Digest of Land Law, 107, 108; 1 Gray's Cases on Prop., 2nd ed. 382.

[24] Dyer, 111b, in marg.; Leake, Digest of Land Law, 107, 108; 1 Gray's Cases on Prop., 2nd ed. 375.

feoffment were made to *A* and his heirs for the use of the *feoffor* in tail, the resulting use of reversion on partial use was in favor of the *feoffor,* because it was proper and even customary for one to have an estate tail and a reversion or remainder in fee to himself afterwards.[25] Finally, it should be noted that all resulting uses are in fee.[26] Thus if *X enfeoffs A* and his heirs, to the use of *B* and his heirs, from and after the death of *X,* the resulting use to *X* is in fee and not for life.

TOPIC 2.

USES RAISED WITHOUT TRANSMUTATION OF POSSESSION.

§ 59. Defined: Today there is no objection to one who has the legal title to land executing a declaration of trust which turns himself into a trustee for such persons as he may name. So before the Statute of Uses, there was no objection to one seized of land executing a covenant or a contract by which he declared that he stood seized of this land to the use of another. When this was done with certain formalities, about to be mentioned, a use was raised by the one seized of land, without any transfer whatever of the *seisin.* The *seisin* remained where it was and the holder of that *seisin* simply declared to whose use he held it. After the Statute of Uses this use so declared was executed by the statute and *seisin* passed at once to the *cestui que use.* This declaration of the use might become effective in two ways, either by what was known as a "valuable" consideration paid, or by a consideration of blood relationship in the person for whom the use was declared. The former was called a "bargain and sale"; the latter, a "covenant to stand seized."

§ 60. The bargain and sale and Statute of Enrollments: A bargain sale was merely the declaration by one seized that he held the seisin for the use of another. It was essential to the enforcement of this declaration of use, as a use, that some valuable consideration be paid to the one declaring the use. The consideration, if valuable, might be ever so slight. Thus, a declaration of use in consideration of the payment of a peppercorn was an enforceable use before the Statute of Uses. The

[25] *Id.*

[26] 2 Hayes on Conveyancing, 5th ed. 464, 465; 1 Gray's Cases on Prop. 2nd ed. 380.

effect of the Statute was naturally to execute the use so raised and by this means confer upon the *cestui* the legal *seisin*. This, of course, at once permitted the transfer of the legal title without any formality whatever, which was so contrary to the desires of those seeking the passage of the Statute of Uses, that the Statute of Enrollments was at once enacted,[27] providing that bargains and sales of freeholds to be valid must be evidenced by a writing indented, sealed, and enrolled in one of the king's courts of record at Westminster. Thus, the possibility of conveying a legal title by bargain and sale without any formality whatever, and by *parol* was apparently avoided.

§ 61. The Statute of Enrollments avoided by the "lease and release": So great was the desire of the English landowner to preserve the secrecy in designating the beneficial interests of the land which had been enjoyed before the Statute of Uses, that the ingenuity of conveyancers was taxed to the utmost to devise a means of avoiding the enrollment in the public records required by the Statute of Enrollments. A loophole in the statute was found by reason of the fact that it applied only to bargains and sales of "freeholds." It, therefore, followed that it did not apply to the bargain and sale of a term for years. It followed then, that one seized in fee could orally, upon a valuable consideration, however slight, declare himself seized to the use of *A* for a term of years. The statute at once executed the use and *A* had the term, and the bargainor had the reversion. Under these circumstances the bargainor could make a common law conveyance by way of release to *A*, and by this means the fee would be transferred. No enrollment was required for the release. By the simple process then of first making a lease for one year to *A*, and then making a release of the fee to *A*, *A* was in possession of the fee without any common law formality of *livery of seisin*, or any formality of enrollment under the Statute of Enrollments. The secrecy of the conveyance was preserved.

At common law the lease, to have been wholly effective, required an entry by the lessee, and the conveyance by way of release would have been ineffective at common law unless the lessee had actually entered. But the force of the Statute of

[27] 27 Hen. VIII., c. 16 (1536); 1 Gray's Cases on Prop., 2nd ed. 382.

Uses was to give to the lessee the legal title of the term *without entry,* so that the release to the lessee was sufficient by the common law, although the lessee had not entered.[28] That enabled the lease and release, to be drawn in a solicitor's office in London, many miles away from the land intended to be conveyed. Not even the formality of the tenant's entering upon possession before the release was made, was necessary to the effectiveness of the lease and release. It became customary to draw the lease and release as one instrument, the first part being a lease for one year, and the second part, the release. Both were executed at the same time. These two instruments taken together were known as a single conveyance by way of "lease and release."[29]

§ 62. No particular form of words is necessary to make a bargain and sale: It is not necessary that the one seized of land should in terms declare that he stands seized, or contract or covenant that he stands seized, to the use of another. That is, in fact, what he does; but, if he merely purports to convey to another, and that other pays the proper consideration, it is as effective as if the one seized had covenanted or declared that he stood seized to the use of the one paying the consideration.[30] Thus, if the one seized executes an instrument in which he purports to convey to *A* and his heirs, in consideration of £5 paid by *A*, the instrument is sufficient in form for a bargain and sale. If signed, sealed, and enrolled according to the Statute of Enrollments, it is a valid bargain and sale. If the instrument is under seal and the consideration is recited to have been paid, although it is not actually paid, still the presence of the seal upon the instrument prevents the grantor from denying that *some* consideration was paid. It, therefore, prevents him from showing that a state of facts exists which would deprive the instrument of the characteristics of a bargain and sale. It must, therefore, as between the parties, be taken as sufficient in form for a bargain and sale. That is the reason

[28] Lutwich *v.* Mitton, Cro. Jac. 604 (1620); Gray's Cases on Prop., 2nd ed. 388; Barker v. Keete, Freem. 249 (1678); 1 Gray's Cases on Prop., 2nd ed. 389.

[29] Williams on Real Property, 13th ed. 187-189; 1 Gray's Cases on Prop., 2nd ed. 395.

[30] Edward Fox's Case, 8 Co. 93b (1610); 1 Gray's Cases on Prop., 1st ed. 489.

for the continued recital at the present day of the payment of a consideration which, in many cases, is not actually paid, and is known by both parties not to have been paid.

§ 63. **Covenants to stand seized:** The special characteristic of the bargain and sale is that it is founded upon a valuable consideration paid to the bargainor. If, however, the use, in an instrument under seal, is declared in favor of a blood relative of the bargainor, it is said to be founded upon a *good* as distinguished from a *valuable* consideration; and the use is validly created in favor of the blood relative. The technical name given to this declaration of use is a "covenant to stand seized." Thus, if *A* being seized in fee, purports to convey, by an instrument under seal, to *B*, his cousin, all the elements are present to furnish the basis for a valid declaration of a use and a covenant to stand seized.[31] The Statute of Enrollments has no application. If the blood relationship exist and the instrument is under seal, the form of it is immaterial. It may be in form a direct conveyance by *A* to the blood relation.[32] There could, however, be no effective covenant to stand seised of lands afterwards to be acquired and of which there was no seisin at the time of the covenant.[33]

§ 64. **Summary:** To illustrate the application of the above principles concerning the raising of uses by bargain and sale, and covenants to stand seized, and the transfer of the legal title by means thereof, under the Statute of Uses, consider the following three problems:

Suppose *A*, in consideration of one dollar, conveys to *B* and his heirs. The instrument is signed but not under seal. Is it a good bargain and sale? Apart from the Statute of Enrollments it is. It complies with the Statute of Frauds because it is in writing, and signed by *A*. If it fails as a bargain and sale it is because the Statute of Enrollments is applicable. If the question arises in this country it may be argued that the Statute of Enrollments has no application. The fact that the

[31] Sharington *v.* Strotton, Plowd. 298 (1565); 1 Gray's Cases on Prop., 2nd ed. 384; Callard *v.* Callard, Moore, 687 (1593); 1 Gray's Cases on Prop., 2nd ed. 386.

[32] Roe *v.* Tranmer, 2 Wils. 75 (1757); 1 Gray's Cases on Prop., 2nd ed. 391.

[33] Yelverton *v.* Yelverton, 1 Cro. El. 401 (1594); 1 Gray's Cases on Prop., 2nd ed. 387.

Statute of Enrollments requires enrollment in one of the king's courts of record at Westminster, or else in the county where the land lies, obviously makes it inapplicable to the colonies, and consequently it has not come down to us through our colonial governments. If the Statute of Enrollments does not apply, so far as enrolling is concerned, it might fairly be argued that it did not apply at all because it should not be taken to apply in part only.[34] Hence, in this country no seal is necessary to the validity of a bargain and sale. Some courts, however, in this country are found holding blindly that the legal title cannot be conveyed without an instrument under seal.[35] The misconception has arisen by following the dogmatic statement of Blackstone that to every conveyance of land in England without *livery of seizin* a seal is necessary.[36] That statement is perfectly sound for England, for there the Statute of Enrollments applied and required the seal.

Suppose *A*, in consideration of $...., conveys to *B* and his heirs. *A* signs and the instrument is under seal. As sometimes happens the blank for the consideration is not filled in, and no consideration is, in fact, paid. The instrument is not good as a bargain and sale because no consideration was paid or recited. If *B* is a blood relative, the conveyance is good as a covenant to stand seized.

If *A* conveys to *B* with the amount of the consideration left blank, and *B* is a stranger and no consideration is in fact paid, then even though it be under seal it fails both as a bargain and sale and as a covenant to stand seized.[37]

TOPIC 3.

OPERATION OF THE STATUTE—USES WHICH THE STATUTE DID NOT EXECUTE.

§ 65. Operation of the Statute: The Statute of Uses operated to place the legal *seisin* and title at once in the *cestui que*

[34] Tiedemen, Real Property, 3rd ed., § 542.

[35] Jackson v. Wood, 12 Johns. (N. Y.) 73 (1815); 3 Gray's Cases on Prop., 1st ed. 233; Watts *v.* Parker, 27 Ill. 224; Barger *v.* Hobbs, 67 Ill. 592; Barrett v. Hinckley, 124 Ill. 32; Irwin *v.* Powell, 188 Ill. 107; Ashelford *v.* Willis, 194 Ill. 492; Wilson *v.* Kruse, 270 Ill. 298, 302. See also, Maupin on Marketable Title to Real Estate, 2nd ed., § 22.

[36] 2 Bl. Com. 297, 312.

[37] It would seem that title should

use. It followed that the *cestui* could bring an action of trespass against any stranger for entering, although the *cestui* had not entered.[38] The statute also operated to convey the estate or interest designated in the *cestui* without any common law formality. Thus the use of a term placed the possession of the term in the tenant without entry.[39] The use of a reversion or remainder transfered the reversion or remainder without any attornment.[40]

§ 66. Suppose A, seized in tail or for life, were directed to hold to the use of one in fee: It was the law before the statute that such a use, enforcible in chancery, could not arise out of the *seisin* of a tenant in tail.[41] It followed that after the statute no such use would be executed. The use was void and the feoffee had the estate tail limited to him.[42] If, however, the feoffee to uses were seized of a life estate, the use to another would be executed by the statute, but not for a greater estate than the life estate of the feoffee.[43]

§ 67. Uses which the statute did not execute: (1) It has already been observed that where there was a *feoffment* to *A* and his heirs for the use of *A*, the statute did not operate. *A* was in by the common law and the declaration of the use simply rebutted any possible resulting use.[44] If, however, there was a *feoffment* to *A* and his heirs for the use of *A*, *B*, and *C*, all were in by the statute, since they could not be in by the common law.[45]

pass in Illinois by virtue of R. S. 1874, ch. 30 sec. 1. But see, Redmond *v.* Cass, 226 Ill. 120; Catlin Coal Co. *v.* Lloyd, 180 Ill. 398; 2 Ill. Law Rev., 269.

[38] Anonymous Cro. El. 46 (1582); 1 Gray's Cases on Prop., 2nd ed. 396. But see Lutwich *v.* Mitton, Cro. Jac. 604 (1620); 1 Gray's Cases on Prop., 2nd ed. 388.

[39] Lutwich *v.* Mitton, *supra;* Barker *v.* Keete, Freem. 249 (1678); 1 Gray's Cases on Prop., 2nd ed. 389.

[40] Gilbert on Uses, 73; 1 Gray's Cases on Prop., 2nd ed. 396; Taylor *v.* Vale, Cro. El. 166 (1589); 1 Gray's Cases on Prop., 2nd ed. 385; Co. Lit. 309a, b; 1 Gray's Cases on Prop., 2nd ed. 354. *Quaere:* Must there have been an attornment till the Statute of Anne (*ante*, § 43), in order that the assignee might collect rent?

[41] Anonymous, Bro. N. C. by March, 89; 1 Gray's Cases on Prop., 1st ed. 465.

[42] Cooper *v.* Franklin, Cro. Jac. 400; 1 Gray's Cases on Prop., 2nd ed. 411. *Compare*, Dick *v.* Ricker, 222 Ill. 413, 419.

[43] Bacon on Uses, 47; Gilbert on Uses, 297; Cruise on Uses, 96; Meredith *v.* Joans, Cro. Car. 244.

[44] *Ante*, § 58; Orme's Case, L. R. 8 C. P. 281 (1872); 1 Gray's Cases on Prop., 1st ed. 524.

[45] Heelis *v.* Blain, 18 C. B. N. S.

(2) Another use which the statute would not execute has already been referred to. Since the statute operated only when one person was seized to the use of another, it followed that whenever the person holding an estate to the use of another had less than a freehold estate, for instance, a term for years, and was holding that for the use of another, the use was not executed by the statute.[46] Although, however, there was no actual *seisin* in a reversioner or vested remainderman after an estate of freehold, yet such a reversioner or remainderman could limit the future interest to uses which the statute would execute.[47] But a contingent remainderman clearly could not do so because he had no alienable interest.

(3) The statute would not execute a use on a use. That is to say, if there were a *feoffment* to *A* and his heirs to the use of *B* and his heirs to the use of *C* and his heirs, the statute would execute the first use to *B* and his heirs, but not the second.[48] The legal estate, therefore, would be in *B*. Suppose *A* bargains and sells Blackacre to *B* and his heirs, to the use of *C* and his heirs. Who have what *legal* estates? The bargain and sale is in fact a declaration by *A* that he stands seized to the use of the bargainee. *A*, therefore, stands seized, for a valuable consideration, to the use of *B* and his heirs, to the use of *C* and his heirs. The first use is in *B* and the second use is in *C*, and the statute, therefore, executes only the use in *B*, and *B* has the legal estate.[49]

Suppose a *feoffment* or release to *A* and his heirs to the use of *A* and his heirs to the use of *B* and his heirs. Is the use of *B* and his heirs the first use or the second use? It is submitted that it might have been held that since *A* was in by the common law, and not by the Statute of Uses, the use to *B* was the first use. It was settled, however, that *B's* use was the second use.[50]

90 (1864); 1 Gray's Cases on Prop., 2nd ed. 404.

[46] *Ante*, § 53; Symson and Turner, 1 Eq. Cas. Ab. 220, pl. 1, 383, note; 1 Gray's Cases on Prop., 2nd ed. 411; Bacon on Uses, 42; 1 Gray's Cases on Prop., 2nd ed. 411, note 2.

[47] *Ante*, § 53.

[48] Symson and Turner, 1 Eq. Cas. Ab. 220, pl. 2, 383, note; 1 Gray's Cases on Prop., 2nd ed. 411.

[49] Tyrrel's Case, Dyer, Pt. II, 155a (1557); 1 Gray's Cases on Prop., 2nd ed. 410.

[50] Doe *v.* Passingham, 6 B. & C. 305; 1 Gray's Cases on Prop., 2nd ed. 412; Watkins *v.* Specht, 7 Coldw. (Tenn.) 585.

The use *on* a use must be distinguished from a use *after* a use. Thus, where *A* stands seized or is *enfeoffed* to the use of *B* for life to the use of *C* in fee, *C's* use is a use *after* a use, and not a use *on* a use. So where *A* is *enfeoffed* or stands seized to the use of *B* in fee, but if *B* dies without issue him surviving to *C* in fee, *C's* interest is a valid future interest.[51] *C's* interest is not a use on a use, but a use after a use. In other words, *A* stands seized of a use for *B*, and then for *C*. *A* does not stand seized to the use of *B*, who is then to stand seized to the use of *C*.

(4) If there were any active duties put upon the person standing seized to the use of another the statute would not execute the use. Thus if a *feoffment* were made to *A* and his heirs, to receive and pay over the rents and profits to *B* and his heirs, the statute would not execute the use in *B* because of the intention expressed that *A* was to continue in the *seisin* and legal estate for the purpose of receiving and disbursing the rents and profits.[52] If, however, the *feoffment* is to *A* and his heirs with a direction that *B* shall take the rents and profits, this makes a use in *B* which the statute will execute.[53] Modern cases frequently have to deal with the distinction between trusts without active duties which are uses executed by the statute, and trusts with active duties which remain trusts.[54]

[51] *Post*, § 72.

[52] Note (1544), Bro. Ab. Feoff. al Uses, 52; 1 Gray's Cases on Prop., 2nd ed. 410; Symson and Turner, 1 Eq. Cas. Ab. 220, pl. 1, 383, note; 1 Gray's Cases on Prop., 2nd ed. 411. But compare Appeal of Rodrigue, 15 Atl. 680 (Pa.)

[53] Note (1544) Bro. Ab. Feoff. al Uses, 52; 1 Gray's Cases on Prop., 2nd ed. 410. Smith *v.* Smith, 254 Ill. 488.

[54] See cases cited *post*, § 69.

It is sometimes difficult to tell whether the trustee is given any active duties or not. For instance, if the conveyance is to A and his heirs upon trust to convey to B, C and D, or to convey to B and the heirs of his body, the context may indicate that the direction to "convey" is used merely to indicate the use or beneficial ownership. In that case there are no active duties and the use is executed by the statute. (See Lynch *v.* Swayne, 83 Ill. 336; Uzzell *v.* Horn, 71 S. C. 426; Adams *v.* Guerard, 29 Ga. 651.) The context may, however, show that in the direction to convey active duties were clearly provided. This is so where the special context indicates that a settlement is to be made by the trustee with more complete and detailed provisions than the direction to convey express. Thus, if the conveyance is to A and his heirs upon trust to convey to B for life and then to B's heirs, the court may very properly treat this as an executory trust and make a settle-

(5) It has already been suggested that where a *feoffment* was made to *A* and his heirs, and nothing more was said, but *B* paid the consideration, there was a use in favor of *B* before the Statute of Uses. Did the Statute of Uses execute this use? The matter is somewhat obscure and perhaps there is no express adjudication upon the point, but the fact that the rights of *B* were ultimately enforced in equity, as a trust against *A*, leads to the conclusion that the Statute of Uses did not execute the use raised in favor of *B*.[55]

§ 68. Status of uses which the statute did not execute: Professor Ames was of opinion that for perhaps a century after the Statute of Uses they were void, or at least unenforceable.[56] About a century after the statute, however, the uses which the statute did not execute came to be enforced by the chancery in the same manner in which uses were enforced by the chancery before the statute. In short, they came back into the law as the modern trust.

§ 69. Whether or not the statute executes a use is to be determined finally at the time the use is created: If the transferee to uses (apparently taking the fee) is given no active duties whatever he clearly takes the fee and the beneficial interests are uses executed by the statute. Thus, where the conveyance is to *A* in fee, upon trust for *B* in fee, the statute executes the use and *B* and his heirs have the fee at once.[57] So where the conveyance is to *A* and his heirs in trust for *B* for life and then to *C* in fee, *B* and *C* have legal estates—*B* the life estate and *C* the remainder in fee.[58]

ment, and when the settlement is made under the direction of a court of equity it will be so molded as to prevent the application of the rule in Shelley's Case. *Post*, § 430.

If the transfer is to A and his heirs upon trust to *divide* among B, C and D, the context may indicate that "divide" is used merely to indicate the use or beneficial ownership, in which case there will be no active duties and the use will be executed by the statute. (Drake *v.* Steele, 242 Ill. 301; Moll *v.* Gardner, 214 Ill. 248; Reeves *v.* Brayton, 36 S. C. 384.) Another context may show that there was imposed upon the trustee an actual active duty to divide. In that case the statute did not operate. (Bowen *v.* Humphreys, 24 S. C. 452.)

[55] See *ante*, § 56, where the New Hampshire cases *contra* are noted.

[56] Ames' Lectures on Legal History, 243-247.

[57] Witham *v.* Brooner, 63 Ill. 344.

[58] O'Melia *v.* Mullarky, 124 Ill. 506; Barclay *v.* Platt, 170 Ill. 384; Drake *v.* Steel, 242 Ill. 301; Smith *v.* Smith, 254 Ill. 488, 492; Little

If, however, active duties are imposed upon the trustee and they are so extensive as to require him to take the fee,[59] then no use will be executed by the statute.[60] If the active duties cease the trustee will still retain the legal title and the trusteeship must be closed by a conveyance from the trustee.[61] It cannot be properly said that the use is executed by the statute when the active duties of the trustee cease.[62] The statute executes the use, if at all, only at the time the use is created.

v. Bowman, 276 Ill. 125; Newcomb *v.* Masters, 287 Ill. 26.

[59] *Post*, §§ 183 *et seq.*

[60] Leary *v.* Kerber, 255 Ill. 433; McFall *v.* Kirkpatrick, 236 Ill. 281; Burbach *v.* Burbach, 217 Ill. 547 (*semble*); Chicago Term. R. R. Co. *v.* Winslow, 216 Ill. 166, 175; Binns *v.* LaForge, 191 Ill. 598 (*semble*); Lawrence *v.* Lawrence, 181 Ill. 248, 251; King *v.* King, 168 Ill. 273 (*semble*); Hart *v.* Seymour, 147 Ill. 598; Preacher's Aid Soc. *v.* England, 106 Ill. 125; Kirkland *v.* Cox, 94 Ill. 400; Meacham *v.* Steele, 93 Ill. 135, 143, 146; Ames *v.* Ames, 15 R. I. 12; Henson *v.* Wright, 88 Tenn. 501.

[61] McFall *v.* Kirkpatrick, 236 Ill. 281; Kirkland *v.* Cox, 94 Ill. 400; Vallette *v.* Bennett, 69 Ill. 632; Doe *v.* Edlin, 4 Ad. & El. 582; Doe *v.* Field, 2 B. & Ad. 564; Ayer *v.* Ritter, 29 S. C. 135; Huckabee *v.* Newton, 23 S. C. 291; Dakin *v.* Savage, 172 Mass. 23, 26.

It has been said, however, that such conveyances might be presumed from lapse of time. Kirkland *v.* Cox, 94 Ill. 400, 413; Uzzell *v.* Horn, 71 S. C. 426.

[62] Expressions to the contrary in the following cases must, since McFall *v.* Kirkpatrick, 236 Ill. 281, be regarded as overruled: Harris *v.* Cornell, 80 Ill. 54, 67; McNab *v.* Young, 81 Ill. 11, 14; Lynch *v.* Swayne, 83 Ill. 336; Moll *v.* Gardner, 214 Ill. 248; Cary *v.* Slead, 220 Ill. 508, 512; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238.

In Kirkland *v.* Cox, 94 Ill. 400, 413, the court said: "In Harris *v.* Cornell, 80 Ill. 67, it was said, referring to Hardin *v.* Osborn, Sept. T., 1875, that it had been held the purposes of a trust having been accomplished, the owner of the trust became, by operation of law, reinvested with the legal title and could sue in ejectment. This was unadvisedly said. A rehearing was granted in Hardin *v.* Osborn, and the opinion therein referred to was withdrawn. In McNab *v.* Young, 81 Ill. 11, language of like import as that used in Harris *v.* Cornell, *supra*, was used upon the authority of the same case, although it is therein erroneously referred to as being reported in 60 Ill. at p. 93."

In Moll *v.* Gardner, *supra*, the decree which was affirmed directed a conveyance by the trustee but held the interest of those entitled subject to judgments. This might go on the ground that the judgments were a lien on a bare equitable interest or that the trustee had only an estate for a term of years with a legal fee in the ultimate beneficiary.

In Cary *v.* Slead, *supra*, a bill was filed by a beneficiary ultimately en-

Suppose that the trustee is given some active duties but they are so far limited that, under the rule that the trustee takes only such estate as his active duties require, he has only an estate for years or for the life of the life tenant.[63] Under these circumstances the legal estate in fee, subject to the term or the life estate as the case may be, is limited to the beneficiary by direct words of grant or devise and not at all because the statute of uses executes a use when the active duties of the trustee cease. The statements by courts in such cases that the statute executes the use when the active duties of the trustee cease,[64] while not

titled for the purpose of ending the trust and securing the conveyance from the trustee. A decree dismissing the bill upon the sustaining of a demurrer was reversed because the time had come to terminate the trust. The remarks of the court about the beneficiary having the legal title without a conveyance were *obiter*, inadvertent and apparently said rather by way of emphasizing the fact that the trusts were ended.

In Reichert *v.* Mo. & Ill. Coal Co., *supra*, the limitation involved was the usual one providing for successors in trust in a deed of trust. It in effect provided a shifting use of the legal title from the old trustees to the new trustees. The court very properly said that the statute of uses executed the shifting use in the successors in trust. (*Post*, § 444.)

Where a debt secured by mortgage or trust deed is barred by the statute of limitations the legal fee is in the mortgagor. This has been supported on the ground that the mortgagee had a determinable fee which came to an end when the debt was barred. (*Post*, § 230.) The results obtained in this line of cases, whether right or wrong, do not lend any support to a rule that when the active duties of the trustee terminate the trustee's title terminates and a use is executed in the beneficiary.

In the following cases outside of this state the language used by the courts apparently upholds the proposition that when the trustee's active duties cease a use is executed in favor of the beneficiary. These, however, are cases where the trustee had active duties in favor of a life tenant and a trust "to convey" after the death of the life tenant to the named beneficiary. It is difficult to tell whether the legal title vested in the ultimate beneficiary because of the Statute of Uses or because the trustee had only such legal estate as his active duties required and that his active duties only required an estate for the life of the life tenant,—the further trust to convey being construed as a mere designation of the beneficiary and not as imposing an active duty upon the trustee to make any conveyance: Bacon's Appeal, 57 Pa. St. 504; Westcott *v.* Edmunds, 68 Pa. St. 34; Chamberlain *v.* Maynes, 180 Pa. St. 39; Welch *v.* Allen, 21 Wend. (N. Y.) 147; Watkins *v.* Reynolds, 123 N. Y. 211.

[63] *Post*, §§ 183 *et seq.*

[64] See Moll *v.* Gardner, 214 Ill. 248.

correct, do no harm so far as the result is concerned, because the same result would be reached by applying the rule which limits the extent of the estate which the trustee takes. Since *McFall v. Kirkpatrick*,[65] it must be regarded as improper in Illinois to assert that the ultimate legal estate in fee is the result of the operation of the Statute of Uses.

TOPIC 4.

ESTATES AND LIMITATIONS BY WAY OF USE.

§ 70. Estates of freehold and less than freehold in possession: These could all be created by way of use. Thus, by limitations to uses there could be created a fee simple, a fee tail, a life estate, a term for years or at will, and the joint estates recognized by the feudal law. For the creation of a fee simple or fee tail by way of use the common law rule which required the word "heirs" to be used, prevailed.[66] The use must be to *A* and his "heirs" or to *A* and the "heirs" of his body. If "heirs" were not used, a life estate only was created no matter how clearly it was expressed that the *cestui que use* was to have the fee or the fee tail.

Under the feudal system of land law, *A* being seized in fee could not cause himself to be seized for life with remainder to another unless he first *enfeoffed* a third person, who then made *livery of seizin* to *A* for life with remainders over. Under the Statute of Uses, however, it was possible for *A* to bargain and sell or covenant to stand seized to the use of himself for life with remainders over, and the statute would execute all the uses and confer the estates named. So if *X* being seized in fee *enfeoffed* *A* and his heirs, to the use of *X* and *Y*, or to the use of *X* for life, with remainder to *Y*, or to the use of *A* for life, remainder to the use of *X*, the uses were all properly created and executed.[67] This mode of conveying was of practical value where one trustee wished to increase the number of trustees. By

[65] 236 Ill. 281.

[66] *Per* Walmesley, J., in Corbet's Case, 1 Co. 83b, 87b (1600); 1 Gray's Cases on Prop., 2nd ed. 402.

[67] Sanders on Uses (5th ed.) 134; 1 Gray's Cases on Prop., 2nd ed. 397; Gilbert on Uses (Sugden's ed.) 150-152, note; 1 Gray's Cases on Prop., 2nd ed. 403-404, note.

lease and release he would convey to *X* to the use of himself and the additional trustees.[68]

§ 71. Future interests—Those permitted by the feudal land law could be created by way of use: Reversions by way of resulting use on partial use were created as already described.[69] Remainders by way of use which correspond to the remainders which the feudal law held valid, and which are properly called vested remainders, because they stand ready throughout their continuance to take effect in possession, whenever and however the preceding estate of freehold determines, so that no gap can possibly occur, are valid. Remainders by way of use, corresponding to what the common law called contingent remainders, because limited upon an event which might not happen until after the termination of a particular estate of freehold, so that the fatal gap might occur, were at least conditionally valid as under the feudal land law.[70] So reversionary interests, and non-contingent future interests, by way of use subject to terms for years, were valid, as under the feudal land law.

§ 72. Future interests not permitted by the feudal land law were valid when created by way of use—(1) Springing and shifting uses: A springing future interest is one limited upon an event which makes it certain that a gap will occur between the future interest and the preceding estate of freehold actually limited, or which is limited to take effect *in futuro* without any preceding estate expressly created.[71] Thus, where the limitations are to *A* for life, and one year after *A's* death to *B* in fee, *B's* is a springing interest. So if the limitations are to *B* in fee from and after the death of *A* (who has no estate at all), *B's* is a springing future interest. A shifting future interest is one which is limited upon an event which made it sure to take effect, if at all, by cutting short, or lapping over upon the preceding interest expressly created.[72] Thus, where the limitations were to *A* in fee, and if he died without issue him surviving, then to *B* in fee, *B* had a shifting future interest.

[68] Sanders on Uses, (5th ed.) 134; 1 Gray's Cases on Prop. 2nd ed. 397.

[69] *Ante*, § 58. See also Leake, Digest of Land Law, 112, 113; 1 Gray's Cases on Prop., 2nd ed. 403.

[70] Whether they were not wholly valid and released from the feudal rule of destructability is considered, *post*, § 77.

[71] *Ante*, § 26.

[72] *Id.*

Both springing and shifting future interests were wholly void by the feudal law;[73] but both came to be entirely valid when created by way of use.

Thus, suppose *X*, being seized in fee, *enfeoffed A* and his heirs to the use of *Y* for life and one year after *Y's* death, to the use of *B* and his heirs, or to the use of *B* and his heirs after four years, or after the death of the *feoffor*. In all these cases *B* had a valid springing future interest by way of use.[74] It came to be called a springing use. In the same way *X*, being the owner in fee, might, by bargain and sale, or covenant to stand seized, declare a use in favor of *A* for life and one year after *A's* death to *B* and his heirs; or to *B* and his heirs after four years; or to *B* and his heirs from and after the bargainor or covenantor's death.[75] It has been said that a bargain and sale could not be made to a person not *in esse*, because there was no one in being to pay the consideration. Professor Gray, however, was of the opinion that a bargain and sale could be made if a third party paid the consideration, as well as where the bargainee paid it. If that be so, then he must be correct in his conclusion that a bargain and sale could be made even in favor of a person not *in esse*.[76] So if *X* being seized in fee *enfeoffs A* and his heirs, to the use of *B* in fee, and if *B* die without issue him surviving, to *C* in fee, *C* has a valid shifting future interest by way of use. It is properly called a shifting use. In the same way *X* may bargain and sell, or covenant to stand seized, to the use of *B* in fee, and if *B* die without issue him surviving, to *C* in fee. In that case also *C* has a valid shifting future interest by way of use.[77]

§ 73. (2) **Powers**: The validity of estates created by the exercise of a power of appointment, created by way of use, naturally followed from the ability to create shifting and springing future interests by way of use. Estates created by the exercise of a power of appointment were in fact nothing but springing or shifting future uses. Thus if *X* being the owner in fee *enfeoffed A* and his heirs, to such uses as *B* should appoint, and *B* subse-

[73] *Id.*

[74] Leake, Digest of Land Law, 112, 113; 1 Gray's Cases on Prop., 2nd ed. 402, 403.

[75] *Id.*

[76] Gray's Rule Against Perpetuities, §§ 61 *et seq.*

[77] Leake, Digest of Land Law, 112, 113; 1 Gray's Cases on Prop., 2nd. ed. 403.

quently appointed the fee to *C*, *C* in fact received his fee as if it had been limited as part of the original conveyance creating the power. *C* takes from *X* by reason of *X's feoffment* to uses, and not from *B*, the person appointing. *C's* interest is a perfect instance of a springing use. The use might be to *B* and his heirs, with power in *B* to appoint. Upon *B's* appointment to *C* and his heirs, *B's* fee would be divested in favor of *C* and *C's* estate would be a shifting future use.

Powers may also be created by way of bargain and sale, or covenants to stand seized. It should be observed, however, that the appointee must come within the consideration. This is especially important in a covenant to stand seized where the appointee must be a blood relative of the creator of the power. An early case went further and decided that, in the deed creating the power, the power must be in terms restricted so that appointment can only be made to blood relations.[78] But this has been thought to be a doubtful restriction at the present day. It would seem that it ought to be enough that the appointment was in fact to a blood relative.

§ 74. (3) **Limitations to classes by way of use:** Under the feudal system of land law if *A* made *livery of seisin* of Blackacre to *B* and his children "born and to be born," only the children of *B in esse* at the time of the *feoffment* would take. If the after-born child had been allowed to take, it would obviously have resulted in divesting *pro tanto* the *seisin* already held, and would in effect have created a shifting future interest.[79] By a conveyance to uses, however, such a shifting estate might be created. If a use were raised to *B* and his children "born and to be born," all the children would take according to the expressed intent.[80]

§ 75. Conveyance creating estates will take effect in any way possible: It is now clear that estates and future interests which are void or impossible when created by a feudal mode of conveyance, may be valid when created by a conveyance operat-

[78] Mildmay's Case, 1 Co. 175 (1582); 6 Co. 40a (1605); 1 Gray's Cases on Prop., 2nd ed. 398; Kales' Cases on Future Interests, 1215, notes.

[79] *Ante*, § 26.

[80] Mellichamp *v.* Mellichamp, 28 S. C. 125 (1888); Kales' Cases on Future Interests, 236. *Contra*, Miller *v.* McAlister, 197 Ill. 72 (1902); Kales' Cases on Future Interests, 239.

ing under the Statute of Uses. The full force of the innovations introduced under the Statute of Uses, both as to the mode of conveyance and the interests which were created, would have been too much limited if there had been any technical adherence to a particular form of conveyance, so that a conveyance would be valid or effective only in the form in which it was executed. The rule, therefore, was early applied that a conveyance should take effect so as to carry out the intent expressed in any mode that was possible. Thus, if an instrument purported to be a common-law grant *in futuro* of a reversion, it was ineffective for that purpose as a conveyance under the feudal land law, and the conveyance itself would be wholly void if there was no attornment. But if the grant recited a consideration paid and was under seal and enrolled, then it might take effect as a bargain and sale, which requires no attornment and is effective to convey a freehold to begin *in futuro*. If there were no enrollment but the grantee happened to be a blood relative of the grantor, the conveyance was effective as a covenant to stand seized because neither attornment nor enrollment was necessary.[81]

§ 76. Basis for the new freedom in creating estates and future interests: Such was the new freedom in the creation of estates, and more particularly future interests, which arose under the Statute of Uses. What was the reason for this utter disregard of the principles of *seizin*, without which the feudal organization could not be maintained? The fact is the feudal organization of society as a reality had passed away. The incidents of tenure had become obsolete, or of less and less importance. Feudal England was becoming commercial England. Feudal England had entered upon the beginning of what we may call, its modern history. There was a demand for liberty in the landowner to do what he might choose with his own, unfettered with the burdens of tenure. Because judges were moved by a perception of the desirability of this new liberty, the inno-

[81] Roe *v.* Tranmer, 2 Wils. 75 (1757); 1 Gray's Cases on Prop., 2nd ed. 391. See also, Edward Fox's Case, 8 Co. 93b (1610); 1 Gray's Cases on Prop., 1st ed. 489, where the grant of a reversion for the term of ninety-nine years, without attornment or enrollment, and not to a blood relation, but upon a consideration recited, was sustained as a bargain and sale.

vations achieved under the Statute of Uses were obtained. But these innovations were achieved under the forms of law, and the Statute of Uses was made responsible for them. No doubt springing and shifting uses were known before the Statute of Uses. For instance, before the Statute of Uses one seized in fee might *enfeoff A* and his heirs, to such uses as the *feoffor* might appoint by will, and then the *feoffor*, by his will, appoint the uses.[82] This was a clear example of a springing future use. It was only natural then that when the statute turned uses into legal estates it should have turned springing and shifting future uses into springing and shifting legal estates. It should be observed, however, that the new freedom in creating springing and shifting future interests by way of use was not achieved immediately. It was not until almost a century after the Statute of Uses that the complete validity and indestructibility of the springing and shifting future interests by way of use was determined.[83] That century was indeed one of great conflict among lawyers and judges as to whether this new liberty should be permitted, and if it were permitted at all, to what extent. The reactionaries did not lose every point in the contest.[84]

§ 77. **Contingent remainders by way of use—The rule of destructibility applies:** It is possible that before the time of Henry VIII. the rule of destructibility of contingent remainders was avoided where the interests were limited by way of use. In Sugden on Powers [85] 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.[86]

[82] Pollock on Land Laws, 91.

[83] Gray's Rule against Perpetuities, §§ 135-139; 142-147; 159.

[84] *Post*, §§ 77, 80.

[85] 8th ed. 34, § 24.

[86] Mr. Jenks in a recent article (Law Quart. Rev. XX. 280, 285) 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."

When, after the Statute of Uses, springing future interests by way of use became valid and indestructible because a new freedom in the creation of future interests was thought desirable, there was no reason why contingent remainders by way of use should continue to be destructible according to the feudal rule. The law, however, did not work out these *a priori* logical results. Springing and shifting uses were no sooner held valid then the impression seems to have obtained that they were destructible.[87] The 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 as a remainder. An interest, therefore, which never could take effect as a remainder must, if it were valid at all, have been indestructible. The impression that the future shifting interest might be destroyed by the levying of a fine or the suffering of a recovery by the one seized of the preceding interest seems, however, to have prevailed at least till 1599.[88] It was during this period that by a series of cases decided in 1592, 1595 and 1598, it became firmly established that a contingent remainder by way of use continued to be destructible, as under the feudal land law.[89] Afterwards springing uses were held to be indestructible,[90] but the holding that contingent remainders by way of use were destructible continued as the survival of a period when the court either failed to perceive, or refused to act upon, the perception, that to hold springing interests valid

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

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

[89] Gray's Rule against Perpetuities, § 141; Chudleigh's Case, 1 Co. 120a (1595), Kales' Cases on Future Interests, 82; Archer's Case, 1 Co. 66b (1597); 5 Gray's Cases on Prop., 2nd ed. 42; Kales' Cases on Future Interests, 98.

[90] Pells *v.* Brown, Cro. Jac. 590, 2 Roll. Rep. 196 (1620), held a shifting executory devise indestructible: Gray's Rule against Perpetuities, § 159. In Snowe *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.

and indestructible was logically to hold contingent remainders valid and indestructible.[91]

§ 78. **Trustees to preserve contingent remainders:** In the latter half of the seventeenth century[92] the English conveyancers invented a device to deprive the rule of destructibility of any general practical operation. It was this: After the particular estate of freehold was created, a remainder was limited to trustees to hold during the life of the first taker upon trust, for the first taker for life, and to preserve contingent remainders. Thus, to *A* for life, remainder to *B* and *C* and their heirs as trustees to hold during the life of *A* upon trust for *A* for life and to preserve contingent remainders,[93] with remainder to *A's* (unborn) son in tail, etc. By the insertion of this estate to the trustees, who held during the life of *A*, the fatal gap was prevented and the contingent remainder to *A's* unborn son could not be destroyed by the premature termination of *A's* life estate by forfeiture or merger, unless, of course, the trustees in breach of their trust joined with *A* in a conveyance which would terminate the life estate of the trustees as well as that of *A* before the contingent remainder vested. So in the case where a life estate is limited to *A*, with remainder to such children of *A* as reach twenty-one, the trustees would take during the life of *A* and until *A's* children reached twenty-one, or died under that age, in trust for *A* for life, and then in trust for the children of *A* until they reach twenty-one, and upon trust to preserve contingent remainders. This prevents any gap occurring between the termination of *A's* life estate and the time when the children should all reach twenty-one. The constant use of the estate to trustees to preserve contingent remainders in England resulted in the doctrine of destructibility being applicable only in the case of careless conveyancing. The feudal rule of destructibility thus became to a very considerable extent harmless, and in a roundabout way the object was effected which would have been reached had the logical result

[91] See *post*, §§ 96 *et seq.*, on the later history of the rule of destructibility of contingent remainders.

[92] "Origin of the Present Mode of Family Settlements of Landed Property," by Joshua Williams, 1 Jurid. Soc. Papers, 45, 53; Kales' Cases on Future Interests, 100.

[93] Vaizey, Law of Settlements, 1161, 1162; Kales' Cases on Future Interests, 101.

of allowing springing uses been applied to contingent remainders by way of use.

The question was raised whether the remainder to the trustees to preserve the contingent remainder was not itself a contingent remainder because uncertain ever to take effect unless the prior estate terminated prematurely or before the remainder vested and so might itself be destroyed. Clearly it was not destructible because it exactly answered the feudal description of a vested remainder. It stood ready, throughout its continuance, to take effect in possession whenever and however the preceding estate determined.[94] That is the true test. If it is fulfilled it is not material whether the future interest is or is not uncertain ever to take effect *in possession*.

§ 79. The feudal distinction between vested and contingent remainders continued to be important: So long as the rule of destructibility of contingent remainders continued, the feudal distinction between vested and contingent remainders, and the distinction between contingent remainders and indestructible springing uses, continued to be important.

§ 80. Contingent future interests by way of use after terms for years: Under the feudal land law a contingent interest after a term for years was wholly void.[95] The reason was that no one would be actually seized of the freehold during the term until the event happened upon which the future interest was to take effect in possession. Hence the case was actually no different from the one where the freehold was limited to begin *in futuro*. The fatal gap in the *seizin* was bound to occur. It followed that when springing future interests created by way of use were allowed, the contingent future interest, limited by way of use, after the term would be valid. On the other hand, the reactionary decision which made the contingent remainder after a particular estate of freehold still destructible, even when created by way of use, would, if pressed to its logical conclusion, require the contingent interest after a term to be wholly void, even when created by way of use. It is an interesting fact that so far as the decisions in England go, it cannot be affirmed that a contingent legal interest after a term created by way

[94] Smith d. Dormer *v.* Packhurst, 3 Atk. 135 (1742); 5 Gray's Cases on Prop., 1st ed. 55; Challis, Law of Real Prop., 2nd ed. 133; Kales' Cases on Future Interests, 158.

[95] *Ante*, § 33.

of use is valid. Two cases decided about the beginning of the eighteenth century held such an interest void.[96] No doubt this was a late triumph of the reactionaries who worshiped the principles of the feudal land law and were bent upon resisting the strange innovations introduced by holding valid springing and shifting interests. Time, however, has approved and extended the innovations so introduced. Modern ideas and habits of thought approve the freedom in creating interests in lands which was wrought out by means of the Statutes of Uses and Wills. The decisions of the early eighteenth century, which refused to recognize the validity of a contingent future interest after a term by way of use may, in the presence of modern judicial wisdom, be assumed to be ill-founded and not the law.

Where contingent interests after terms were limited by deed an estate in trustees to preserve the contingent interest was effectively used. Thus, when the limitations were to *A* for 99 years if he shall so long live, then to trustees and their heirs during the life of *A* upon trust for *A* and to preserve the contingent interests, then to the first son of *B* (unborn),[97] the contingent interest of the unborn son was valid.

§ 81. The Rule in Shelley's Case: The Rule in Shelley's Case applied to remainders created by way of use in the same way and to the same extent as it applied to remainders created at the common law. Shelley's Case [98] was decided in 1581 with reference to limitations created by way of use. It was noteworthy as continuing the application of the feudal rule to such limitations.

In 1599 Archer's Case [99] emphasized the view that the Rule applied because the testator or settlor intended that heirs in the plural meant primarily the indefinite line of inheritable succession, and that in order to give effect to that expressed intent, the ancestor himself must take the fee or the fee tail as the case might be. Therefore, when, as in Archer's Case, the limi-

[96] Adams *v.* Savage, 2 Ld. Ray. 854, 2 Salk. 601-679; 5 Gray's Cases on Prop., 2nd ed. 105; Kales' Cases on Future Interests, 246; Rawley *v.* Holland, 22 Vin. Ab. 189, 2 Eq. Cas. Ab. 753. Compare cases of contingent interests after terms for years created by devise, *post*, § 85.

[97] Smith *v.* Packhurst, 3 Atk. 135 (1742); 5 Gray's Cases on Prop., 1st ed. 55.

[98] 1 Co. 93b.

[99] 1 Co. 66b; 5 Gray's Cases on Prop., 2nd ed. 42; Kales' Cases on Future Interests, 98.

tations were to "A for life, remainder to his next heir male [in the singular number] and to the heirs male of the body of the next heir male," it was held that the two circumstances of the use of "heir male" in the singular number, and the superadded words of limitation rebutted the *prima facie* expressed intent that the indefinite line of inheritable succession was meant, and the Rule in Shelley's Case did not apply. Much of the later history of the Rule in Shelley's Case consists in determining how far the reasoning upon which Archer's Case went, may be used to avoid the application of the Rule. Lord Mansfield in the 18th century attempted to make the question of the application of the Rule in Shelley's Case turn upon whether "heirs" (in the plural) was used as a *descriptio personae*—i. e., as a word of purchase—or as indicating the indefinite line of inheritable succession—i. e., as a word of limitation. He held that superadded words of limitation, and a direction in the context that the "heirs" were to take as tenants in common, were sufficient to indicate that "heirs" was used as a word of *purchase* and that the Rule would not apply.[1] Early in the 19th century, the House of Lords [2] put an end to this attempt to reduce the application of the Rule. Archer's Case was practically limited to the case where the remainder was to the "heir" (in the singular number) of the life tenant with superadded words of limitation.[3]

§ 82. Alienability of future interests created by way of use: Under the feudal law the only future interests which were alienable were reversions, vested remainders, and non-contingent interests after terms. Possibilities of reverter, rights of entry for condition broken and contingent remainders were inalienable. It is clear that the same interests if created by way of use, so as to create legal interests after the Statute of Uses, were subject to the same rules as to alienability. Springing and shifting uses were inalienable. This continued to be the law in England till 1845,[4] and still prevails in many states of

[1] Doe *v.* Laming, 2 Burr. 1100; Crump *v.* Norwood, 7 Taunt. 362.

[2] Jesson *v.* Wright, 2 Bligh, 1 (1820); 5 Gray's Cases on Prop., 2nd ed. 90; Kales' Cases on Future Interests, 262.

[3] See *post*, §§ 421 *et seq.*, where the decisions are gone into extensively.

[4] 8 and 9 Vict., c. 106, sec. 6.

this country. Even very broad statutes, relating to lands which may be taken on execution, have been construed not to permit the levy of execution on contingent remainders.[5] The fact that vested remainders were alienable *inter vivos,* so that the legal title passed, and contingent remainders were not, has kept alive the common-law distinction between vested and contingent remainders.

TOPIC 5.

SUMMARY OF CHANGES WROUGHT BY STATUTE OF USES.

§ 83. **Summary:** The Statute of Uses was passed at the instance of the feudal landowners who desired to perpetuate the feudal land law. By the astuteness of the judges, the statute not only did not have that effect, but it was used as the foundation of a revolution both as to the mode of conveying land and as to the interests in land which might be created. One of the objects of the Statute of Uses was to abolish wills of real estate. This practically failed, for in 1540, four years after the Statute of Uses was passed, the Statute of Wills was enacted, which permitted the devise of two-thirds of a knight's fee, and all lands held in socage.[6] It was the object of the Statute of Uses to prevent any conveyance which would not have been valid under the feudal land law. This not only failed, but the Statute of Uses was at once used as a means for originating two new modes of conveying the legal title, utterly unknown to the feudal land law—the "bargain and sale," and "the covenant to stand seized" to uses. It was an object of the Statute of Uses to unite every use with the legal estate or *seisin* so that no use could exist apart from the legal estate or *seisin.* It may be that for a century the statute was effective in doing this, but by the end of that time the uses which the statute did not execute, came to be enforced as trusts and have ever since continued to be so enforced. From that beginning, the law of trusts has developed. The Statute of Uses attempted to destroy the secrecy of conveyance by requiring all conveyances to be made as at common law. The Statute of Uses, however, necessarily defeated this object at once because a *parol* conveyance based upon a valuable consideration, how-

[5] *Post,* § 320.

[6] *Post,* § 84.

ever slight, was sufficient to raise a use which the statute would execute, and the legal estate would then vest by a most informal and secret conveyance. To prevent this the Statute of Enrollments was passed in the same year with the Statute of Uses. This required bargains and sales of freeholds to be signed, sealed, indented, and enrolled. This would have prevented the secrecy of the conveyance by bargain and sale but it was avoided by the lease and release. The Statute of Uses established a form of conveyance by lease and release which was not only secret but could be effected in a solicitor's office many miles from the land intended to be conveyed. The fact that the conveyance could be executed in a solicitor's office was revolutionary to a degree that should not be overlooked. Another wholly unexpected result of the Statute of Uses was the making springing and shifting future interests valid.

CHAPTER III.

WILLS AND TRUSTS OF LAND.

TITLE I.

WILLS.

§ 84. **The Statute of Wills:** Under the feudal law devises of lands held on most of the tenures were not permitted.[1] As the result of special custom [2] and by means of *feoffments* to such uses as the *feoffor* should direct by his will, a right to devise was practically obtained before the Statute of Uses.[3] The Statute of Uses, by turning uses into legal estates, put an end to this practice, but such was the demand for the right to devise land by will that the Statute of Wills of Henry VIII.[4] was passed. It allowed the devise of two-thirds of a knight's fee, that is, land held by military tenure, and all lands held by socage tenure. When, therefore, by the Statute of Charles II.,[5] military tenures were turned into common socage tenures, all lands became fully devisable. The Statute of Wills of Henry VIII. required only that the will be in writing. The Statute of Frauds of Charles II. required the will to be in writing, signed, and attested by three witnesses. Statutes in this country follow the lines of the Statute of Frauds requiring signature and attestation.

§ 85. **Limitation of estates by devise:** The utmost freedom in the creation of estates was permitted by will. All the estates, present and future, which could be created under the *feudal land law*, could be created by will. The feudal rule which required the word "heirs" to be used when a fee, or fee tail, was to be created, was so far relaxed that any formula of words which expressed the testator's intent that a fee or fee

[1] *Ante*, § 41.

[2] *Id.*

[3] Digby, History of Real Property, 4th ed. 375-377; 1 Gray's Cases on Prop., 2nd ed. 417.

[4] 32 Hen. VIII, ch. 1 (1540).

[5] *Ante*, § 8.

tail, be created would be given effect. Unless, however, it affirmatively appeared that a fee or fee tail, was intended to be created, a life estate would be regarded as limited.

All future interests which were void by the feudal law, but which were valid by way of use, were equally valid when created by will. Thus springing and shifting future interests created by will were valid. They were called executory devises. It was not, however, until the case of *Pells v. Brown*[6] in 1620, that it became settled that the executory devise was not destructible by the first taker suffering a recovery, or in any other way. It was this case which established the complete validity of the executory devise, and of all springing and shifting future interests by will, and inferentially, all springing and shifting future interests by way of use. Powers of appointment created by will were equally valid, and here there was no restriction in any case that the appointee come within any consideration of blood, as in the case of a power created by way of covenant to stand seized. So gifts to a class, "born and to be born," were valid, and would be carried out according to the intent expressed.[7] A decision in the early part of the eighteenth century made it clear that the creation by devise of a contingent interest after a term for years would be valid as a springing executory devise.[8]

The rule of destructibility of contingent remainders was forced upon contingent remainders created by devise[9] just as it had been upon contingent remainders created by way of use.[10] The application of the rules of destructibility and inalienability of contingent remainders created by devise and the indestructibility of springing and shifting executory devises kept alive the feudal distinction between vested and contingent remainders and between contingent remainders and executory devises.

The Rule in Shelley's Case continued to apply to remainders created by will in the same way and to the same extent as it did to remainders created under the feudal law.

[6] Cro. Jac. 590, 2 Roll. Rep. 196; 5 Gray's Cases on Prop., 2nd ed. 140; Kales' Cases on Future Interests, 140.

[7] *Post*, § 474.

[8] Gore *v.* Gore, 2 P. Wms. 28; 5 Gray's Cases on Prop., 2nd ed. 143; Kales' Cases on Future Interests, 247.

[9] Archer's Case, 1 Co. 66b (1599); 5 Gray's Cases on Prop., 2nd ed. 42; Kales' Cases on Future Interests, 98.

[10] *Ante*, § 77.

The rules determining what future interests were alienable and what were not, which obtained where the future interest was created by way of use,[11] applied in the same way where the future interest was created by way of devise. Thus, a vested remainder created by way of devise was alienable, so that title passed at law, while the contingent remainder created by will, and executory devises, were inalienable at law.

§ 86. **Devise as a mode of alienation:** A reversion or vested remainder or a non-contingent interest after a term was alienable by devise without attornment.[12] Contingent interests which were not alienable *inter vivos* were alienable by devise, provided, of course, the death of the devisee was not such an event as forever made it impossible for the future interest to take effect—as where the devisor's interest was contingent upon his surviving the first taker and he died before him.[13]

TITLE II.

TRUSTS.

§ 87. **Origin and reappearance of trusts of land:** The use before the Statute of Uses was fundamentally the same as the modern trust. When the Statute of Uses caused the trust, or use, to become a legal estate, the use, as a trust enforced by the court of chancery, disappeared for the time being. Professor Ames believed, as a result of his historical researches, that it did not reappear until about a century after the Statute of Uses.[14] Then the uses which the Statute did not execute[15]—principally the trust with active duties, and the use on a use—came again to be enforced by the court of chancery, just as the use had been enforced by the same court before the Statute of Uses. This was the beginning of the modern law of trusts. The Statute of Frauds of Charles II.[16] required the trust to be evidenced by a writing signed by the person to be charged with the trust.

§ 88. **Equitable estates in land:** In the creation of equitable estates in land it is only necessary that the meaning be made clear as to the estate intended to be conferred. An equi-

[11] *Ante*, § 82.
[12] *Ante*, § 43.
[13] *Post*, § 324-325.
[14] *Ante*, § 68.
[15] *Ante*, § 67.
[16] Ch. 3, § 7 (1676).

table fee or fee tail may, therefore, be limited without the use of the word "heirs" provided some words be used which affirmatively indicate the creation of a fee or fee tail, as the case may be.[17] Where an equitable estate in land was created by devise and the trustee had by express words a fee, the *cestui* took a fee even though there were no words of limitation at all.[18]

The greatest freedom was permitted in the creation of equitable future interests in land. Equitable future estates corresponding to the common law or feudal future interests were, of course, permitted. Thus, there might be an equitable vested remainder, an equitable reversion, often called a resulting trust of reversion, and equitable contingent interests in form like the common law contingent remainder. All the future interests which in legal estates were permitted only by way of use or devise, were allowed. Thus, all springing and shifting[19] equitable interests were valid. Powers over equitable interests were valid. Equitable interests in classes were carried out as limited. Equitable contingent interests after terms were unobjectionable.[20] The rule of destructibility of contingent remainders was inapplicable to equitable interests because the requirements of the feudal land law were satisfied by the *seisin* of the trustees. If, therefore, the equitable remainder were to such of the equitable life tenant's children as attained twenty-one and the life tenant died leaving children under twenty-one, the trustee held the fee until the children reached twenty-one and thereupon conveyed to them according to the expressed intent.[21]

For the transfer of an equitable interest in land already created, no formal act was necessary. Before the Statute of Frauds the transfer might have been by parol. After that act a writing was required signed by the transferror. For the transfer of an equitable fee by an equitable tenant in tail, equity followed the law and required an equitable recovery under the circumstances demanded for the recovery of a legal fee tail.[22] When trusts of land came to be used and enforced by chancery in the

[17] Lewin on Trusts, 124 (ed. 1911).

[18] *Id.* 125.

[19] *Id.* 90; post, § 472.

[20] Leake, Digest of Land Law, 471.

[21] Astley v. Micklethwait, 15 Ch. Div. 59 (1880); 5 Gray's Cases on Prop., 2nd ed. 65; Kales' Cases on Future Interests, 122.

[22] Lewin on Trusts, 891 (ed. 1911).

17th and 18th centuries, the view that all conveyances of contingent future interests were in their nature champertous and contrary to public policy had lost its force. The feudal reason that the contingent estate, if it could take effect at all, was nothing until it vested, was wholly eliminated by the fact that the legal seisin was outstanding in the trustee. It followed that the feudal rule of inalienability of legal contingent future interests had no application to equitable contingent future interests.[23]

§ 89. The Rule in Shelley's Case applied to equitable interests in land: The Rule in Shelley's Case applied to equitable estates in land just as under the feudal law it applied to legal estates or, after the Statute of Uses, it applied to legal estates created by way of use.

Two slight qualifications of this statement may, however, be noted: *First,* if the life estate is equitable and the remainder is legal, or *vice versa,* the Rule does not apply.[24] The Rule only applies when both interests are equitable or both legal. Why was this? Perhaps the Rule applied when both interests were equitable, because the analogy to the common-law situation where both were legal was perfect. When one interest was equitable and the other legal, the original common-law or feudal situation where the rule applied, was not present, and the perfect analogy which existed where both were equitable, was not present. *Second,* where there was an executory trust which required the trustee to settle an estate upon *A* for life, and then upon the heirs of *A*'s body, equity required the trustee to so make the settlement that the Rule in Shelley's Case would not apply.[25] Thus, if the remainder were to be settled upon the heirs of the body of *A*, the settlement must be made in the usual form of a strict settlement upon *A* for life, then to trustees to preserve contingent remainders, then to the first and other sons of *A* successively in tail, etc.[26]

[23] *Id.* 889. At *post,* § 374, it appears that in equity an attempted transfer of a legal contingent remainder might be given effect as a contract to convey when the remainder vested which a court of chancery specifically enforced. A *fortiori,* the assignment of an equitable contingent interest would be given effect in equity when the contingency upon which it was limited occurred.

[24] *Post,* § 413.

[25] *Post,* § 430.

[26] *Ante,* § 18.

The refusal of courts of equity to apply the Rule in Shelley's Case where the trusts were executory, resulted from the fact that equity at first started to exclude the application of the Rule to any equitable interests. It undertook to look at the actual meaning of the testator, or settlor, in all cases. It was prepared to take the position that primarily "heirs," or "heirs of the body," were used as words of purchase to designate the particular individual or individuals, who answered that description at the life tenant's death. The court of chancery at first did this in the case of executory trusts, but Lord Hardwicke took the same position where there was no executory trust but the interests were merely equitable.[27] But this last position was overruled and the law finally crystallized so that the courts of equity drew a distinction between the case where the trusts were executory, and where the interests were merely equitable, and the trust was not executory.

[27] Bagshaw *v.* Spencer, 1 Ves. Sr. 142.

CHAPTER IV.

THE LATER HISTORY OF REVERSIONS, REMAINDERS, AND THE RULE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS.

TITLE I.

REVERSIONS.

§ 90. **Vested and indefeasible:** The earliest and simplest case of a reversion occurred where a particular estate of freehold was created in *A* and no further estate was limited. A reversion by operation of law was thereupon left in the *feoffor* or the grantor. The reversion was indefeasible. It had this essential characteristic. It stood ready at all times to take effect in possession whenever and however the preceding estate of freehold might determine, so that there could be no gap in the seisin between the termination of the particular estate and the taking effect in possession of the reversion.[1]

§ 91. **Vested, but uncertain ever to take effect in possession and defeasible—e. g., a reversion pending the vesting of a contingent remainder:** So long as contingent remainders were wholly void the reversion was vested and indefeasible as in the case put in the preceding section. The moment, however, the contingent remainder was held to be valid upon the condition that it must vest before the preceding estate determined, the reversion became at once defeasible and uncertain ever to take effect in possession. This was conspicuously so when contingent remainders in double aspect occurred as where, after a life estate, remainders were limited to the issue of the life tenant if he had any, and if not, to *B* and his heirs.[2] If the reversion were now regarded as vested, then when the contingent remainder vested it would do so by way of cutting short a prior

[1] *Ante*, § 24.

[2] Loddington *v.* Kime, 1 Salk. 224 (1695); 5 Gray's Cases on Prop., 2nd ed. 49; Kales' Cases on Future Interests, 107.

vested interest in fee. In order to avoid this infraction of the feudal theory of estates it was perhaps urged that the reversion remained *in nubibus* and took effect by operation of law in the reversioner when the contingent remainder failed. Such a view was consistent with the fact that the reversion itself was not destructible. By its very terms it stood ready throughout its continuance to take effect in possession whenever and however the preceding estate determined. After the Statutes of Uses and Wills, when a fee on a fee was unobjectionable, the view obtained that the reversioner had a vested fee which was cut short by the vesting of a contingent remainder. As a matter of fact, this was not a serious inroad upon the feudal theory of estates because there could not be any shifting of the possession from the reversioner to the contingent remainderman. All shifting occurred while the reversioner was still out of possession and without any actual seizin. At all events, time has settled it that the reversioner has a vested interest which is alienable *inter vivos* and indestructible by any rule of law defeating intent, though the reversion may be uncertain ever to come into possession and is subject to be defeated by the vesting of a contingent remainder while the reversioner remains out of possession.[3] Upon a conveyance by the reversioner to the life tenant or *vice versa*, the life estate merged in the reversion and was extinguished.[4]

§ 92. Vested, but subject to be defeated by events happening after the reversion came into possession: The moment the rule of destructibility of contingent remainders is removed the reversioner may come into possession after the termination of the life estate and thereafter his estate may be divested by the happening of the contingency upon which the contingent remainder is to take effect. This was entirely contrary to feudal principles, but it was precisely what happened when springing future interests were valid by way of use or devise. It is a necessary consequence of the turning of a contingent remainder into a future interest which may take effect according to the intent of the parties even though it must do so as a springing executory interest.

[3] Williams on Real Property, 21st ed. 359.

[4] Purefoy *v.* Rogers, 2 Wms. Saund. 380 (1670); Kales' Cases on Future Interests, 101.

TITLE II.

REMAINDERS.

§ 93. Vested and indefeasible: These differ from the vested and indefeasible reversions only in being limited by the act of the parties in the same instrument which created the particular estate. Thus, where the limitations are to *A* for life with a remainder to *B* and his heirs, the remainder to *B* has the same characteristics as the vested and indefeasible reversion. It stands ready to take effect whenever and however the preceding estate determines and is certain to take effect some time. Under the feudal land law there could be no other kind of a vested remainder, for the executory future interest, which might operate to divest a vested remainder, was invalid.

§ 94. Defeasible and uncertain ever to take effect in possession: When, under the Statutes of Uses and Wills, shifting future interests came to be valid and indestructible, it was possible, after limiting a remainder in fee upon a life estate, to provide that if the remainderman did not survive the life tenant, or if he died without leaving issue, the fee should go over to *C*. This at once made the remainder uncertain ever to take effect in possession because it was subject to be divested. The remainder, however, still retained its essential characteristic of standing ready *throughout its continuance*, to take effect in possession whenever and however the preceding estate determined. Hence, the remainder was, as it had been before, vested, alienable *inter vivos* and indestructible by any rule of law defeating intent.[5]

§ 95. The problem of Egerton v. Massey:[6] The limitations in this case were by devise in substance to *A* for life, remainder to the children of *A* living at *A's* death and in default of such, to *B* in fee. Then there was a devise of the residue to *A* in fee. It is clear that the ultimate gift to *A* has (leaving out of consideration for a moment its mode of creation) all the characteristics of a vested remainder and a vested reversion. It stands

[5] *Post*, §§ 327, 328.

[6] 3 C. B. N. S. 338 (1857); 5 Gray's Cases on Prop., 2nd ed. 63; Kales' Cases on Future Interests, 111. The same problem was presented to our Supreme Court in Benson *v.* Tanner, 276 Ill. 594, and in Freedman *v.* Freedman, 283 Ill. 383, but was unnoticed by the court, which reached a result similar to that in Egerton *v.* Massey.

ready throughout its continuance, to take effect, if at all, whenever and however the life estate in *A* may determine. It fills in as an abstraction, the time between any termination of *A's* life estate and the taking effect of the contingent interests expressly limited. It is not destructible because there is no possibility of a gap occurring between the termination of the life estate and the taking effect in possession of *A's* interest as residuary devisee. It is alienable [7] and the transfer of *A's* life estate and *A's* interest in fee by the residuary clause in a third person will terminate the life estate by merger.[8] The future interest in *A* by the residuary clause is only divested by the vesting of one or the other of the contingent future interests expressly limited. It must, indeed, be either a vested remainder or a vested reversion intervening before the contingent future interests, and defeated only by being divested by the taking effect of one or the other. *A* having transferred her life estate and her fee to a third party the life estate terminated by merger and the question arose whether the contingent gifts over were thereby destroyed. The court held that they were. It apparently accepted the view that if the fee in *A* was a *remainder* then the contingent future interests were executory devises and indestructible. The court, therefore, makes the result that the contingent future interests were destroyed turn on the fact that *A* had a *reversion* and not a remainder.

Professor Gray justifies this for the court by suggesting that [9] "although in a will the residuary gift is contained in the same instrument as the particular devise, yet the effect of the whole is to be regarded as the establishment of a particular estate with a reversion, and an independent transfer of that reversion, so established, to the residuary devisee." His position, however, requires a most extraordinary mental effort. We must suppose that the testator dies at one time, so far as the commencement of the will is concerned, and a little later with respect to the subsequent clause. Or else we must suppose that the will took

[7] Caraher *v.* Lloyd, 2 Com. Rep. (Australia) 480; Benson *v.* Tanner, *supra.*

[8] It is so held in Egerton *v.* Massey, *supra,* and Benson *v.* Tanner, *supra.* See, however, McCreary *v.* Coggeshall, 74 S. C. 42, where the residuary devisee was assumed to have a vested interest, but a merger was held not to have occurred.

[9] Rule against Perpetuities, § 113a.

effect in sections, with momentary lapses of time between each and that there was a moment of time in which the heir at law had a reversion by descent and then (*mirabile dictu!*) the later clause of the will operated as an assignment by the testator (*sic*) of the reversion which has already vested in the testator's heir. The plain facts are that the same instrument which creates the life estate and contingent interests expressly limits the vested future interest by the residuary clause and all of them take effect at once upon the testator's death. It is perfectly proper that the case should be supported as far as it holds that the future interest limited to *A* by the residuary clause was vested and preceded in order the contingent interests, but it is submitted that the future interests created by the residuary clause were as plainly limited by the *act of the devisor* and at the same time as the other interests as if the testator had expressly devised to *A* for life, remainder to *A* in fee, provided, however, that if *A* left children surviving her those children should take, and if *A* did not, then to *B* in fee. In such a case surely no one would contend for the fiction that *A's* remainder was the assignment of a reversion. The fact that *A's* interest is limited by a subsequent residuary clause in the will does not in substance altar the situation. The future interest limited to *A* by the residuary clause is a remainder. If the court called it a reversion that must be regarded as an unnecessary extension of the rule of destructability of contingent remainders.

TITLE III.

THE RULE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS.

§ 96. Contingent remainders defined: A contingent remainder is a legal future interest after a particular estate of freehold limited upon an event (precedent in fact and in form to its taking effect in possession) which may happen before or after, or at the time of or after, the termination of the preceding estate of freehold.[10] This group of remainders is not described for the mere pleasure of abstruse classification but because certain important legal attributes attach to remainders of this class.

[10] *Ante*, §§ 27, 79; *post*, § 309.

From the time of the feudal land law to the present day they have been inalienable *inter vivos* while they remained contingent. Prior to 1430 they were wholly void. After that they became valid if the event upon which they were limited happened before or at the time of the termination (whenever and however that might occur) of the preceding estate of freehold. This was later translated into the rule that the contingent remainder was destroyed unless the event upon which it was limited happened before or at the time of the termination of the preceding estate of freehold. This became the rule of destructibility of contingent remainders. Then, illogically enough, after springing and shifting future interests by way of use or devise became valid and indestructible, contingent remainders still continued to be destructible by a rule of law defeating intent even when the contingent remainder was created by way of use or devise.[11] The characteristics of inalienability and destructibility (together, no doubt, with others) have required the drawing of a line between *contingent* remainders—which are inalienable and destructible, —and *vested* remainders—which are alienable and indestructible. Because *shifting* and *springing executory interests* were held to be indestructible it is also necessary to draw a line between them and contingent remainders.

§ 97. The continuation of the rule of destructibility of contingent remainders after springing and shifting future interests became valid and indestructible: It became settled in *Chudleigh's Case*[12] and *Archer's Case*,[13] at the end of the sixteenth century, that the rule of destructibility would apply to contingent remainders created by way of use or devise. It was not till later that it became settled that springing and shifting uses and devises were not only valid but indestructible.[14] When that occurred the logical incongruity in leaving contingent remainders destructible by a rule of law defeating intent, if as events turned out they would take effect as springing future interests, became apparent. Renewed ef-

[11] *Ante*, §§ 77, 85.

[12] (1594) 1 Coke 120a; Kales' Cases on Future Interests, 82.

[13] (1599) 1 Coke 66b; 5 Gray's Cases on Prop., 2nd ed. 42; Kales' Cases on Future Interests, 98.

[14] Pells *v.* Brown (1620), Cro. Jac. 590, 2 Roll. Rep. 196; Kales' Cases on Future Interests, 65; Gray, Rule against Perpetuities, § 159; Snowe *v.* Cuttler (1664), 1 Lev. 135; Gray, Rule against Perpetuities, § 165.

forts seem, therefore, to have been made to defeat the application of the rule of destructibility of contingent remainders.[15] These failed presumably because the feudal rule of destructibility had become established and acted upon.[16] The announcement that contingent remainders would still be destructible in spite of the fact that springing and shifting uses and devises were valid and indestructible was made by declaring in substance that if a future interest after a particular estate of freehold could by possibility take effect as a remainder it must do so or fail entirely. It could not take effect as a springing or shifting future interest. Lord Hale in *Purefoy v. Rogers*[17] said: "Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only and not otherwise." Lord Northington in *Carwardine v. Carwardine*[18] said: "It is a certain principle of law, that wherever such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise." Lord Ellenborough in *Doe v. Roach*[19] said: "* * * it is a rule of law that no limitation shall operate by way of executory devise, which, at the time of the testator's death, was capable of operating by way of contingent remainder." Lord St. Leonards in *Cole v. Sewell*[20] said: —"Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder."[21] The same idea as that contained in the passages quoted was expressed in the rule that one could not, by events happening after the interests were created, turn a contingent remainder into a springing executory interest. This, in effect, forbade any attempt to split by operation of law the contin-

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

[16] Weale *v.* Lower, *supra;* Southcote *v.* Stowell, *supra;* Carwardine *v.* Carwardine (1757-8), 1 Eden, 27, 34; Sugden on Powers, 8th ed. 34-37.

[17] (1681), 2 Wms. Saund. 380, 388; Kales' Cases on Future Interests, 101.

[18] (1757-8), 1 Eden, 27, 34.

[19] (1816), 5 M. & S. 482, 491, 492.

[20] (1843), 4 D. & War. 1, 27; 2 H. L. C. 186.

[21] Many other expressions to the same effect can be found. See Gray, Rule against Perpetuities, 3d ed., §§ 920, 921.

gencies upon which the contingent remainder was limited. It could not be said that the happening of the contingency before or at the time of the termination of the preceding estate of freehold was one event, and that the same event happening afterwards was another, and that the two were split by operation of law because if the event happened before or at the time of the termination of the preceding estate of freehold the future interest became a vested remainder, while if it happened afterwards it took effect as a springing executory interest.

§ 98. Application of the rule of destructibility in the modern cases—Where the remainder is limited to an individual: Where the future interest after the particular estate of freehold was limited to an individual on an event which might happen before, or at the time of, or after the termination of the preceding estate of freehold, the event must happen before or at the time of the termination of the preceding estate or fail entirely. The common instance of this is where the limitations are to *A* for life and then to the first son of *A* who reaches twenty-one. Here the expressed intent is that the son of *A* who first reached twenty-one, either before or after the termination of *A's* life estate, is to take.[22] Nevertheless, if *A* dies before any son reaches twenty-one the entire remainder fails.[23] Nor would the result be any different if the testator said that the rule of destructibility was not to apply. In *White v. Summers*[24] it was held that where the remainder was limited to the eldest son of *A* "who shall first attain *or have attained* the age of twenty-one years," the testator meant to include the eldest son no matter when he reached twenty-one, whether before or after the termination of the life estate. Nevertheless the contingent remainder was destroyed. It is submitted that even if the limitations were to *A* for life and then to the eldest son of *A* who "either before or after *A's* death" shall have attained twenty-one, the case is not in the least altered. The meaning expressed

[22] White *v.* Summers [1908] 2 Ch. 256, Kales' Cases on Future Interests, 134.

[23] White *v.* Summers, *supra*. If *In re* Wrightson [1904], 2 Ch. 95, is *contra*, it must be regarded as wrong or as repudiating the entire rule of destructibility of contingent remainders. For explanation of this case see White *v.* Summers, *supra;* Gray, Rule against Perpetuities, 3rd ed. § 926; Kales' Cases on Future Interests, 91.

[24] *Supra*, note 22.

is the same. The remainder is still limited to the same person and upon the same event precisely as it was before. There are not two gifts on separable contingencies. There is one gift in remainder on one event with a precautionary phrase declaring that it is no part of the event upon which the eldest son is to take that he shall reach twenty-one before the termination of the life estate. The future interest as limited may take effect as a remainder. The rule requires that it do so or fail.

Again, take the common case where the limitations are to *A* for life and then to *B* if he survive *A*. This means that *B* is to take whenever he survives *A*, either at the termination of *A's* life estate or after the premature termination of *A's* life estate, by forfeiture or merger. Yet *B's* remainder fails if the life estate terminates prematurely during *A's* life.[25] Can it then make any difference that the remainder is limited "to *B* if he survive *A*, whether such survivorship occur at the time of or after the termination of *A's* life estate"? The expressed intent is the same as it was before. The additional words used merely emphasize the fact that *B* is to take no matter when the survivorship occurs with reference to the termination of the preceding life estate. This makes more plain, but it adds nothing to, what was said before. The character of the remainder is the same. It should be held destructible.

§ 99. **Suppose the remainder be limited to a class and when the life estate terminates no member of the class has attained a vested interest:** Suppose, for instance, the limitations be to A for life, remainder to such children of *A* and *B* as survive *A* and *B*. It is conceded that this means that the children who survive *A* and *B* no matter when that occurs—whether at the time of or after the termination of *A's* life estate—are to take.[26] Yet, if at *A's* death *B* is still living so that no children have

[25] Dunwoodie *v.* Reed, 3 Serg. & R. (Pa.) 434. The same result occurred where the remainder was limited to an individual on a collateral contingency other than survivorship. Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322; Waddell *v.* Rattew, 5 Rawle (Pa.) 231.

[26] Cunliffe *v.* Brancker, 3 Ch. Div. 393. Here Jessel, M. R., speaking of just such a future interest, says: It is impossible that the will should take effect not "through any defect of expression of intention, but through the fault of the rule of law."

survived *B*, the remainder to the entire class of children fails by reason of the rule of destructibility.[27]

If the limitations are to *A* for life, remainder to such children of *A* as attain twenty-one, it must be conceded that as a matter of interpretation this means that the children of *A* who reach twenty-one, either before or after the termination of *A's* life estate, are to take. This is decisively demonstrated by the fact that the moment the rule of destructibility is removed by statute or because the interests are equitable, so that full scope is given to the expressed intent, the children who reach twenty-one after the death of the life tenant are allowed to take.[28] Yet, if at *A's*

[27] Cunliffe *v.* Brancker, *supra.*

So where the remainder is to a class who, to take, must survive the life tenant, and the life estate terminates prematurely by forfeiture or merger, none have survived the life tenant and therefore the remainder to all is destroyed. Redfern *v.* Middleton, Rice L. (S. C.) 459; Faber *v.* Police, 10 S. C. 376; McElwee *v.* Wheeler, 10 S. C. 392; Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296; Stump *v.* Findlay, 2 Rawle. (Pa.) 168; Belding *v.* Parsons, 258 Ill. 422; Barr *v.* Gardner, 259 Ill. 256; Messer *v.* Baldwin, 262 Ill. 48; Smith *v.* Chester, 272 Ill. 428; Blakeley *v.* Mansfield, 274 Ill. 133; Benson *v.* Tanner, 276 Ill. 594.

The same is true where the remainder is limited to a class on a collateral event other than survivorship of the life of tenant, and the life estate terminates prematurely by forfeiture or merger. In such a case none of the class is entitled to a vested interest and the entire remainder is destroyed. Craig *v.* Warner, 16 D. C. (5 Mack.) 460; Bond *v.* Moore, 236 Ill. 576.

[28] Astley *v.* Micklethwait, 15 Ch. D. 59; 5 Gray's Cases on Prop., 2nd ed. 65; Kales' Cases on Future Interests, 122; *In re* Robson, 1 Ch. 116; *In re* Bourne, 56 L. T. Rep. (N. S.) 388; Blackman *v.* Fysh, 3 Ch. 209; *In re* Freme, 3 Ch. 167, 170; Challis on Real Property, 2nd ed. 111.

In Festing *v.* Allen, 12 Mees & W. 279, 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." Perceval *v.* Perceval, L. R. 9 Eq. 386, *accord.* In Dean *v.* Dean, [1891] 3 Ch. 150, 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,

death none have reached twenty-one, none at all can take. The remainder fails or is destroyed.[29]

Suppose now there is added in the above cases the expressed direction that the remaindermen are to take whether the event happens before or after the termination of the life estate. Suppose, for instance, the limitations are to *A* for life, remainder to such children of *A* as "either before or after the death of *A*" attain twenty-one, and suppose at *A's* death no child has attained twenty-one. It is submitted that the case is not in the least altered. The meaning is exactly the same as it was before. The nature of the future interest is the same. It may still take effect as a remainder or as a springing executory interest. According to the rule it must take effect as a remainder or fail entirely. There are not two gifts to two separate classes, one to take in one event and the other in another. There is a gift to one class on one event only, namely, attaining twenty-one. The additional language is again simply a precautionary emphasis of the intention that this event is not in any way restricted so that it must occur before *A's* death, but that the children who reach twenty-one are to take no matter when the event happens. *Lechmere and Lloyd's Case*[30] rightly understood does not prevent the remainder in the case put from being destructible, in view of the fact that in that case there were at *A's* death children who had attained twenty-one and the question was whether the interest of those who were *in esse* but who had not attained twenty-one was destroyed. That is quite a different case subject to quite different considerations from the one now being con-

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."

[29] Festing *v.* Allen, 12 Mees & W. 279; 5 Gray's Cases on Prop., 2nd ed. 60; Kales' Cases on Future Interests, 108; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532; Holmes *v.* Prescott, 33 L. J. Ch. N. S. 264; Bull *v.* Pritchard, 5 Hare, 567, 1 Russ. 213. In Browne *v.* Browne, 3 Sm. & G. 568, the remainder to the children was erroneously held vested subject only to be divested if the children died under twenty-one.

[30] 18 Ch. D. 524; 5 Gray's Cases on Prop., 2nd ed. 69; Kales' Cases on Future Interests, 126.

sidered where at the life tenant's death no child had attained twenty-one. The propriety of this distinction is dealt with at length, hereafter.[31] Nevertheless, Chitty, J., in *Dean v. Dean*,[32] where none of the children had reached twenty-one when the life estate terminated, thought *Lechmere and Lloyd's Case* controlled and held the future interest to the children who should reach twenty-one to be indestructible. He asserted that the limitations involved were precisely the same in meaning as those presented in *Festing v. Allen*,[33] where the remainder was limited to the children who reached twenty-one without saying "either before or after the death of the life tenant." He admitted that the reasoning by which the future interest in the children who reached twenty-one was destructible in *Festing v. Allen* and took effect as an executory devise in *Dean v. Dean*, while "subtle" was "not more subtle or artificial than the reasoning of a scholastic character which the common-law judges of former times applied to cases of this kind." The court might as well have said that a distinction without a difference was allowable to avoid the feudal rule of destructibility and give effect to the testator's intention. The fact is that so long as the rule of destructibility is recognized and supported on principle, *Dean v. Dean* is logically wrong. So long as the rule of destructibility is recognized as itself an anachronism and logically a mistake after springing and shifting interests became valid and indestructible, *Dean v. Dean* may be justified as the refusal to apply the rule of destructibility to a remainder limited in language to which the rule had never before been applied.

§ 100. **Now suppose the remainder is limited to a class, but before the life estate terminates the interest of one member of the class has vested, and other members of the class are in esse who might according to the expressed intent take vested interests in the future—Typical cases stated and analyzed:** Suppose the limitations are (1) to *A* for life, remainder to such children of *A* as reach twenty-one; and (2) to *A* for life, remainder to such children of *A* as "either before or after *A's* death" reach twenty-one. Both cases are the same so far as the expressed

[31] *Post*, § 102.

[32] (1891), 3 Ch. 150; 5 Gray's Cases on Prop., 2nd ed. 71; Kales' Cases on Future Interests, 128.

[33] 12 Mees & W. 279.

intent is concerned. The first means exactly what the second more emphatically says. The second gives to the children of *A* the same remainder as the first on the same contingency, merely inserting the precautionary phrase which emphasizes that the contingency of reaching twenty-one is to have no reference to its occurrence before the termination of the life estate. There is no separation of the children into two classes and the giving to each class an interest on a different contingency. If no children have reached twenty-one when the life estate terminates it is assumed that the entire remainder would be destroyed in both cases alike.[34]

Suppose, however, that before the termination of *A's* life estate in both cases one child, *X*, has reached twenty-one so that the remainder has vested in him. Clearly, no rule of destructibility can interfere with *X's* interest. Suppose there is another child, *Y*, who has not yet attained twenty-one. Is his interest destroyed by *A's* death before *Y* reaches twenty-one?

In both cases alike it might be said that the interest of *Y* could by possibility take effect as a remainder because if *Y* reached twenty-one before the determination of the life estate *Y* would come a co-owner of the remainder with *X* and as such would be a remainderman. Furthermore *Y's* interest would be one limited on an event which might happen before or after or at the time of or after the termination of the life estate. Looked at solely in its relation to the life estate *Y's* interest would seem to have all the attributes of a contingent remainder which was destructible. But that would be only a partial view of the case presented. If such a remainder had been limited to a class before the Statutes of Uses and Wills, it may be assumed that only the first member of the class in whom the remainder vested would take.[35] The interests of the other members of the class would be looked upon as shifting future interests divesting the fee which had already vested in *X* and would be wholly void for that reason. When, however, a remainder to a class was attempted to be created after the Statutes of Uses and Wills and by way of use or devise, it was valid so far as the other members of the class were concerned simply because shifting interests

[34] *Ante*, § 99.

[35] *Ante*, § 26.

by way of use and devise were allowed.[36] It follows that *Y's* interest was at all times until it vested, a shifting executory interest. It took effect by way of divesting a vested remainder in fee. It was bound from the beginning to take effect in that way if it took effect at all. It was likewise void under the feudal land law. It was valid only by way of use or devise. As such why should it not be indestructible? The fact that when it vested it was like a remainder was of no more consequence than if the limitations had been to *A* for life, remainder to *B* and his heirs, but if *B* died within two years to *C* in fee. Here *C's* interest, if *B* died within the two years and *A* still lived, might take effect as a remainder, but only after it had divested a previously vested remainder. Hence it was at all times till it vested a shifting executory interest and as such must have been valid and indestructible.

Obviously, the cases put at the commencement of this paragraph were bound to be the point of contention between those who would extend or press to its logical conclusion the maintenance of feudal principles regarding the validity of future interests and those who would extend to its logical conclusion the new liberty in creating future interests permitted by the Statutes of Uses and Wills. It is not a case of one faction being right and the other being wrong, so much as it is which of two inconsistent and competing principles shall prevail in a given case. Sympathy with the changes wrought by the Statutes of Uses and Wills so as to free testators' and settlors' efforts from the restrictions of the feudal land law, together with a lively appreciation of the fact that when springing and shifting future interests by way of use and devise were allowed and became indestructible the feudal rule of destructibility of contingent remainders not only defeated the expressed intention but became logically unsound, would (provided authority did not prevent) easily tip the scales in favor of the remainder to Y being valid and indestructible.

§ 101. State of the English authorities—Where the limitations are to "A for life, remainder to such children of A as reach twenty-one" and where at the time of A's death X, one of the children of A, has reached twenty-one and another, Y, has not: Fearne seems to say that Y's interest is destroyed.

[36] *Ante*, § 74.

He says:[37] "For where a contingent remainder is limited to the use of several, who do not all become capable at the same time: notwithstanding it vests in the person first becoming capable; yet shall it devest as to the proportions of the persons afterwards becoming capable, *before the determination of the preceding estate.*" The suggestion that the child who attains twenty-one after the determination of the life estate will not take is very cautiously stated, and Fearne cites no authorities actually holding that *Y's* interest is destroyed. Jarman says:[38] "* * * the rule before the act was, that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age." No cases, however, are cited actually so holding, where the validity of *Y's* interest was involved. Theobald says:[39] "* * * only those children can take whose interests become vested before the determination of the life interest,"[40] but he cites no cases precisely so holding and involving the right of *Y* to take. In *Blackman v. Fysh*[41] Lindley, L. J., assumes without question (though the case did not turn on this) that "the limitations to the children were clearly contingent remainders, and if the son had died, those of his children only who had before his death attained twenty-one, or being daughters had married under that age, would take. Then we should have been obliged to give effect to the rules of law as to contingent remainders,

[37] Contingent Remainders, 312, 313.

[38] Vol. I (6th Am. ed.) * 833.

[39] Wills (7th ed.) 312.

[40] See also Challis on Real Property, 3d ed. 125.

In Mogg *v.* Mogg, 1 Mer. 654 (Kales' Cases on Future Interests, 232) the limitations were in substance to A for life and then to the children of B born and to be born. Some children were born before the life estate had terminated and some after. It was held that the children born afterwards could not take. It is not made clear whether this was because the rule of destructibility applied or because a rule of construction for the determination of the class fixed the testator's actual intention as including only children born before the determination of the life estate. See *post*, § 104.

In Archer *v.* Jacobs, 125 Ia. 467, the limitations were to A for life and then to her children. Two were in *esse* when the life estate terminated by merger. It was held that the remainder to the unborn children was terminated by the rule of destructibility. Whether this could have gone on the rule as to the determination of the class, see *post*, § 104.

[41] [1892] 3 Ch. 209, 223.

and to defeat the intention of the testator that those who afterwards attained twenty-one should participate."

These *dicta* rather induce the conclusion that while direct authority may be lacking, yet conveyancers and conveyancing counsel in England have for a long time acted upon the assumption that the above statement of the law and its application were correct. Perhaps it is now too late to overturn the conclusion stated, so that in England it must be accepted that the feudal rule of destructibility applies to *Y's* interest and defeats it. Yet the precarious position of such a conclusion at once appears when we have come to observe the result reached by Sir George Jessel, M. R., in *Lechmere and Lloyd's* case and the favor with which that case was received.[42]

§ 102. Where the limitations were to A for life, remainder to such children of A as "either before or after" A's death, reach twenty-one and where at the time of A's death, X, one of the children of A, has reached twenty-one and another, Y, has not: Here we have precisely the same case as that dealt with in the preceeding section. The fact that the remainder is limited to such children as "either before or after the death of *A*" attained twenty-one makes no difference in the expressed meaning. It does not make a gift to two separate classes on different events. The gift is still to the same class on the same event. Precautionary words have merely been added to make it plain that the children are to take no matter when the event occurs with reference to the termination of the preceding life estate.

Hall, V. C., in *Brackenbury v. Gibbons*,[43] evidently observing that the case now presented was exactly the same as that dealt with in the preceding section, and believing the law to be as there stated, held the interest of *Y* to be destroyed.

Five years later precisely similar limitations came before Jessel, M. R., in *Lechmere and Lloyd's* case.[44] He said the rule of destructibility was "harsh. Why should I extend it?" He clearly felt that he had a case which he could deal with in the freest manner on principle and that on principle the rule of destructibility should be held down to the precise cases where

[42] *Post*, §§ 102, 103.

[43] [1876] 2 Ch. D. 417.

[44] [1881] 18 Ch. D. 524; 5 Gray's Cases on Prop., 2nd ed. 69; Kales' Cases on Future Interests, 126.

its applicability had been determined by authority. The continuance of the doctrine of destructibility after springing and shifting future interests became valid and indestructible was illogical and anomalous. Jessel was prepared on this round to refuse the application of the rule of destructibility in any case where authority did not require it. In the case where the remainder had already vested in one member of the class, the feudal rule requiring the vesting of the remainder before the termination of the life estate was certainly satisfied, and it was clear that the interests of the other members of the class were bound to take effect as shifting executory interests divesting a previously vested remainder. Authority, so far as judicial decisions were concerned, was apparently entirely lacking to require an application of the rule of destructibility to *Y's* interest. It may be assumed that the practice of conveyancers had never dealt extensively with the case where the remainder was limited to the children "who *either before* or *after* the *termination of A's life estate* attained twenty-one." Jessel, therefore, very properly insisted that the rule of destructibility should not be applied.

Jessel should have admitted that the logic of his conclusion would have made *Y's* interest indestructible where the remainder was "to such children of *A* as reached twenty-one," and that if *Y's* interest in such a case was to be regarded as still destructible it was because a long continued practice of conveyancers required that it should be so. The weakness of Jessel's opinion is that instead of doing this he put forward a purely subtle and scholastic distinction without a difference between the case where the remainder was to "such children of *A* as reached twenty-one" and where the remainder was to "such children of *A* as *either before or after A's death* reached twenty-one."

In *Miles v. Jarvis*[45] the limitations were to *A* for life, remainder to the children of *B* "living at the time of *A's* death or thereafter to be born." At *A's* death some children were *in esse* and the remainder had vested in them. Hence, the indestructibility of the gift to those afterwards to be born was clear upon the reasoning upon which *Lechmere and Lloyd's* case is to be supported. In *In re Bourne*[46] the limitations were to *A*

[45] 24 Ch. D. 633.

[46] 56 L. T. Rep. (N. S.) 388.

for life and then to such children of *A* as should attain twenty-one. The mystical words "before or after *A's* death" were not present. There was merely a clause that trustees were to take the rents and issues during the minority of any child after the life tenant's death upon trust for the child, thus showing that children who did not reach twenty-one till after the life tenant's death were expected, and expressly intended to take. Two children reached twenty-one before the life tenant died and Kay, J., held that the gift took effect in the others as an executory devise. This, it is submitted, presses *Lechmere and Lloyd's* case far toward its logical conclusion that in all cases where the limitations are to *A* for life, remainder to such children of *A* as reach twenty-one, without the words "either before or after *A's* death" the interest of *Y* is indestructible.

§ 103. The Massachusetts Supreme Court has extended the rule of In re Lechmere and Lloyd logically to the case where the limitations are to A for life, remainder to such children of A as reach twenty-one, and where one child has reached twenty-one before the life tenant's death: This is the holding in the recent case of *Simonds v. Simonds*.[47] The court seems very clearly to have perceived that where the remainder vested in two children before the life estate terminated, the interest of the other children took effect only as a shifting use and as such was not subject to any rule of destructibility. The court very properly relied upon *Lechmere and Lloyd's* case and, in Massachusetts no doubt, very properly threw out any distinction between the case of a remainder to the children "who reached twenty-one" and the children who "either before or after the life tenant's death" reached twenty-one. There was, in all probability, no conveyancers' practice in Massachusetts which would require the rule of destructibility to be applied in one of these cases any more than in the other. It is believed that in other American jurisdictions the result reached in *Simonds v. Simonds* ought to be and will be followed.[48]

[47] 199 Mass. 552; Kales' Cases on Future Interests, 148.

[48] Observe, however, that in Archer *v.* Jacobs, 125 Ia. 467, where the limitations were to A for life and then to A's children, and before the termination of A's life estate by merger two children were born, the court held that the interest of the unborn children was destroyed.

§ 104. Where the remainder is to a class, the operation of the rule of destructibility must be distinguished from the operation of rules of construction for the determination of the class: Where the limitations are to A for life, remainder to the children of *B* who reach twenty-one, if the rule of destructibility be in force and applicable, only such children will take as reach twenty-one before the termination of the life estate. If that rule is not in force or is inapplicable then the question arises as to how many are included in the class. This is a question of construction. If the usual rule as to personal property be followed the class will close when the life tenant dies or the first child reaches twenty-one, whichever last happens.[49] But if this be regarded as a rule which cuts down the natural and usual meaning because of the inconvenience of having new interests arise in personal property after it has been distributed, then where real estate is involved and there is not the same inconvenience, the natural and usual meaning of the words might be taken and the class enlarged to include all the children born at any time. This was done in *Blackman v. Fysh*[50] where the remainder was to children born or to be born who should live to attain twenty-one.

Now suppose the limitations are to *A* for life, remainder to the children of *B*, and *B* has a child or children at the date of the will, at the testator's death and at the death of the life tenant, and others are born afterwards. Does the class close at *A's* death? If the rule of destructibility is in force and applicable this need not be decided, because that rule will permit only those children who are *in esse* at the testator's death to take.[51] If the rule of destructibility be not in force or not

Lechmere and Lloyd's Case and its logical extension was not observed. Perhaps the result reached might have gone on the ground that by a rule of construction concerning the determination of classes the class closed when the life estate terminated and the remainder vested in possession.

[49] Theobald, Wills, 7th ed. 310. *In re* Robson, [1916] 1 Ch. 116, *In re* Bourne, 56 L. T. Rep. (N. S.) 388, and Simonds *v.* Simonds, 199 Mass. 552, only needed to go this far.

[50] [1892] 3 Ch. 209.

[51] In Mogg *v.* Mogg, 1 Mer. 654 (Kales' Cases on Future Interests, 232) it is impossible to say whether the court went upon the application of the rule of destructibilty or a rule of construction as to the determination of the class. The learned author in 3 Preston on Conveyanc-

applicable, then the question of construction arises as to the determination of the class, and the reasoning already indicated is applicable. If personal property were involved the class would close at the life tenant's death.[52] If that is in accordance with the fair and primary meaning of the language used then it should apply equally where real estate is involved. If, however, the natural and primary meaning would include all the children of *B* born at any time, but that meaning is cut down because of the inconvenience of holding up a distribution of personalty until all possible members of the class are ascertained, then such reason of convenience would not have the same application where real estate was involved and all the children born at any time might be let in to share in the remainder.

Now suppose the limitations are to *A* for life, remainder to the children of *B*, but *B* has no child when the will was made or at the testator's death or at the death of the life tenant, can children born afterwards take? If the rule of destructibility is in force and applicable they cannot. If that rule is not in force or is not applicable, then if personalty were involved all the children born at any time could take.[53] In *Hayward v. Spaulding*[54] the same rule was applied to a remainder in real estate which was not destructible.

The rules for the determination of classes are rules of construction merely and yield at once to any expressed intention inconsistent with them. Where, for instance, the remainder, as in *Leehmere and Lloyd's* case,[55] was limited to the children of the life tenant who should "either before or after the life tenant's death" attain twenty-one, the words quoted were obviously inserted to overcome any supposed rule of construction that, where the remainder was to children who reached twenty-one, only those were intended to take who had reached twenty-one when the life estate terminated. The phrase "either

ing, 555, evidently thought that the rule of destructibility applied. In Archer *v.* Jacobs, 125 Ia. 467, the children born after the termination of the life estate by merger were excluded on the ground of the application of the rule of destructibility.

[52] Theobald, Wills, 7th ed. 306, 307.

[53] *Id.* 307.

[54] 75 N. H. 92.

[55] 18 Ch. D. 524; 5 Gray's Cases on Prop., 2nd ed. 69; Kales' Cases on Future Interests, 126.

before or after the life tenant's death" did not, therefore, change the character of the remainder or the meaning to be given to the language by which it was created. It did not make distinct gifts to two different classes. In *Miles v. Jarvis*[56] the limitations were to *A* for life and then to the children of *B* "who survived *A* or were born afterwards." The phrase "who survived *A* or were born afterwards" was plainly put in to overcome any rule of construction that only such children would take as were born prior to the death of the life tenant. The extent of the class was made clear. Then the question of the destructibility (by a rule of law defeating intent) of the interest of those not born until after *A's* death, arose.

§ 105. As to the application of the rule of destructibility where the future interest is limited on such events that it may take effect either as a remainder or as a shifting interest cutting short a prior vested remainder in fee: In all the cases where the rule of destructibility of contingent remainders has been applied, the future interest which was destroyed has been so limited that, if no rule of destructibility existed and the event happened after the termination of the preceding estate of freehold, there would be a gap in the estates expressly limited, and the future interest, if it took effect, would have cut short a reversion in fee in possession. It should be observed that precisely the same situation may be presented except that the future interest, if it took effect, would cut short a vested remainder expressly limited which might have come into possession. Thus, suppose the limitations are to *A* for life, remainder to *A's* children (now unborn), but if *A* leaves no children who shall reach twenty-one then to *B* in fee. Here *B's* interest may take effect as a remainder. This occurs if *A* dies leaving no children. The possibility that *B's* interest may take effect as a remainder continues as long as *A* has no children. On the other hand, the moment a child is born to *A* it takes a vested remainder and *B's* interest then takes effect, if at all, as a shifting future interest. If it is a corollary of the rule of destructibility, or a part of it, or the rule itself, that future interests which may by possibility take effect as remainders, must do so or fail entirely and cannot be turned into executory

[56] 24 Ch. D. 633.

interests by events happening after the creation of the limitations, then *B's* interest fails as soon as a child is born to *A*.[57]

It cannot be doubted that under the strictly feudal land law *B's* interest would be destroyed on the birth of a child to *A*. It is equally clear that when springing and shifting uses and devises became valid and indestructible the application of such a rule of destructibility was illogical and incongruous. It continued only because it had been established. But *Lechmere and Lloyd's* case and those following it[58] show that in these days the courts regard themselves as fully authorized to refuse to extend the rule of destructibility beyond the precise cases where its application has become settled, and that any feature of the remainder which gives it a novelty sufficient to enable the court to say that its destructibility has never been passed upon is a valid ground for holding that the rule of destructibility shall not be applied to it. The result reached in *Doe d. Evers v. Challis*[59] might have gone on the ground that the remainder to *B* in the case put was subject to the rule of destructibility and could not therefore be void for remoteness. It is significant that the court refused to put its decision on that ground and insisted that the contingencies might be split by operation of law. On the contingency that *A* had no children *B's* interest was a contingent remainder and must vest if at all on *A's* death. In the event that *A* had children but they died under twenty-two, *B's* interest was a shifting executory devise and void for remoteness. The testator did not split the contingencies by his words. They were split by the court, by operation of law, because in one event the future interest was a remainder and in the other it was an executory devise. This splitting of the contingencies by operation of law is in fact a refusal to apply the rule of destructibility to *B's* interest so that it would fail the moment the remainder vested in a child of *A*. Such, it is submitted, was a proper result for the House of Lords to reach, and the decision of Jessel, M. R., in *Lechmere and Lloyd's* case proceeds upon the application of the same principle, namely, that the rule of destructibility will not in these days

[57] See Gray, Rule Against Perpetuities, § 338, note 3; Doe d. Evers *v.* Challis, 18 Q. B. 224, 231; 7 H. L. C. 531; 5 Gray's Cases on Prop., 2nd ed. 582; Kales' Cases on Future Interests, 1059.

[58] *Ante*, § 102.

[59] 18 Q. B. 224; 7 H. L. C. 531.

be permitted to apply to any remainders presenting distinctive features unless authority or long practice requires it.

§ 106. Abolition of the rule of destructibility by legislation: In the absence of any legislation abolishing the rule of destructibility even American courts, where the survival of feudal principles might be regarded as least likely to occur, have regularly recognized and applied the rule of destructibility of contingent remainders.[60] During the nineteenth century statutes both in England and the United States have undertaken to abolish wholly or in part the rule of destructibility.

The Real Property Act of 1845[61] 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

[60] 1st: *Cases where the destruction of contingent remainders was held to have occurred:* District of Columbia: Craig *v.* Warner, 16 D. C. (5 Mack.) 460. Mississippi: Irvine *v.* Newlin, 63 Miss. 192. South Carolina: Redfern *v.* Middleton, Rice L. (S. C.) 459; Faber *v.* Police, 10 S. C. 376; McElwee *v.* Wheeler, 10 S. C. 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.) 9, 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. Illinois: Bond *v.* Moore, 236 Ill. 576, Kales' Cases on Future Interests, 144; Belding *v.* Parsons, 258 Ill. 422; Barr *v.* Gardner, 259 Ill. 256; Messer *v.* Baldwin, 262 Ill. 48; Smith *v.* Chester, 272 Ill. 428; Blakeley *v.* Mansfield, 274 Ill. 133; Benson *v.* Tanner, 276 Ill. 594. Iowa: Archer *v.* Jacobs, 125 Ia. 467.

2nd: *Cases containing dicta recognizing the doctrine by which contingent remainders may be destroyed:* Kentucky: Edwards *v.* Woolfolk's Adm'r, 56 Ky. (17 B. Mon.) 376. New Hampshire: Dennett *v.* Dennett, 40 N. H. 498. Illinois: Madison *v.* Larmon, 170 Ill. 65. See also Young *v.* Harkleroad, 166 Ill. 318, and Spencer *v.* Spruell, 196 Ill. 119.

Haywood *v.* Spaulding, 75 N. H. 92 (Kales' Cases on Future Interests, 152) refused to apply the rule, but only by the subterfuge of appointing trustees to preserve the contingent remainder.

Simonds *v.* Simonds, 199 Mass. 552 (Kales' Cases on Future Interests, 148) as already explained, *ante*, § 103, is a correct application of the reasoning upon which Lechmere and Lloyd's Case is to be sustained and a logical deduction from the result reached in that case.

[61] 8-9 Vic. c. 106, sec. 8.

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 remainder act[62] was passed which applied only to contingent remainders created by an instrument executed after August 2, 1877, and provided that every contingent remainder "which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of a particular estate determining before the contingent remainder vests be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." A doubt has long existed, and still remains, whether the act of 1877 applied where the remainder was to the children of a life tenant who reached twenty-one and one child had reached twenty-one before the termination of a life estate and others were *in esse* who might do so afterwards.[63] It has been suggested[64] that a simple and comprehensive form of contingent remainders act might be worded as follows: "No remainder or other interest shall be defeated by the determination of the precedent estate or interest prior to the happening of the event or contingency on which the remainder or expectant interest is limited to take effect." This, however, fails to cover the case mentioned, *ante* § 105. To do so we might add to it the following: "and any rule which requires a future interest which by possibility may take effect as a remainder to do so or fail entirely is hereby abolished."[65]

[62] 40-41 Vic. c. 33.

[63] Williams on Seisin, 205; Jarman on Wills (6th ed. by Sweet), 1445; Vaizey, Law of Settlements, 1164, 1165. The point was left undecided in *In re* Robson, [1916] 1 Ch. 116.

[64] Kales' Cases on Future Interests, 155.

[65] The only states which seem to have a complete Contingent Remainders Act are given in Washburn on Real Property (6th ed.) sec. 1600, note, as follows: Ala., Ga., Ind., Ky., Mich., Minn., Mont., N. Y., N. Dak., Va., W. Va., Wis. To this should now be added Massachusetts.

In some states the act which is now in force, or has existed, has a partial effect only, like the English Act of 1845. Maine: Rev. St. 1871, ch. 73, sec. 5. Massachusetts: Rev.

Laws 1902, p. 1268, sec. 8. The acts in both these states antedate the English Contingent Remainders Act of 1845. The Massachusetts act appears in Rev. St. 1836, ch. 59, sec. 7; the Maine act in Rev. St. 1841, ch. 91, sec. 10.

In South Carolina (1 Rev. St. 1893, ch. 66; 1 Code of Laws 1902, sec. 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. St. 1897, sec. 626.

CHAPTER V.

ESTATES AND FUTURE INTERESTS IN PERSONAL PROPERTY.

§ 107. **Chattels personal—English law**: Prior to the beginning of the seventeenth century it is probable that no interest, other than an absolute and indefeasible one, could be created in a chattel personal. In the seventeenth century the distinction was taken that if the *use* of a chattel were given by will to *A* for life, the property or absolute interest might be limited to *B* after *A's* death.[1] By the end of the seventeenth century it became settled that a bequest to *A* for life and then to *B* absolutely, gave *B* a valid future interest at law.[2] By a deed or act of transfer *inter vivos,* no future interest could however be created in a chattel personal in England. This seems to be the law at the present day, though the reason for it is not apparent.

The nature of the future interest when it is validly created by will is in some doubt. It is clear that it is a valid legal interest recognized and protected by courts of law as distinguished from courts of equity.[3] But is it like a remainder after a limited estate for life, or is the interest in the life tenant an absolute interest in the property, which comes to an end only when *A's* life terminates? If the latter view be taken, then the gift to *B* is a shifting interest. The English cases seem to adopt this view.[4]

[1] Anonymous, March, 106, pl. 183 (1641); 5 Gray's Cases on Prop., 2nd ed. 118; Kales' Cases on Future Interests, 344; Vachel *v.* Vachel, 1 Ch. Cas. 129 (1669); Kales' Cases on Future Interests, 345.

[2] Hide *v.* Parrat, 2 Vern. 331 (1696); 5 Gray's Cases on Prop., 2nd ed. 118; Kales' Cases on Future Interests, 346; Hoare *v.* Parker, 2 Term R. 376 (1788); 5 Gray's Cases on Prop., 2nd ed. 123; Kales' Cases on Future Interests, 347.

[3] Hoare *v.* Parker, *supra.*

[4] *In re* Tritton, 6 Morrell's Bankcy. Cas. 250; 5 Gray's Cases on Prop., 2nd ed. 124; Kales' Cases on Future Interests, 349.

§ 108. **The American cases:** In the United States the courts go farther than in England in permitting future interests in chattels personal. Except, perhaps, in North Carolina,[5] the future interest may be created by a transfer *inter vivos*[6] or by deed[7] as well as by will, and it makes no difference whether the first taker has a life estate with a gift over on his death,[8] or an absolute interest, subject to a gift over to another absolutely upon a specified contingency, as for instance, if the first taker dies without issue him surviving.[9]

It may be assumed also that the American cases incline to the older view of the English cases, that when the first taker is given only a life estate the first taker has only the use and occupancy for life, so that a limited estate is created and the future interest takes effect like a vested remainder in real estate after a life estate, or, if no such future interest is limited, there will be a reversionary interest to the creator of the life estate.[10]

§ 109. **Chattels real:** Prior to the seventeenth century it is probable that future interests in chattels real were not attempted or were invalid. But early in the seventeenth century it was held that when a leasehold interest was limited by will to *A* for life, and then to *B*, *B's* interest was valid.[11] A little later, it was held that if the future interest limited by will in chattels real were contingent, as to *A's* unborn son, it was valid.[12] In 1618, however, it was held that a gift over of a term to *B*, if the first taker (to whom an absolute interest in the term was expressly limited) died without issue him sur-

[5] Gray, Rule Against Perpetuities, §§ 92-94.

[6] McCall *v.* Lee, 120 Ill. 261; Brummet *v.* Barber, 2 Hill 543 (S. C.); 5 Gray's Cases on Prop., 2nd ed. 129; Kales' Cases on Future Interests, 354.

[7] Duke *v.* Dyches, 2 Strob. Eq. (S. C.) 353, note; 5 Gray's Cases on Prop., 2nd ed. 126; Kales' Cases on Future Interests, 351.

[8] Duke *v.* Dyches, *supra.*

[9] Brummet *v.* Barber, *supra.*

[10] Anonymous, 2 Hayward (3 N. C.) 161 (1802); 5 Gray's Cases on Prop., 2nd ed. 125; Kales' Cases on Future Interests, 350; Boyd *v.* Strahan, 36 Ill. 355. *Contra,* State *v.* Savin, 4 Harr. (Del.) 56, note; Merkel's Appeal, 109 Pa. 235.

[11] Manning's Case, 8 Co. 94b (1609); 5 Gray's Cases on Prop., 2nd ed. 112; Kales' Cases on Future Interests, 316.

[12] Cotton *v.* Heath, 1 Roll. Abr. 612, pl. 3 (1638); 5 Gray's Cases on Prop., 2nd ed. 117; Kales' Cases on Future Interests, 324.

viving, was void.[13] Thus the English judges started to draw a distinction between future interests in chattels real after a life interest expressly limited and after an absolute interest expressly limited. But this was put an end to in the Duke of Norfolk's Case [14] in 1682. Thereafter future interests in chattels real could be freely created by will subject only to the rule against remoteness which was first definitely suggested in the Duke of Norfolk's Case.[15]

The theory of the English cases seems to have been that the first taker, even when given only a life estate, had an absolute interest in the chattel real, subject to a shifting gift over upon his death, which was like a shifting executory devise of real estate.[16] This theory was adhered to even when a life estate in the chattel real was limited to *A*, and nothing further was said.[17] The position was then taken that *A's* absolute interest came to an end at *A's* death, and thereupon there was a reverter, like a reverter of real estate when a determinable fee came to an end. The logical basis for the theory that *A* had an absolute interest in a chattel real where it was limited to him only for life, rested upon the feudal notion that every life estate was in law longer than any term for years. Hence a life estate in a term for years must always include the entire term.

The English law apparently does not permit any future interest in a chattel real to be created by deed, or other mode of transfer *inter vivos*.[18] Precisely why is not perceived. It may be assumed that in most of the states in this country future interests in chattels real could be created by deed, or conveyance *inter vivos* as well as by will. This, it is believed, is a sound inference from the fact that future interests can, in this country, be created by deed or other mode of transfer *inter vivos* in a chattel personal.[19]

[13] Child *v.* Baylie, Cro. Jac. 459 (1618); 5 Gray's Cases on Prop., 2nd. ed. 425; Kales' Cases on Future Interests, 321.

[14] 3 Ch. Cas. 1; 5 Gray's Cases on Prop., 2nd ed. 428; Kales' Cases on Future Interests, 324.

[15] *Id.*

[16] Gray, Rule Against Perpetuities, 3rd ed. §§ 71a, 807 *et seq.*

[17] Eyres *v.* Faulkland, 1 Salk. 231 (1697); 5 Gray's Cases on Prop., 2nd ed. 119; Kales' Cases on Future Interests, 341.

[18] Gray, Rule Against Perpetuities, 3rd ed. § 853 G.

[19] *Ante*, § 108.

§ 110. No doctrine of destructibility: The rule of destructibility of contingent remainders never had any application to personal property. Hence the reason which that rule furnished for distinguishing between vested and contingent remainders does not exist where personal property was involved. The future interest in personal property was either valid or invalid. If it was valid it took effect according to the expressed intent.

§ 111. The Rule in Shelley's Case had no application to personal property: The English authorities have now made it clear that the Rule in *Shelley's Case* does not apply to personalty.[20] On the contrary a bequest of personal property to *A* for life and then to *A's* heirs is to be considered as creating such interests as the expressed intent of the testator calls for. It is believed that a number of jurisdictions in this country have adopted the same rule.[21] On principle this is correct. When one turns to the feudal origin, and the conjectured feudal necessity and feudal reasons supporting the Rule in *Shelley's Case,*[22] it is apparent that they have no possible application to interests in personal property.

§ 112. Created by means of trust: If the legal title to a chattel real or to any other form of personal property be placed in a trustee, the utmost freedom was allowed in the creation of the future equitable interests. It made no difference whether the trust was created by a conveyance to a trustee *inter vivos,* or by will.[23]

[20] *Post,* § 436.
[21] *Id.*
[22] *Ante,* § 35.
[23] Gray, Rule Against Perpetuities, §§ 75, 87.

CHAPTER VI.

THE RULE AGAINST PERPETUITIES.

§ 113. The necessity for a rule limiting the length of time in the future, at which future interests could be designated to take effect, became apparent in the seventeenth century: It was during the seventeenth century that the new freedom in creating future interests was realized. In 1609 it was established that legal future interests in chattels real could be created by will,[1] and the reported cases during the balance of the century show that the use of long term leases became a popular form of property, and their limitation by wills creating future interests in them naturally followed. In 1620 it was established that shifting future interests in real property could be created and that the same were not only valid but indestructible.[2] It followed that springing future interests in land were valid and indestructible when created by will. It followed also that both springing and shifting future interests were valid and indestructible when created by way of use. Trusts of land and of personal property began to appear and to be enforced by the court of chancery. With regard to them the utmost freedom in the creating of future interests prevailed. In 1696 it was settled that a legal future interest after a life estate in a chattel personal could be created by will.[3]

In the seventeenth century, and especially toward its end, it became apparent that some limits must be placed upon this new power to create future interests. The owner of property could not be permitted to direct the course of the beneficial ownership throughout succeeding generations. The courts, however, did not refer the matter to parliament—or wait for parliament to act. They laid the foundation for the rule themselves, in the seventeenth century, and developed it to completion in the nineteenth century. The rule so wrought out by the courts is called the Rule against Perpetuities, or the rule against remoteness.

[1] *Ante*, § 109.
[2] *Ante*, § 85.
[3] *Ante*, § 107.

It is one of the most striking instances of a purely judge-made rule of law of comparatively modern origin.

§ 114. Manning's Case and Child v. Baylie: In Manning's Case in 1609 [4] it was settled that a chattel real might be limited to *A* for life, then to *B*, and that *B's* interest was valid. In *Child v. Baylie* in 1618 [5] it was held that *if a chattel real* were limited to *A* absolutely but if he leaves no issue him surviving, to *B* absolutely, the limitation to *B* was void. In both cases alike the future interest was bound to take effect at the end of a life in being. The results reached indicate that the courts were attempting to make an arbitrary distinction dependent upon the manner in which the future interest was expressly limited. Nothing like the modern rule against remoteness was suggested.

§ 115. Duke of Norfolk's Case (1682): [6] Here a future interest in a chattel real like that held void in *Child v. Baylie* [7] was held valid because it was certain to take effect at the end of a life in being at the creation of the interests. This established the rule that future interests which were certain to take effect at the end of a life in being were valid. It equally suggested that future interests which might not take effect at some time (not yet determined) after a life in being, would be void.

§ 116. Subsequent leading cases completing the statement of the rule against perpetuities: In *Lloyd v. Carew* [8] (1697), there was a conveyance to *A* and his wife for life; remainder to her children successively in tail; remainder *to A in fee*, provided that if at the death of the survivor of *A* and his wife, there should be no issue of theirs *then* living, and if the heirs of the wife should, within twelve months after such death without issue, pay to the heirs of *A* £4,000, then the estate should go *to the heirs of the wife forever*. *A* and his wife both died without leaving issue living at the death of the survivor. The heir of the wife tendered the £4,000. It was held in the House of Lords that the executory devise over was valid. This case estab-

[4] 8 Co. 94b; 5 Gray's Cases on Prop., 2nd ed. 112; Kales' Cases on Future Interests, 316.

[5] Cro. Jac. 459; 5 Gray's Cases on Prop., 2nd ed. 425; Kales' Cases on Future Interests, 321.

[6] 3 Ch. Cas. 1; 5 Gray's Cases on Prop., 2nd ed. 428; Kales' Cases on Future Interests, 324.

[7] *Ante*, § 114.

[8] Show. P. C. 137; 5 Gray's Cases on Prop., 2nd ed. 445; Kales' Cases on Future Interests, 858.

lished the proposition that the future interest will be valid although it is not to take effect until some period of time in gross after the termination of some lives in being. Here the period of time in gross was one year.

In *Stephens v. Stephens* [9] it was held that an executory devise to the child of a person living at the testator's death on such child reaching twenty-one was valid.

In *Thellusson v. Woodford*,[10] it was settled that in fixing the time when the future interest should take effect as the termination of lives in being when the interests were created, it was proper to take the lives of persons who were entirely unconnected with the beneficial interests in the trust estate.

In *Cadell v. Palmer* [11] it was held by the House of Lords that where the future interest did not take effect in possession until the end of a period of twenty-one years in gross after lives in being, it was still valid. This case fixed the limit of time within which the future interest might take effect and still be valid. As the law stood after that case the future interest was valid if it was certain to take effect, if at all, in possession within lives in being and twenty-one years after the date of the creation of the interests.

§ 117. In determining when a freehold interest took effect in possession resort was had to certain purely feudal conceptions: Thus a non-contingent freehold after a term was, from the feudal point of view, a present freehold in possession.[12] The freeholder was seized. Hence the Rule as formulated was not violated, no matter how long the term might be. The freehold was valid, regardless of the length of the term, before the Rule against Perpetuities existed. Hence it was most natural that the Rule should be so formulated as not to make invalid that which before had been valid. Thus did the feudal position of a freehold after a term survive to determine the application of the Rule against Perpetuities.

[9] Cas. temp. Talb. 228 (1736); 5 Gray's Cases on Prop., 2nd ed. 452; Kales' Cases on Future Interests, 863.

[10] 4 Ves. 227 (1799), 11 Ves. 112 (1805); 5 Gray's Cases on Prop., 2nd ed. 460; Kales' Cases on Future Interests, 871.

[11] 1 Cl. & F. 372 (1833); 5 Gray's Cases on Prop., 2nd ed. 482; Kales' Cases on Future Interests, 898.

[12] *Ante*, § 32.

Suppose the freehold after the term be contingent on an event which must happen, if at all, within lives in being and twenty-one years from the creation of the interests; and suppose it be allowable as a springing use or executory devise.[13] It will be valid so far as the Rule against Perpetuities is concerned because when the event happens the freehold becomes non-contingent and the holder is then seized and in possession subject to the term, and it makes no difference how long the term may be.

§ 118. It was enough if the future interest vested in interest (as distinguished from taking effect in possession) within the required time: A future interest might not take effect in possession in either a modern or a feudal sense within the time specified by the Rule against Perpetuities, and yet it might "vest in interest" within such time. Thus, if the limitations were to *A* for life, remainder to the eldest son (unborn) of *A* for life, remainder to *B* and his heirs if he survive *A*, *B's* remainder would vest in interest at *A's* death, but it might not come into possession till the death of an unborn person. So if the limitations were to *A* for life, remainder to the eldest son (unborn) of *A* for life, remainder to *B* and his heirs, *B's* remainder is vested at once, but may not come into possession till after lives in being and twenty-one years. *B's* remainder in both cases is valid because the Rule against Perpetuities only required that the future interest vest *in interest* in the required time. This was a natural development because otherwise remainders which, before the Rule was known, would have been valid, would suddenly have been made void.

The conception of vesting *in interest* is the same as the feudal conception of a vested remainder after a particular estate of freehold. Thus, a future interest vests in interest when it stands ready, throughout its continuance, to take effect in possession whenever and however the preceding estate of freehold (or estate analagous thereto) terminates.

Under the feudal law the determination of whether a remainder was vested or not had reference to its validity and alienability under that law. It was a relevant inquiry only when a legal remainder after a particular estate of freehold was concerned. But when the Rule against Perpetuities took over this concep-

[13] *Ante*, §§ 80, 85.

tion of vesting, as indicating the condition into which the future interest must come within lives in being and twenty-one years from the time of the creation of the interests, it was applied indiscriminately to *all future interests in property*. Thus it was applied to equitable future interests in land and to interests in personal property,[14] whether legal or equitable. It may be that the feudal distinction between vested and contingent remainders is no longer of much account in determining the validity or alienability of the remainder, or the application of the doctrine of destructibility because of modern statutes making contingent remainders indestructible and alienable. But the feudal distinction between what future interests are vested remainders according to the feudal law and what are not, lives and is of importance in determining whether future interests in real or personal property, and whether legal or equitable, offend against the Rule against Perpetuities.

§ 119. Statement of the Rule: Professor Gray thus states the Rule against Perpetuities:[15] "No interest is good unless it *must* vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

If the difficult word "vest" be eliminated by incorporating into the Rule what is meant by "vest" the Rule would read something like this: No interest is good unless it must come into possession, if at all, not later than twenty-one years after some life in being at the creation of the interest; except that if the interest, whether in real or personal property, or by way of equitable interest in real or personal property, must, if at all, not later than twenty-one years after some life in being at the creation of the interest, stand ready throughout its continuance to come into immediate possession, whenever and however a preceding estate which, if a legal interest in land, would have been a particular estate of freehold, determines, it is valid.

To avoid the clumsiness of this formula three propositions may be stated:

(1) All interests which are sure to take effect in possession, if at all, not later than twenty-one years after some life in being

[14] Evans *v.* Walker, 3 Ch. Div. 211 (1876); 5 Gray's Cases on Prop., 2nd ed. 493; Kales' Cases on Future Interests, 348.

[15] Gray, Rule against Perpetuities, § 201.

at the creation of the interest, are so far as the question of remoteness is concerned valid.

(2) Every interest which must, if at all, not later than twenty-one years after some life in being at the creation of the interest, stand ready throughout its continuance to come into possession, whenever and however a preceding estate which, if a legal interest in land, would have been a particular estate of freehold, determines, it is, so far as the question of remoteness is concerned, valid.

(3) Future interests not embraced in the two preceding classes are void.

§ 120. Inaccurate and unsatisfactory statements of the Rule against Perpetuities: The Rule against Perpetuities is often stated as if it were a rule making void restraints on alienation. Thus, in Bouvier's Law Dictionary, a perpetuity is defined to be "Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond."[16] Such a method of stating the rule is unfortunate, for it mixes up the Rule against Perpetuities with the rules making void restraints on alienation. The Rule against Perpetuities should be carefully distinguished at all times from the rules making void restraints on alienation. There are two different principles of public policy involved and each finds expression in a different rule.

§ 121. Public policy behind the Rule against Perpetuities: While it is in accordance with modern views that the owner of property may dispose of it as he pleases, yet it is clearly inexpedient that he should be allowed to dictate who shall beneficially enjoy it much beyond the limits of his own personal experience. It is fair that he should designate who among persons living at his death should enjoy it, for these he knows. It is liberal to allow him to designate who shall enjoy it at the death of persons living at his death, although these he may not know; but it would clearly be most unwise and inexpedient to permit him to dictate the beneficial enjoyment into the third generation. This is completely beyond his own experience. It runs into a time when other lives ought to be allowed to dictate the enjoyment of the property. It was to place a limit upon the power of owners of property to designate who in the future shall

[16] *Post*, § 656.

enjoy the beneficial ownership that the Rule against Perpetuities was invented. It does not seek directly to prevent restraints on alienation. It is not guided in its application by the fact of whether the fee is alienable or inalienable. It merely seeks to stop the creation of future interests which may take effect at too remote a time in the future. It says to the testator or settlor: "you cannot control the beneficial ownership of your property beyond a certain time in the future." The law has developed an entirely different set of rules which undertake to make invalid all improper restraints and forfeitures on alienation as such.[17]

[17] *Ante*, § 18; *post*, §§ 711 *et seq.*

BOOK II.

INTERPRETATION OF WRITINGS—MORE ESPECIALLY WILLS.

CHAPTER VII.

THE THEORY OF LEGAL INTERPRETATION AND AVAILABILITY OF EXTRINSIC EVIDENCE.

§ 122. **Introductory:** In performing the process of interpreting writings, three steps preliminary to the practice of the art of interpretation must be taken: (1) the subject matter to be interpreted must be precisely defined; (2) the standard of interpretation in the given case must be determined; (3) the sources from which the tenor of that standard is to be derived must be ascertained.

TITLE I.

SUBJECT MATTER OF INTERPRETATION.

§ 123. **Inducement distinguished from legal act—The writing constituting the legal act is the only subject matter of interpretation:** A testator or settlor in the effort to express himself has two mental reactions. He first desires to accomplish a certain object and to do so may have the will or purpose to use certain words according to a given standard, such as their ordinary and general usage. All this is preliminary, or by way of inducement, to his legal act of using certain words according to some standard. Then comes the decisive step of completing or making final a legal act in writing in which certain words are used with reference to a standard of meaning.

If the words of the legal act, according to the standard used, express perfectly the purpose or object of the inducement, we have no occasion to consider whether the words used or the inducement is the subject matter of interpretation or to distinguish between them for any purpose of interpretation. If,

however, words are missing from the legal act or if the wrong word is used so that what was willed to be expressed is not, in fact, expressed, we are at once required to choose between two possible subjects matter of interpretation—the object and purpose of the inducement or the words used.

Conceivably, of course, a system of law might exist where the courts endeavored to give effect to the objects and purposes of the inducement which were sought to be expressed in the formal act reduced to writing. In such a system, the writing might be used merely as evidence—no doubt often *prima facie* correct—of the objects and purposes of the inducement to the act. In such a system the subject matter to be interpreted would be the objects and purposes of the inducement to the writing—the "will" or "desire" of the actor. Whether for good or ill the common law did not take this course. It has unequivocally made the writing the legal act which is enforced, and in consequence it is the writing *alone* which constitutes the subject matter to be interpreted. That which is unequivocally withdrawn as a subject matter of interpretation is the inducement. This is uncompromisingly fundamental.[1]

It follows that nothing can be inserted in the writing which is not there.[2] No word not in the writing can be substituted for one that is there.[3] These rules apply with special force where the legal act is required by law to be in writing. They apply, however, as well where the legal act is, in fact, in writing, though not required to be. This is the result of the rule of law as to writings that where a legal act is expressed in writing (though not required to be) it may, and in most cases must, by a necessary inference that the party so wills, be taken as the sole memorial of the act.[4]

[1] This has been laid down so many times that a complete list of references in the Illinois cases could hardly be given. A few picked up at random, are as follows: Blatchford *v.* Newberry, 99 Ill. 11, 50; Henderson *v.* Harness, 176 Ill. 302, 305; Butterfield *v.* Sawyer, 187 Ill. 598, 602; Engelthaler *v.* Engelthaler, 196 Ill. 230; Deemer *v.* Kessinger, 206 Ill. 57, 62.

[2] 4 Wigmore on Evidence, § 2459; Thayer, Preliminary Treatise on Evidence, 411-412; Bond *v.* Moore, 236 Ill. 576; Heslop *v.* Gatton, 71 Ill. 528; Jordan *v.* Jordan, 281 Ill. 421.

[3] Kurtz *v.* Hibner, 55 Ill. 514.

[4] 4 Wigmore on Evidence, §§ 2401, 2425 *et seq.*

With the rise and development of equity and its jurisdiction to remedy mistakes the court of chancery might conceivably have provided a remedy to rectify the mistake of a testator or settlor in a unilateral instrument of devise or gift, due to the omission of a word or phrase or the insertion of the wrong word. This, however, it has refused to do.[5]

It may, therefore, be stated generally that (apart from exceptional cases, if any, where a remedy is given to reform a unilateral instrument because of mistake and by this process to give effect to the objects and purposes of the inducement) the only subject matter of interpretation is the legal act of the party or parties contained in the words of the writing as distinguished from the inducement to the legal act. It makes no difference whether the legal act is required by law to be in writing or not, or whether the question arises at law or in equity. To this proposition, there is general agreement, though it is stated in a variety of ways. Wigram distinguished, "What the testator meant" from "What is the meaning of his words."[6] "Intent" has been distinguished from "meaning."[7] Mr. Wigmore distinguishes "will" from "sense."[8] All alike are merely attempting to find suitable expressions for distinguishing the inducement to the legal act from the legal act itself for the purpose of emphasizing the fundamental rule that the latter only is the proper subject matter of interpretation.

TITLE II.

STANDARDS OF INTERPRETATION.

§ 124. Wigmore's three standards applicable to unilateral acts: So far as unilateral acts—such as wills or settlements by way of gift *inter vivos*—are concerned, Mr. Wigmore sets out three possible standards of interpretation:[9] *First:* "The standard of the normal users of the language of the forum, the community at large, represented by the ordinary meaning of

[5] Newburgh *v.* Newburgh, 5 Madd. 364; Miller *v.* Travers, 8 Bing. 244.

[6] Wigram, Extrinsic Evidence in Aid of the Interpretation of Wills, Introductory par. 9.

[7] Parke, J., in Doe *v.* Gwillim, 5 B. & Ad. 122, 129; Denman, C. J. in Rickman *v.* Carstairs, 5 B. & Ad. 651, 663; Lord Wensleydale in Grey *v.* Pearson, 6 H. L. C. 61, 106.

[8] 4 Wigmore on Evidence, § 2459.

[9] 4 Wigmore on Evidence, §§ 2458, 2461.

words''; *Second:* ''The standard of a special class of persons within the community''; *Third:* ''The standard of an individual actor who may use words in a sense wholly peculiar to himself.''

§ 125. Mr. Justice Holmes' single standard of interpretation: Mr. Justice Holmes seems to be of opinion that one standard only is used—that ''of a normal speaker of English, using them [the words in question] in the circumstances in which they were used.'' [10] Justice Holmes does not quite make it clear whether he is merely asserting a fact or a rule of law. Does he say that all the so-called possible standards really reduce themselves to one? Or does he say that the law allows only the one? Perhaps he means that the law allows only the one and that the different standards so far as they appear to be available are really reducible to the one.[11] Mr. Wigmore, on the other hand, asserts: ''All the standards are provisional only, and therefore each may be in turn resorted to for help''; [12] and ''a unilateral act may be interpreted by the individual standard of the actor''; [13] the point being to find out which standard is used.

Suppose, for instance, the testator wrote his will in a cipher which made sense as the words stood according to common usage, could it be shown that he had used a cipher or special individual standard of interpretation so that his words would, for the purpose of determining their legal consequences, bear a different meaning? Judge Holmes indicates that he would answer this in the negative.[14] Would Mr. Wigmore answer in

[10] ''The Theory of Legal Interpretation,'' 12 Harv. Law Rev., 417.

[11] That would explain the following passage in ''The Theory of Legal Interpretation,'' 12 Harv. Law Rev., 417, 420: ''I do not suppose that you could prove, for purposes of construction as distinguished from avoidance, an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church. On the other hand, when you have the security of a local or class custom or habit of speech, it may be presumed that the writer conforms to the usage of his place or class when that is what a normal person in his situation would do.''

[12] 4 Wigmore on Evidence, § 2461.

[13] *Id.* § 2467.

[14] See note 11 *supra.*

the affirmative,[15] or would he avoid making a decision in the case put decisive of his theory by advocating a special rule that, on grounds of policy, the individual standard differing from that of common usage would not be permitted in the special case?

§ 126. The "will" or "intention" of the inducement as a standard of interpretation: There is still another possible standard of interpretation—the inducement of the testator to his act,—what he intended to accomplish by his legal act. Why should not his words be interpreted in the light of such "intention" as a standard? It would seem that Hawkins may have contended for some such view,[16] and that perhaps Thayer followed him in it.[17] Certainly Mr. Phipson[18] more recently so interpreted Hawkins' and Thayer's views and appears to have agreed with them and to have thought that some authorities went so far. It is believed that no authority has ever consciously adopted such a view. To do so would be in effect to make the inducement the subject matter of interpretation in the guise of considering it as an appropriate standard for determining what the words used mean. There is little practical difference between taking the words used as the subject matter of interpretation while at the same time using the inducement to them as a standard, and taking the inducement as the subject matter of interpretation and then considering whether the words used express the meaning which is found in the interpretation of the inducement. If the inducement is to be kicked out of the front door as the subject matter of interpretation, it should not be taken in at the back as the standard of interpretation.

TITLE III.

SOURCES FOR ASCERTAINING THE TENOR OF THE STANDARD OF INTERPRETATION—EXTRINSIC EVIDENCE.

§ 127. The instrument itself: The instrument itself not infrequently on its face indicates what standard of interpreta-

[15] See 4 Wigmore on Evidence, §§ 2462, 3481.

[16] Hawkins, "Principles of Legal Interpretation," 2 Jurid. Soc. Papers 298, reprinted in Thayer, Preliminary Treatise on Evidence, App. C.

[17] Thayer, Preliminary Treatise on Evidence, 412, 480.

[18] "Extrinsic Evidence in Aid of Interpretation," 20 Law Quart. Rev. 245, 253.

tion is to be used. It may disclose on its face that it was written in cipher. Most frequently, of course, the instrument shows that the words employed were used in their usual and ordinary meaning. Indeed, it may be laid down that *prima facie* the popular or common usage standard is to be taken. A mistake may have been made. The testator may have inadvertently used the wrong word, but the face of the instrument may show that he was not consciously putting any unusual meaning upon the language used. It may show that he was using the word which he did use by mistake according to the standard of the normal user of English. For instance, if he devises "section thirty-one," there may be evidence showing that his object was to devise "section thirty-two" and that he made a mistake in using "thirty-one," but the evidence may still be conclusive that the testator when he used "thirty-one," was not making use of a code in which "thirty-one" meant "thirty-two," but that he was using "thirty-one" in its usual sense. The interpretation of what he said is, therefore, plain, according to his words and the standard which he employed. If there is any relief, it is to correct a mistake and not to effect a different interpretation of the instrument.[19]

§ 128. Extrinsic evidence — Introductory: All evidence which is relevant to complete or ascertain the tenor of the standard of interpretation to be applied and which is not excluded by any special rules of exclusion, is admissible and must be considered.

(1) According to Mr. Justice Holmes[20] the standard is that of "a normal speaker of English" using words in the "circumstances in which they were used." If, however, the "circumstances" are part of the test they must be carefully defined. Apparently Judge Holmes means by "circumstances" those which the courts, proceeding on an entirely different theory,—*namely,* that the individual standard of the writer may be used, —have been accustomd to admit for consideration.

(2) According to Mr. Wigmore (following, it is believed, the usual view of the courts), the individual standard of a testator or settlor may be used. Hence extrinsic evidence of that standard may be considered if it is not excluded by some rule of

[19] Kurtz *v.* Hibner, 55 Ill. 514; see *post,* § 134 *et seq.*

[20] "The Theory of Legal Interpretation," 12 Harv. Law Rev. 417.

evidence. Always, however, the ultimate fact to be proved is whether the testator or settlor had an individual standard and if so, what it is. Never is the interpreter permitted to use the extrinsic evidence to prove the object and purposes of the inducement as a standard of interpretation.

(a) In some cases, extrinsic evidence tends to prove an individual standard and does not, at the same time, tend to prove the objects and purposes of the inducement. In such cases the use of the extrinsic evidence does not run the danger of introducing the immaterial and improper issue of what are the objects and purposes of the inducement. Extrinsic evidence of this sort is, therefore, admitted. Thus, evidence that the testator habitually called a devisee by a particular name would tend to prove the use of an individual standard in the use of that name by the testator, and so with regard to habits of speech generally. If a will were on its face in cipher, the testator's key to the cipher would be relevant to show the individual standard in the use of the words and the inducement would be untouched by the evidence.

(b) In most cases, however, any effort to go into extrinsic circumstances in order to establish an individual standard of the testator without, at the same time, showing the objects and purposes of the inducement to the legal act, is impossible. The ultimate facts regarding the objects and purposes of the inducement and the ultimate facts as to the individual standard are usually founded upon the same extrinsic evidence. The two issues are inextricably mixed. Take, for instance, "the knowledge and surrounding circumstances of the testator" or "his treatment of and relations with particular persons" or "his mode of enjoying and dealing with property."[21] It is precisely out of evidence along these lines that the objects and purposes of the testator may be built up and used as a standard of interpretation. At the same time, evidence on these lines often tends with varying degrees of probative value to show that the testator was using words according to a standard peculiar to himself.

[21] "Extrinsic Evidence in Aid of Interpretation of Wills," 20 Law Quart. Rev. 257.

In *Charter v. Charter*,[22] for instance, the testator having only two sons, William Foster Charter and Charles Charter, appointed as his executor "my son, Foster Charter." The testator's habits of speech were allowed to be proved, *i. e.*, that he called his first son "William" or "Willie," but never Foster. Evidence was also considered that William had quarreled with the testator and had left the house. Other evidence was considered of the testator's treatment of and feelings toward his sons. Such evidence may be of very slight or remote relevancy in determining whether the testator had a special individual standard of interpretation in writing Foster so that it referred to a son named Charles, but that it had *some* probative value in that connection should not be open to doubt. Proof of an inducement or "will" or "desire" to make Charles executor would tend to show either mistake in using the wrong name or else that the name used was to be interpreted with reference to a special individual standard of interpretation. It is probative of either fact. It is, therefore, at least relevant to prove a special individual standard of interpretation. Sir James Stephen asks [23] "How can any amount of evidence to show that the testator intended [*i. e.*, "willed" or "desired"] to write Charles, show that what he did write means Charles?" The answer is simple. What the testator "willed" or "intended" by way of inducement to say, tended to prove that what he did say was so said with reference to an individual standard of interpretation in which "Foster" designated the person named Charles. It must, therefore, be conceded that what a testator "wills" or "intends" by way of inducement, will frequently be of some probative value in determining whether or not he has used words according to some special individual standard.[24]

[22] (1874) L. R. 7 H. L. (Eng. & Ir. App.) 364.

[23] Digest of Evidence, note 33.

[24] It should be observed that other writers, perceiving that some of the evidence of surrounding circumstances considered by the courts was relevant to prove the "intent" of the inducement, have insisted that it was not relevant to prove that the testator used any special individual standard, and that, therefore, such cases prove that the inducement was a real and proper factor in the process of interpretation. Thus, Mr. Phipson in 20 Law Quart. Rev. 245, 252, after accepting the view that the evidence of the testator's treatment of and feelings towards his sons in Charter *v.* Charter was relevant only to show the testator's "intention" by way of

Here, then, is the Achilles' heel of the subject for the interpreter who wishes to use the inducement to control the meaning of the legal act. Here we have a theoretically correct issue upon which all evidence of the inducement—the "will," "desire" or "intention"—of the testator, may be received if not excluded by any rule of evidence. The logical pursuit of sound theory has, therefore, brought us to an investigation of the theoretically forbidden field of the inducement to the legal act. The situation is a practical theoretic dilemma. A theory founded upon the fact that it is the legal act which is to be interpreted, which tolerates no competition by the purposes and objects of the inducement, either as a subject matter of interpretation or as a standard of interpretation, is faced with a logical ground upon which the whole inducement may be gone into by way of showing an individual standard of interpretation.

In this situation, the courts have done the only thing that could be expected. They have allowed experience to dictate several rules which have the effect of excluding to a considerable extent, but not wholly, inquiries into the "inducement" or "will" or "intent" of the testator. In short, an effort has been made to allow *some* proof of the inducement of the testator in order to ascertain the tenor of an individual standard of interpretation without, at the same time, throwing the whole subject of the inducement open to proof and thus, in practical effect, making the inducement the subject matter to be interpreted or the standard of interpretation. Such a course is a practical solution of the theoretic dilemma. It cannot be called illogical or unsound in theory because the theory of interpretation, itself, pressed to its logical conclusion, results in a hopeless theoretic dilemma. The practical solution of a theoretic dilemma means that of two completing theoretically correct results one gives way before the other. It remains, then, to consider the special rules by means of which evidence of the ob-

inducement, says: "The issue or object, then, could not have been to ascertain the meaning of the words 'Foster Charter' according to either general or special standards; apparently, therefore, it must have been to ascertain their meaning according to the actual intention of the testator, for otherwise the evidence would have been irrelevant." The fallacy here is the assertion that the evidence would otherwise "have been irrelevant."

jects and purposes of the inducement—the "will" or "desire" of a testator—is excluded when offered to prove that the testator had a special individual standard of interpretation and what that standard was.

§ 129. The rule against "disturbing a clear meaning": This is embodied in Wigram's Proposition II as follows:[25] "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

The practical operation of this rule was to forbid the resort to any surrounding circumstances or to any individual standard where the words used in their primary sense were "sensible with reference to extrinsic circumstances." In such cases the rule cut off the interpreter from the opportunity to build up the inducement and use that as a standard of interpretation. This, so far as it tends to prevent the objects and purposes of the inducement from being used as a rival subject matter of interpretation or a rival standard of interpretation, is theoretically sound. So far as it prevents proof of the use by the testator of an individual standard of interpretation, it is theoretically unsound. A theoretic dilemma is presented. It has been solved by the application of practical considerations. The rule against disturbing a plain meaning rests in the last analysis upon grounds of practical expediency which support one theoretically correct result at the expense of another. Its only basis is the practical danger to the whole theory of interpretation in letting in the intent of the inducement to be used as a competing subject matter or standard of interpretation. There is no use in saying that it would not compete but would only furnish the basis for ascertaining the individual standard of

[25] Wigram, Extrinsic Evidence in Aid of the Interpretation of Wills, Introductory par. 14.

the testator. Practically it would compete. Counsel are quick to build up a whole structure of inducement and to use it as a subject matter or standard of interpretation in order to overthrow the meaning of the words according to the standard which the testator has in most cases actually used. Practically, counsel would use the inducement for the purpose of so molding the process of interpretation as to correct mistakes. When the door had been opened that wide we would enter the realm of false, exaggerated and speculative claims. The inconvenience and expense of uncertainties in conveyancing and the handling of trust estates would arise and multiply. No cause would be hopeless and no cause secure. Suits to construe or for the protection of trustees or purchasers would multiply. Questions which ought to be settled inexpensively without litigation would have to go through the courts for a final determination as to the proper meaning of the writing. In determining the force to be given to these practical considerations the opinions of a writer like Wigram and of judges and lawyers having the most considerable experience in the construction of wills and settlements are entitled to much weight.

There have been in recent times at least two views as to the rigidity of this rule against disturbing a plain meaning. Wigram laid it down as a rule of law—"an inflexible rule of construction"—to be obeyed as other rules of law are obeyed. This view of the rule has been held and enforced in England and to some extent in this country.[26] Lord Bowen, on the other hand, declared the rule to be not so much "a canon of construction as a counsel of caution"—not so much a rule of law as a reminder to judges that they were "not to give weight to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion."[27] How far Lord Bowen's suggestion as to the character of the rule should prevail is again a practical question. In the hands of judges with the special training which success in practice at the English chancery bar furnishes, a "counsel of caution" might be sufficient to achieve all the best results of the more rigid rule and still leave some margin for the special case. Suppose, however, among

[26] 4 Wigmore on Evidence, §§ 2462, 2463.

[27] Bowen, L. J. in *Re* Jodrell, 44 Ch. D. 590.

judges of far less specialized training the "counsel of caution" comes to mean merely the absence of any rule against disturbing a plain meaning and complete freedom to proceed as if no such rule existed. Such a condition continuing for a generation means that all suggestion of the rule would disappear and that judges and counsel alike would assume the freest right to consider all the extrinsic evidence, not excluded by recognized rules, in order to build up the inducement and to use it as the standard of interpretation. If that is the result of turning the rule against disturbing a plain meaning into a mere "counsel of caution," then the rule against disturbing a plain meaning has not only been wholly lost but the supreme effort of the common law to keep the inducement from becoming the subject matter or a controlling standard of interpretation has to a large extent failed.

§ 130. Direct declarations by the testator or settlor—Such declarations as relate to the standard of interpretation used, when they do not also disclose the objects and purposes of the inducement, should be received: Thus, if a writing is apparently in cipher the declarations of the writer which reveal the key should be received. They are relevant. There is no rule of exclusion. If they are regarded as hearsay, then the exception which permits declarations showing the state of the declarant's mind is applicable. So declarations of a testator which show his "habits of speech" should be received on the same ground. They preponderate to show the actual, individual standard. They may have practically no effect in indicating the objects and purposes of the inducement.

§ 131. Declarations of the testator or settlor which disclose the objects and purposes of the inducement: These are relevant in determining the individual standard used. They are not excluded by the hearsay rule because they fall within a well recognized exception. They are excluded [28] because they are too certain to be used improperly to make the objects and purposes of the inducement the subject matter of interpretation or the standard of interpretation.[29] They give more com-

[28] Wilson *v.* Wilson, 268 Ill. 270.

[29] Nichols, "Extrinsic Evidence in the Interpretation of Wills," 2 Jurid. Soc. Papers 352: "There is a kind of evidence to which both of these reasons [securing certainty of title and preventing fraudulent proof] and the analogy of the law

fort to the false and improper issue than they give aid to the proper one.

§ 132. Exception in the case of equivocation: To the general rule excluding such declarations there is an exception in the case where the term to be interpreted, upon application to external objects, is found to fit two or more equally.[30] The basis of this is the fact that upon a balance of all the considerations the objections to not using the evidence overcome the dangers from its use. For instance, if the evidence be not used, the gift may fail entirely for uncertainty. In such a situation, any evidence of the actual individual standard of interpretation used ought to be resorted to. Mr. Justice Holmes makes the acute suggestion[31] that "while other words may mean different things, a proper name means one person or thing and no other." Hence (though this is not quite the way Mr. Justice Holmes puts it)[32] the declaration of what the testator meant is in the highest degree probative of the individual standard of interpretation which he has, in fact, used.

It has been argued that because in one case it is permissible to put in direct declarations which show the objects and purposes of the inducement, such objects and purposes are theoretically proper facts to be considered in the process of interpretation. The present exposition is made for the purpose of pointing out the danger of adhering to such a statement. The objects and purposes of the inducement are not in and of themselves either the proper subject matter of interpretation or a proper standard of interpretation. They are, as such, and in accordance with our legal theory, rigidly excluded. Indeed, even

requiring the will to be in writng, must strongly apply; I mean, of course, the species of evidence which we have called direct evidence of intention; and which, if admitted, would consist for the most part of declarations and informal written memoranda of the testator, and of instructions given by him to the persons employed in the preparation of the formal instrument. Evidence so nearly allied in character to that furnished by the will itself, presents an aspect of rivalry to the will, which raises a prejudice against its reception."

[30] 4 Wigmore on Evidence, § 2472.

[31] "The Theory of Legal Interpretation," 12 Harv. Law Rev. 417, 418.

[32] He says: "* * * recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said."

when evidence of the objects and purposes of the inducement tends to show an individual standard of interpretation, it is still excluded because of the danger arising in permitting any opportunity for the objects and purposes of the inducement to become a competing subject matter or standard of interpretation. To a slight extent, evidence which tends to reveal the objects and purposes of the inducement is let in because it also tends to prove an individual standard of interpretation. That is the true basis for the exception which lets in direct declarations of intention in the case of equivocation.

Some controversy has arisen as to whether the rule excluding direct declarations of intention, and the exception which admits them in the case of equivocation, are rules of the substantive law of evidence or of the substantive law of interpretation. This is a debate over the names to be given to ideas. It is a profitless field of discussion except so far as it offers the opportunity again to state essential differences. The rule which excludes objects and purposes of the inducement as a subject matter of interpretation or as a standard of interpretation is a rule of the substantive law of interpretation. Hence, so far as direct declarations of intention, which show the objects and purposes of the inducement, are excluded because they are irrelevant, the application is of the substantive law of interpretation. So far as direct declarations of intention tend to prove an individual standard of interpretation the substantive law of interpretation makes them relevant. When they are still excluded merely because they are of slight probative value to the proper issue and almost certain to be used improperly to make the objects and purposes of the inducement a subject matter of interpretation or a standard of interpretation, a rule of the substantive law of evidence is being applied. When this general principle of exclusion becomes inapplicable in the case of equivocation, we simply have a well defined situation where the principle of the substantive law of evidence upon which the rule of exclusion is founded becomes inapplicable. The results, therefore, logically reached by applying the rules of the substantive law of interpretation to determine what is relevant, coupled with the absence of any rule of exclusion, are produced. It is futile to spend time debating whether the failure of the general rule of exclusion to operate in the particular

case is a mere application of the rule of the substantive law of interpretation, coupled with an absence of any rule of the substantive law of evidence requiring exclusion, or whether it is a part of the rule of exclusion of the substantive law of evidence which determines when the general rule of exclusion does not operate.

§ 133. Even where extrinsic evidence (other than direct declarations of the testator or settlor) tends to prove an individual standard of interpretation in cases of ambiguity under Wigram's Proposition II, it may still be excluded because it is of slight and remote probative force to establish any standard of interpretation on the one hand and is likely to be used improperly to establish the inducement as a rival subject matter or standard of interpretation: Wigram,[33] so far as he went, was exactly correct when he said, "Any evidence is admissible, which, in its nature and effect, *simply* explains what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing *merely* what he intended to have written." His error was in assuming that evidence presented tended to prove merely one thing or the other. The fact is that most extrinsic evidence tends to prove both things—namely, that the testator used an individual standard and that he intended to accomplish certain objects and purposes by his words. Wigram's error in refusing to notice that the same evidence might be relevant on both issues, and, indeed, that because it tended to prove the intent of the inducement it tended to prove the special individual standard of the testator, made it difficult for him to explain some cases where extrinsic evidence was, in fact, admitted. At the same time, Hawkins, whose views would seem to require that the intention of the inducement be regarded practically as a standard of interpretation, finds many apparent difficulties in the cases where the evidence of extrinsic circumstances tending to prove the intent of the inducement was excluded. The true view, however, and the one which will best reconcile all the cases is this: In determining that the testator has used a special individual standard, one may go into evidence of the intention

[33] Wigram, Extrinsic Evidence in Aid of the Interpretation of Wills, Preliminary Observations, Pars. 9 and 10.

of the inducement, but in so doing it must be remembered that there is danger of the evidence of the "intention" of the inducement being used as in and of itself a standard of interpretation or a rival subject of interpretation. This is to be avoided as improper. Hence, on a familiar principle (believed by the writer to be a rule of the substantive law of evidence, but this is wholly inconsequential), facts which tend only very remotely to prove the "intention" of the inducement and therefore, still more remotely, to prove any special standard of interpretation, are of such slight and remote value regarding the proper issue and so likely to be used in an improper way to make the intention of the inducement a subject matter or standard of interpretation, that courts have refused to consider them at all and have, therefore, excluded them.[34] On the other hand, in many cases the extrinsic evidence (other than direct declarations) has much probative force to show an individual standard of interpretation and are weak and indirect in their

[34] Examples of such rulings will be found in Mr. Phipson's article in 20 Law Quart. Rev. 245, at 258, as follows: "In Maybank *v.* Brooks (1780), 1 Bro. C. C. 84, A left a legacy to 'B, his executors administrators and assigns' but, B having died before the date of the will, B's representative claimed the legacy, tendering evidence that A knew of B's death when making the will, in order to show that A meant the legacy to be transmissible. Lord Thurlow held proof of A's knowledge to be evidence of intention and inadmissible. Again, in Neale *v.* Neale (1898, C. A.), 79 L. T. 629, A, a widow, having settled property on certain trusts to arise after the 'solemnization of her intended marriage,' B, a beneficiary, claiming that these trusts had arisen, tendered evidence that the settlement was made in contemplation of a marriage, which had in fact taken place, although known by the parties to be invalid, between A and her deceased husband's brother. These facts were held to be evidence of intention and rejected. 'The intention of the parties cannot,' Smith, L. J., held, 'be taken into account for the purpose of construing the plain words of a deed,' which here clearly referred to a valid and not an invalid union. Lastly in Higgins *v.* Dawson, [1902] A. C. 1, the question being whether the words 'residue and remainder,' in a will, referred to the surplus of two sums recited to have been lent by the testator on mortgage, or to the surplus of his whole estate, proof that the mortgage debts were all the property the testator possessed at the time of the will was tendered as favoring the former view, but held to be evidence of intention and rejected. 'The purpose and effect of the evidence,' Lord Shand remarked, 'is to supply a basis for inferring the intention of the testator.' "

tendency to show the objects and purposes of the inducement. Typical cases of this sort are those where the extrinsic evidence relates to "the knowledge and surrounding circumstances of the testator," or "his treatment of and relations with particular persons," or "his mode of enjoying and dealing with property."[35] Clearly the determination of whether a particular item of extrinsic evidence which tends to prove the intention of the inducement, does so to a degree so slight as to be excluded as evidence of a special individual standard lies largely in the discretion of the court. All courts and all judges would not rule the same in every case and the facts of the different cases are infinitely various. It is enough to have pointed out the actual line of reasoning upon which the difference in results rests. It is not to be supposed that all results can be reconciled or that any generalization can be made under which they could be reconciled.

TITLE IV.

CASES ILLUSTRATING THE APPLICATION OF SOME OF THE FOREGOING PRINCIPLES—PARTICULARLY THE RULE AGAINST DISTURBING THE PLAIN MEANING.

§ 134. **Introductory**: The central point in the theory of legal interpretation is whether the objects and purposes of the inducement—what Wigram calls the "meaning of the testator" as distinguished from "what his words mean,"—what others have called the "intent" as distinguished from "meaning,"—what Mr. Wigmore calls the "will" as distinguished from the "sense"—may be used as the subject matter of interpretation or as a standard of interpretation, or to what extent they may be used to prove a special individual standard of interpretation.

The cases relating to the description of property devised are especially useful in furnishing the answers to these questions.

§ 135. (1) **Description of property devised — Where the description of the land devised is precisely and in all particulars applicable to an existing piece of land no ambiguity arises and, though the extrinsic evidence shows beyond question a mistake in using the description expressed, that description**

[35] See Mr. Phipson's article, *id.*, 257.

must prevail as a matter of construction: In such a case the language employed was used with reference to the ordinary standard of usage. It is sensible with reference to extrinsic circumstances. The difficulty is one of mistake. If no remedy is permitted for mistake and the question becomes purely one of construction the problem must be solved in favor of the meaning of the words according to the usual and ordinary primary meaning. This is the proposition of *Kurtz v. Hibner.*[36] In that case a testator devised to James "The south half of the east half of the south quarter, Section 31, in Township 35, Range 10, containing forty acres, more or less." In a suit for partition by one of the heirs at law of the south half of the south half of the southeast quarter of Section 32, Township 35, Range 10, containing forty acres, James offered to prove that at the time of the death of the testator he was in the actual possession of the forty acre tract sought to be partitioned as tenant of the deceased and "that the draftsman of the will, by mistake, inserted the word 'one' after the words 'Section thirty' instead of 'two' so as to bequeath to James land in Section thirty-*one* instead of Section thirty-*two.*" The evidence was rejected and this was affirmed. It is submitted that the result reached is a correct application of the principles already set out. In the first place, it should be noted that the description as written does not refer in any way to the land described as land *belonging to the testator.* Hence there is no ambiguity arising from the face of the writing taken in connection with the external facts. The testator has devised forty acres in Section 31 and there was such land as he described. The offer of proof was merely an offer to show that the objects and purposes of the inducement sought a different result. But such objects and purposes were not relevant as a subject matter of interpretation or as a standard of interpretation. Nor, as they were offered, were they relevant to indicate that the testator in using the figure 31 was employing any special individual standard of interpretation—as if he had been using 31 as a sort of cipher code

[36] 55 Ill. 514. This case has been followed by our Supreme Court in the following: Bishop *v.* Morgan, 82 Ill. 351; Bowen *v.* Allen, 113 Ill. 53; Bingel *v.* Volz, 142 Ill. 214; Williams *v.* Williams, 189 Ill. 500; Lomax *v.* Lomax, 218 Ill. 629; Graves *v.* Rose, 246 Ill. 76; Clancy *v.* Clancy, 250 Ill. 297; Stevenson *v.* Stevenson, 285 Ill. 486, 489.

number for 32. Indeed, the evidence was in terms offered to prove "mistake" on the part of the testator, which meant that the offerer admitted that the testator had used the figure 31 in its ordinary and usual meaning but had done so by mistake. No question, therefore, of interpretation of the writing arose as a result of the offer. The only question presented was whether a will can be reformed in equity for mistake. The court assumed that this could not be done.

§ 136. Where, however, the description of the land devised is not precisely and in all particulars applicable to an existing piece of land, the description is not sensible with reference to the extrinsic circumstances and that part of the description which, in view of admissible extrinsic circumstances, appears to be false may be rejected under the rule "falsa demonstratio non nocet": Thus, where, along with the description of land which the testator never owned, there is an added designation of the land devised as "my homestead,"[37] "my house and lot,"[38] "two lots of land known as the house lot and mill lot,"[39] "Hays' farm,"[40] "home farm containing 200 acres,"[41] property "which I now own" or "belonging to me,"[42] or "a part of my estate,"[43] the description is not precisely and in all particulars applicable to an existing piece of land. Therefore an ambiguity arises and that part of the description which is false may be rejected, leaving a balance to be used, if possible, to designate some tract of land.

§ 137. The principal difficulty is in determining whether or not the description of the land devised is precisely and in all particulars applicable to an existing piece of land: Thus in *Lomax v. Lomax*,[44] there was a devise of the "southwest fractional quarter of Section 24, T. 40, containing about 55.87 acres more or less." There was no such fractional quarter in Township 40 and the only fractional quarter in Township 40 containing about 55.87 acres more or less was one in Section 14 and it was owned by the testator. Under these circumstances it

[37] Morrall *v.* Morrall, 236 Ill. 640.
[38] Bowen *v.* Allen, 113 Ill. 53.
[39] Swift *v.* Lee, 65 Ill. 336.
[40] Emmert *v.* Hays, 89 Ill. 11.
[41] Lawrence *v.* Lawrence, 255 Ill. 365.
[42] Douglas *v.* Bolinger, 228 Ill. 23; Daniel *v.* Crusenbury, 279 Ill. 367; Stevenson *v.* Stevenson, 285 Ill. 486.
[43] Decker *v.* Decker, 121 Ill. 341.
[44] 218 Ill. 629.

would seem that the description used did not apply precisely and in all particulars to any land. Hence an ambiguity arose and the false portion which would be "24" of Section 24 could be stricken out, leaving as the description the southwest fractional quarter in Township 40 containing about 55.87 acres more or less. This would have been sufficient to designate the fractional quarter in Section 14. The holding of the court that there was no ambiguity must have been based upon the opinion that the description as contained in the will was precisely and in all particulars applicable to an existing piece of land. The court's conclusion is, therefore, with deference, doubted.

Suppose, however, no super-added descriptive phrase (such as "belonging to me") is explicitly used. Suppose, for instance, there is simply a devise of Section 1 in Township 7, Range 6, and that there is such a tract of land but that it was never owned by the testator. If the additional descriptive phrase "belonging to me" cannot by any process of interpretation be found in the four corners of the instrument, the description is precisely and in all respects applicable to an existing tract of land. There is no ambiguity and therefore no ground for any departure from the primary meaning. If, on the other hand, by any legitimate process of construction the additional descriptive phrase "belonging to me" can be found expressly included, an ambiguity does arise and the false part may be rejected and the balance construed.

The apparently conflicting decisions of our Supreme Court are due to the fact that different judges and, in some instances, the same judges at different times, incline one way or the other on the question whether the context of a particular instrument justifies the finding that the words "belonging to me" are actually and expressly contained in the instrument as part of the description, though such words are in a physical sense absent.

The results of the authorities as they now stand appear to be as follows:

1. If there is nothing on the face of the instrument except the legal description of land, the fact that the testator never owned that land, the further fact that he purported to devise the exact number of acres which he owned but, if the description be taken as it stands, he would die intestate as to all or all but

a few acres which he owned, does not warrant the court in interpreting the will as including the super-added words of description "belonging to me." [45]

2. On the other hand, to some extent, which defies any precise statement, the court may, upon a special context, find such a situation as warrants the determination by it that the words "belonging to me" are an actually expressed part of the description, although such words are not explicitly set out in the instrument. Thus, in *Alford v. Bennett*,[46] where the testator devised all his land by special descriptions except the odd amount of twenty-five acres in the northwest quarter of Section 17, and where by a previous clause he had devised fifteen acres from that quarter section leaving still undisposed of twenty-five acres, the will was construed as expressly referring to land which the testator owned, so that when he devised "twenty-five acres in the northeast quarter of Section 17" the "northeast" could be rejected as false.[47]

§ 138. After part of a description has been rejected under the rule of "falsa demonstratio" the meaning of what is left must be construed and given effect according to the usual principles of construction: In many cases this produces a satisfactory result.[48] In some cases, however, the rejection of what is false in the description may leave the description so

[45] Stevenson *v.* Stevenson, 285 Ill. 486; Clancy *v.* Clancy, 250 Ill. 297; Graves *v.* Rose, 246 Ill. 76; Lomax *v.* Lomax, 218 Ill. 629; Williams *v.* Williams, 189 Ill. 500; Bingel *v.* Volz, 142 Ill. 214; Bowen *v.* Allen, 113 Ill. 53; Bishop *v.* Morgan, 82 Ill. 351; Kurtz *v.* Hibner, 55 Ill. 514.

If the following cases hold the contrary they must be regarded as, for the time being at least, overruled: Felkel *v.* O'Brien, 231 Ill. 329; Collins *v.* Capps, 235 Ill. 560; Gano *v.* Gano, 239 Ill. 539.

As to the advisability and method of changing the rule now in force see 2 Ill. Law Bulletin 175, 286; 14 Ill. Law Rev. 147.

[46] 279 Ill. 373.

[47] See also Whitcomb *v.* Rodman, 156 Ill. 116 (where the descriptions overlapped if taken literally and were therefore contradictory); Huffman *v.* Young, 170 Ill. 290 (where an odd number of acres was referred to); Vestal *v.* Garrett, 197 Ill. 398.

[48] Swift *v.* Lee, 65 Ill. 336; Emmert *v.* Hays, 89 Ill. 11; Decker *v.* Decker, 121 Ill. 341; Whitcomb *v.* Rodman, 156 Ill. 116; Huffman *v.* Young, 170 Ill. 290; Vestal *v.* Garrett, 197 Ill. 398; Douglas *v.* Bolinger, 228 Ill. 23; Felkel *v.* O'Brien, 231 Ill. 329; Collins *v.* Capps, 235 Ill. 560; Morrall *v.* Morrall, 236 Ill. 640; Gano *v.* Gano, 239 Ill. 539; Lawrence *v.* Lawrence, 255 Ill. 365; Daniel *v.* Crusenbury, 279 Ill. 367.

mutilated that it does not describe anything. In that case the devise fails for uncertainty.[49]

Patch v. White,[50] is the leading example of a sound but extremely ingenious handling of what was apparently a hopelessly mutilated description so that it expressed a sensible and an appropriate meaning. In that case the testator devised to his brother "Lot numbered six in Square four hundred three together with the improvements thereon erected and appurtenances thereto belonging." The will, itself, and the extrinsic facts disclosed the following: The testator referred to the lots devised as his own property in the opening words of the will as follows: "and touching worldly estate, wherewith it has pleased the Almighty God to bless me in this life I give, devise, and dispose of the same in the following manner and form." It appeared that the lot described did not belong to the testator and never had and that there were no improvements upon it. Plainly, therefore, the description taken altogether was inapt. An ambiguity arose. The first thing the court had to do was to decide what part of the description was false and what part true. It naturally decided that that part was false which referred to lot six in square four hundred three. The false part of the description having been rejected the devise stood as the devise of a lot owned by the testator at the date of his will number ——— in square ——— which was improved. Now, the difficulty which arose was whether this was a sufficiently certain description to make identification of any lot possible. If the devise, as quoted, had stood alone with nothing else in the instrument it would certainly have been too uncertain to enable any lot to be identified and the devise would, therefore, have failed. From the rest of the will, however, it appeared that every other lot which the testator owned at the date of the will was specifically devised and expressly described with the exception of lot three in square four hundred six and that this lot three was improved with a dwelling house. It also appeared that by a subsequent clause of the will the testator had devised the balance of his real estate which he believed to consist of certain lots, describing them, thereby contributing

[49] Bingel *v.* Volz, 142 Ill. 214; Heller *v.* Heller, 147 Ill. 621; Clancy *v.* Clancy, 250 Ill. 297.

[50] 117 U. S. 210.

an expressed declaration in the will that the descriptions of the lots devised covered every lot he then owned. The further residuary clause related only to personalty. Under these circumstances a devise of lot ——— in square ——— having improvements was as sufficient to identify the lot as if it had said "my only remaining lot" or "my only lot left." The court very properly held, therefore, that the will was to be interpreted to convey lot three in square four hundred six.

It should be noticed that the court did not use any evidence of the objects and purposes of the inducement, either as a subject of interpretation or as a standard of interpretation. Indeed, the extrinsic evidence used can hardly be said to have been evidence of the objects and purposes of the inducement at all. Nor did the court construe "lot six, square four hundred three" as meaning "lot three square four hundred six." To have done so the court must have found that lot six, square four hundred three, was a code expression for something entirely different—that the testator was using the figures according to an individual code standard. There was no evidence at all of anything of the sort. The inference was that the testator had used the figures in their ordinary and usual significance and that he had done so by mistake. This mistake, as such, could not be rectified by a court of equity. In spite of some inadvertent phrases about the "correction" of errors or "slips of attention" the court did not undertake the establishment of any jurisdiction in equity to correct mistakes in wills. What the court did do was this: it found a description which taken altogether did not fit the extrinsic facts. Then it rejected that which appeared on the evidence to be false and inapplicable. After this it still found sufficient in the whole instrument to describe and identify lot three, square four hundred six, as the property devised.

§ 139. (2) **Identification of the devisee:** Where the description of the devisee is precisely and in all particulars applicable to an existing person, and one only, no ambiguity arises; and even though the extrinsic evidence, however strong, shows a mistake in using the description, as a matter of construction simply the description as made must prevail.

Where, however, the description of a devisee is not precisely and in all particulars applicable to any existing person an am-

biguity arises and extrinsic circumstances may be resorted to for the purpose of determining that the testator used a standard of interpretation which justifies the use of the description in question in a secondary meaning. Thus, where several charities were designated as legatees but no corporation or association precisely answered the description used, it was proper to examine the extrinsic circumstances to determine what institutions were designated by the names used.[51]

So where the description of the devisee is precisely and in all particulars applicable to two or more persons an ambiguity arises and extrinsic circumstances may be resorted to. Thus if the devise is to *A. B.* and there are two of the same name, the extrinsic circumstances may be gone into, but if they show that one is the father and the other the son, that circumstance will raise a *prima facie* inference that the father is meant rather than the son.[52]

§ 140. (3) **Who are included in the words of general description:** Where the general description of devisees taken in its primary meaning is sensible with reference to extrinsic circumstances because some one answers the primary meaning of the description, no ambiguity arises and so far as any question of construction is concerned the primary meaning must prevail, even though the extrinsic circumstances show a mistake in not qualifying the designation so as to include others. Thus, if there is a gift to children and there are legitimate children, they and they alone will take and the illegitimates will be excluded even though the extrinsic evidence showed that they and they alone were intended.

Even where there were no other than illegitimate children, when the will took effect or at any other period, so that the gift, if confined to legitimate children would fail for want of objects, the primary meaning of "children" was adhered to[53] because the word as used by the testator was still sensible in its reference to extrinsic circumstances, since at the time it was used it might

[51] Preachers' Aid Society *v.* England, 106 Ill. 125; Missionary Society *v.* Mead, 131 Ill. 338.

[52] Graves *v.* Colwell, 90 Ill. 612; Fyffe *v.* Fyffe, 106 Ill. 646; Doty *v.* Doty, 159 Ill. 46.

[53] Smith *v.* Garber, 286 Ill. 67, 69, quoting with approval 2 Jarman on Wills, 217.

have had reference to a future possibility of marriage and the birth of legitimate children. It was only, therefore, when it could be shown that the illegitimate children had become, according to a usage indulged in by the testator himself, "children" of the person named that they were regarded as designated.[54] Section 2 of the Act on Descent[55] which provides that an "illegitimate child shall be the heir of its mother," has now, however, been held so far to place the illegitimate child in the category of lawful children of the mother, that it is at least ambiguous whether in the will of the mother's aunt devising a remainder to the "child or children" of the mother, the illegitimate child is referred to.[56] This ambiguity makes a resort to extrinsic circumstances possible, so that where they indicated that the testatrix knew of the existence of the illegitimate child when her will was made and that the age of the parent made the existence of legitimate children doubtful, the illegitimate child was included in a devise to the child or children of the mother.[57]

§ 141. (4) **Where the question is as to the estate created or the nature of a contingency:** Where the primary meaning of the words used is sensible with reference to the context and the extrinsic circumstances, that meaning must as a matter of construction prevail, even though the extrinsic evidence shows a mistake in the estate created or the contingency described.

Where, however, the primary meaning gives rise, in connection with the context alone or the context and the extrinsic circumstances, to an incongruity or absurdity so great as to make the primary meaning fairly insensible, an ambiguity arises and the extrinsic circumstances may be used to disclose the tenor of the standard which the testator actually employed.[58]

Even where the context alone of the instrument gives rise to an evenly balanced argument for the secondary meaning as against the primary, an ambiguity arises, and the extrinsic circumstances which disclose the tenor of the standard which the

[54] Smith *v.* Garber, 286 Ill. 67, 70, quoting with approval 2 Underhill on Wills, § 570. See also Dickson *v.* Dickson, 36 Ill. App. 503.

[55] R. S. 1874, ch. 39.

[56] Smith *v.* Garber, 286 Ill. 67.

[57] *Id.*

[58] It should be observed that such an incongruity or absurdity as is referred to is usually sufficient to justify the court in adopting a secondary meaning on the context without any resort to extrinsic circumstances. See *post*, §§ 205, 206, 572, 600, 602.

testator actually employed may be resorted to, even though such circumstances also tend to show the intention of the inducement. This is the proposition of *Abrahams v. Sanders.*[59] There the question was one of construing the nature of a contingency on which a gift over took effect. After finding that special elements of the context made at least an even balance between the primary and secondary meanings of the phrase in question, the court went extensively into the effect of the surrounding circumstances to establish the tenor of the standard actually used by the testator which justified the secondary meaning.

It would seem to follow that where, upon a given context, the considerations were evenly balanced for and against two meanings, neither of which could be said to be primary or secondary, extrinsic circumstances which disclosed the tenor of the standard which the testator actually employed might be used even though the same circumstances tended to show the intention of the inducement.

TITLE V.

COMMENTS UPON THE "OBJECT OF INTERPRETATION" AND UPON "STRICT" AND "LIBERAL" CONSTRUCTIONISTS.

§ 142. The object of interpretation—What part does the "intention" of the inducement play: Wigram's view was that the object of interpretation was to find "the meaning of the testator's words" as distinguished from "what he meant." He attempted rigidly to exclude all references to the "intent" of the inducement as irrelevant and immaterial. Then came Hawkins who insisted that the "intent" of the inducement was a relevant and material element of interpretation of the words used. Both are right, and yet both positions are so far incomplete as to be misleading if not actually incorrect.

(1) The subject matter of interpretation is the writing or the words used and not the inducement to the writing. So far Wigram is right and Hawkins, if he means to assert the contrary, is wrong.

(2) The standard of interpretation may be either that of the normal user of the language or a special, individual standard of the writer himself. It cannot be the inducement to the writ-

[59] 274 Ill. 452.

ing. Again Wigram is correct and, if Hawkins means to assert the contrary, he is wrong.

(3) In ascertaining whether the writer has used a special individual standard and what the tenor of that standard is, the intent of the inducement may become a relevant and material fact. So far as Hawkins recognizes that the intention of the inducement is relevant to the process of interpretation in this precise way he is right. Wigram, if he refuses to recognize, even as a theoretical proposition, any use of the intent of the inducement for this purpose, was in error.

(4) The intent of the inducement having become relevant and material to determine whether the testator has used a special standard of interpretation and to determine what that standard might be, the courts have, for practical reasons, limited the scope of the inquiry into that intent. In the statement of the practical rules which limit the scope of the court's inquiry into the "intent" of the inducement as they have been worked out by the English cases, Wigram excels.

(5) The objects of interpretation of unilateral writings are thus phrased by Professor Graves:[60] "What is it that the judicial expositor seeks to ascertain—is it the meaning of the words or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete, and the answer must be either the one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of words varies with the circumstances under which they are used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to have said, but did not, is foreign to the inquiry. * * * We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but it must be the meaning of his words—of the words as he has used them—the meaning which they have 'in the mouth of this party' to use the language of C. B. Eyre."

This, however, does no more than repeat the proposition that the individual standard of the testator may be used. That is an

[60] 28 Am. Law Rev. 321, 323.

important beginning, but it is only a beginning. The moment one attempts to produce proof of the individual standard by extrinsic evidence he runs into the difficulty that he is in most cases in fact introducing the object and purposes of the inducement as a rival subject matter or standard of interpretation. The real problem of the whole subject is to determine how far the individual standard may be shown and the inducement still be prevented from becoming the real subject matter or standard of interpretation.

§ 143. Strict and liberal constructionists: "Strict" and "liberal" as applied to persons interpreting written instruments are not much more than epithets provoked in the heat of controversy.

In the practice of the art of interpretation, there must, in many cases, be a fair ground of difference of opinion by two experts, both adhering strictly to all the rules and principles imposed upon them by the substantive law of interpretation and the substantive law of evidence. This is true because much of the art in reaching a conclusion depends upon the skilful discovery and balancing of considerations on each side. It would be improper to say of those who did not agree because of differences arising upon the balancing of all the considerations on each side, that one was "liberal" and the other "strict." Both might be equally "liberal" or equally "strict." The fact is they merely differ in their judgment of the weight to be given opposing considerations on each side.

The judge who regards the rule against disturbing a plain meaning as a rule of law (following Wigram) might perhaps be called a strict constructionist, although he is not so much a strict constructionist as he is a believer in the correctness of a certain rule of law of construction. His associate who accepts Lord Bowen's view that the rule against disturbing a plain meaning is merely "a counsel of caution" might perhaps be regarded as a "liberal" although he is, after all, only a believer in a different rule regarding the substantive law of interpretation.

There is, however, a wide gulf between some judges who call themselves "liberal" and those whom "liberal" judges call "strict constructionists." The so-called strict constructionist is frequently one who is attempting to practice the art of interpretation according to the rules of the substantive law of

interpretation and the rules of the substantive law of evidence which have become settled. If the law is settled against the rule which forbids the use of extrinsic evidence to disturb a plain meaning, he accepts that as the rule of law and acts accordingly whether he thinks the law should be otherwise or not. When a rule of law of interpretation tells him that the "intention" of the inducement must not be made the subject matter of interpretation or used as a standard of interpretation he seeks to obey that rule, whether he personally approves of it or not. The so-called "liberal," on the other hand, is too often attempting to find a way to beat the recognized rules of the law of interpretation and the recognized rules of the law of evidence. While giving lip service to these rules he may yet violate the most fundamental of them all. He may, in fact, use all the extrinsic circumstances that can be secured in the case, and frequently a few conjectures besides, to build up a plausible "intention" of the inducement, which becomes, under the assertion that "the intention of the testator is the pole star in the construction of wills," a rival subject matter of interpretation, or at least, a rival standard of interpretation. That one practicing the art of interpretation under the rules of law should, while acting thus, whether in a slight degree or unconsciously or to an extreme degree and brazenly, be permitted unchallenged to shelter himself under the title of "liberal" is a tribute to the paucity of our epithetical vocabulary.

CHAPTER VIII.

SUGGESTIONS CONCERNING THE PRACTICE OF THE ART OF INTERPRETATION.

§ 144. **There is an art of interpretation:** An artist who paints a landscape finds in it a subject matter of interpretation. His standard is what he sees plus his conception of beauty. In his paint and canvas he finds the materials for expressing his interpretation. Any one can furnish the paint and the canvas. Many can cultivate their powers of sight and add to it a conception of beauty. Only a few attain the successful practice of the art of achieving upon the canvas an interpretation of what is observed. So it is to some extent with the practice of the art of interpreting writings. The subject matter and possible standards of interpretation are easily comprehended when stated. The possible sources from which the tenor of the standard is to be derived may be classified without much difficulty. But the process of interpretation, namely, the process of actually ascertaining the standard from the available sources and applying that standard to the subject matter so as to achieve a sound interpretation of the writing is, in many cases at least, an art more successfully practiced by some than by others.

The process of interpretation is not reducible to dogmatic rules. It may be assisted to a slight degree by counsels of caution and suggestions as to method. Practically all that part of the present work which deals with estates created and much of that dealing with future interests is an effort to follow our Supreme Court in its practice of the art of interpretation in regard to a considerable number of related contexts. In the succeeding paragraphs an attempt is made to formulate some practical suggestions to be observed in the performance of the process of interpretation.

§ 145. **Caution against indulging in speculation and conjecture as to what the testator intended—the interpreter should not infer what he (the interpreter) would have intended had he been placed in the position of the testator:** To do so is to

violate the rule that the inducement of the testator shall not be used as a subject matter or standard of interpretation. There is, however, in most cases an even greater objection to such a course because the interpreter is not taking the actual and ascertainable inducement of the testator, but a purely fictitious inducement, based upon the interpreter's guess as to what the testator's inducement was—a guess based not upon the peculiarities and idiosyncrasies of the testator but upon those of the interpreter. Even where some extrinsic evidence is available it is in most cases too partial, too incomplete, to enable the interpreter to do more than guess as to what the actual intent of the particular testator's inducement may have been.

§ 146. In determining the effect to be given to surrounding circumstances (even when admissible) to support a secondary meaning, a practical distinction should be observed between the cases where the difficulty is one of ascertaining what persons are to take or what property is conveyed and those where the question is what estate is created or the nature of a contingency: The question of the identification of the person to take or the property devised is usually a simple matter. Once the ambiguity in the language of the instrument is found the range of choice and the motives for it are limited and the extrinsic evidence is usually conclusive. But when the question is what estate is created or the nature of a contingency it is not only more difficult to find an actual ambiguity which justifies any resort to extrinsic circumstances but the range of choice is so broad, the possible motives of the inducement so various, and the difficulty so likely to be the result of carelessness or a failure of the testator's mind to work on the problem, that the practical value of extrinsic circumstances to furnish a sound basis for a result must be distrusted. They are too likely to furnish only the basis for speculation and conjecture.

§ 147. The interpreter should whenever possible inquire into the primary and secondary meanings of words and phrases with a view to adhering to the primary meaning unless the secondary meaning is fairly required: It is a convenient method to reduce the problem of construction whenever possible to a contest between a given primary meaning and a possible or probable secondary meaning. When this is done it is proper to consider whether extrinsic evidence is available under the prin-

ciples already laid down.[1] If such evidence may be considered the interpreter may then proceed to determine what the available evidence tends to show. He should then balance all the considerations of context and extrinsic circumstances available for and against the primary and secondary meanings as hereinafter indicated[2] and reach a result.

§ 148. It is an especially strong reason for adhering to the primary meaning of the language in question as against slight contextual elements and surrounding circumstances supporting a secondary meaning, that the difficulty of construction is one upon which the testator's mind never acted so that there is no actual intent of the inducement: Courts in their efforts to justify a construction adopted on the ground that they are thereby effecting the "intention" of the testator, not infrequently fail to observe in their opinions (especially those dealing with the problems of what future interests are created; who are included in a general description; or the nature of a contingency) that the testator, while he has expressed a meaning, had no intent in the way of inducement at all. The proof of the absence of any inducement is usually based upon the fact that the difficulty of construction arises by the happening of events after the testator's death which from their nature and the fact that the testator did not provide for them appear never to have been present to his mind.[3] For instance, after a devise *in futuro* to A, B and C, suppose the testator provides that in case of the death of any one without children before the period of distribution the share of the one so dying shall go over to the survivors. A dies first leaving children, then C dies without children. Does B take C's share as the survivor, or do the children of A take half and B half? Here is a situation upon which the testator's mind obviously did not work. He did not think far enough ahead to provide for it. There is no actual intent of the inducement to guide the interpreter even if such intent of the inducement were available. Obviously where courts can fairly say that there was no intent of the inducement the process of interpretation should exclude any consideration of extrinsic circumstances and should confine itself to the actual context and emphasize adherence to an established primary meaning of the words used.

[1] *Ante*, §§ 128-133.

[2] *Post*, § 150.

[3] Gray's "The Nature and Sources of the Law," section 702, page

§ 149. The place of the argument from absurdity or incongruity: It is always an argument to be considered that a given interpretation produces an incongruous or absurd result. Thus where there is a devise to *B* from and after the death of *A*, *A* takes a life estate by interpretation, if *B* is the sole heir of the testator.[4] Otherwise there would have been the incongruous result that *B* who was expressly excluded till *A's* death would come in at once and take the entire interest. If *B* is only one of several heirs of the testator this incongruity is eliminated and *A* takes no interest at all. So where there is a gift to the "heirs" of the testator after a life estate, if the life tenant were the sole heir at law of the testator "heirs" would mean those who would be the testator's heirs if he had died at the time of the death of the life tenant,[5] thus excluding the life tenant. This was based upon the incongruity of the life tenant, who was excluded from the absolute interest, taking it at once, if "heirs" had its primary meaning of heirs at the time of the testator's death. If the life tenant was only one of several heirs, then the incongruity did not arise and "heirs" had its primary meaning of heirs at the death of the testator.

The argument from incongruity or absurdity, while useful, must not be exaggerated. Its weight and effect in a given case are determined by the exercise of judicial discretion, especially in contexts which have not been definitely ruled upon.[6]

316: "It undoubtedly sounds very prettily to say that the judge should carry out the intention of the testator. Doubtless he should; but some judges, I venture to think, have been unduly influenced by taking a fiction as if it were a fact. * * * For instance, if a testator should have present to his mind the question whether a legacy to his wife was to be in lieu of dower, it is almost incredible that he should not make what he wished plain. When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation."

F. M. Nichols, "On the Rules which Ought to Govern the Admission of Extrinsic Evidence in the Interpretation of Wills," 2 Jurid. Soc. Pap. 376, 377: "Difficulties of interpretation more frequently arise in consequence of the events after the date of the will being different from those contemplated by the testator. In such a case it may be said that the testator had no intention specially applicable to the events which have happened."

[4] *Post*, § 205.

[5] *Post*, § 572.

[6] See for instance Rackemann v.

§ 150. The art of balancing all the considerations on one side against all those on the other: Many problems of construction resolve themselves into the balancing of all the considerations on one side against all those on the other. This is especially true where the nature of a contingency is involved and where at the same time the context develops arguments and considerations on both sides. The interpreter, whether it be counsel or the court, must collect all the considerations on each side, then must weigh them correctly and ascertain where the balance lies.

The best concrete example of this process in our Supreme Court reports of which the writer is aware is to be found in the case of *O'Hare v. Johnston*,[7] which is analyzed *post*, § 527.

§ 151. The language used must be able to bear the meaning placed upon it and no additions must be made to the context of what is not in it: These propositions are universally conceded and yet in their application very difficult questions of judgment arise. How far will language properly bear a strange meaning attempted to be put upon it? What is in the context and what is not frequently defies any tangible basis for answer. One could hardly claim that the courts have always stopped at precisely the right point, yet the general rules prevail and it is a matter of trained judgment in the practice of the art of interpretation to know where the line ought to be drawn in a given case.

For instance, the courts have held that "survivor" may mean "other"[8] and yet it would be improper to generalize from this that courts would be equally free in causing words in a written instrument to bear the meaning of other words quite different.

Courts have also held that where a devise is made to *B* from and after the death of *A*, a life estate may be found in *A* by interpretation under some circumstances.[9] They have established rules under which a whole series of cross-remainders

Tilton, 236 Ill. 49; Mills *v.* Teel, 245 Ill. 483; 6 Ill. Law Review 350, where arguments based upon absurdity and incongruity of result were ineffective to support a secondary meaning.

[7] 273 Ill. 458.

[8] *Post*, §§ 602 *et seq.*

[9] *Post*, § 162.

will be found expressed in the instrument, though no word of explicit creation can be found within the four corners of the document.[10] Yet no generalizations can be made from these cases. In the practice of the art of interpretation it is clear that in order to find words uttered by the writing when they are not physically apparent to the eye, the words which are there must, when read, utter those which are not. In our Supreme Court reports there are several examples where words were found to be uttered in a writing when they were not physically apparent to the eye.[11] Where, however, the gifts were to *A* for life and if he died without leaving children to the testator's collateral relations the court held that the words which were used did not utter a gift to the children of *A* if he left such children.[12] Instead of such an utterance the court found that there was silence, perhaps due to mistake, but still the words were not there. Perhaps one of the closest and most difficult cases is where there is a devise of land by a legal description which covers land in existence, which, however, the testator never owned and where in order to find an ambiguity in the will so that the door may be opened to construction and the application of the doctrine of *falsa demonstratio* it is necessary to find such additional descriptive words as "belonging to me." It would seem difficult to quarrel with a court which declared that words of a will devising land by a particular description in fact uttered the words "belonging to me." At the time of this writing, however, the latest decision of our Supreme Court is that such words cannot be found uttered in the instrument unless to some extent at least they are physically present.[13]

§ 152. **The place of precedent in handling problems of construction**: It has been said, particularly in relation to testamentary interpretation, that authorities can be of no service; that to cite cases is to construe one man's nonsense by another man's nonsense; that the mode of dealing with one man's

[10] *Post*, §§ 600, 601.

[11] Glover *v.* Condell, 163 Ill. 566, 583-584; Blinn *v.* Gillett, 208 Ill. 473, 487; Lash *v.* Lash, 209 Ill. 595, 604; Olcott *v.* Tope, 213 Ill. 124, 128; Connor *v.* Gardner, 230 Ill. 258; Martin *v.* Martin, 273 Ill. 595.

[12] Bond *v.* Moore, 236 Ill. 576. See also Engelthaler *v.* Engelthaler, 196 Ill. 230.

[13] Stevenson *v.* Stevenson, 285 Ill. 486; see *ante*, § 137.

blunder is no guide to the mode of dealing with another man's blunder; that all the courts have to do is to look to the intention of the testator as the polar star and give it effect. On the other hand, the law books, the opinions of judges, and the practice of lawyers, all speak for the value of authorities on questions of interpretation and indicate that they are regarded as helpful, in some instances to the point of being controlling. The truth is that in matters of interpretation authorities are sometimes valuable and sometimes not. The sensible effort is to attempt to ascertain when they are valuable and when not, and then to use them when they help and leave them alone when they do not. It is the indiscriminate use of authorities and the claiming of too great an effect by them that has brought the use of all authorities in matters of construction into disrepute.

Clearly, authorities are of first importance in determining what shall be taken as the primary meaning of words and phrases. This is especially so where the same words or the same phrases have often occurred in the same or similar contexts and the courts have dealt with their meaning. In such cases authority simply provides a precise and valuable dictionary. It has a direct and positive value which cannot be ignored or minimized. Thus, where there is a gift to the testator's "heirs at law," that primarily means those who are heirs of a testator at his death and this prevails even though the gift is to the testator's heirs at law after a life estate and even though the life tenant is one of several heirs at law.

Authority is important to establish for many recurring similar contexts what contextual situation will furnish a sufficient basis (*prima facie* only, of course) for adopting or refusing to adopt a possible secondary meaning. Thus where a testator devises to *A* for life and then to the testator's heirs at law and *A* is one of several heirs at law of the testator, heirs at law has its primary meaning of heirs at law at the testator's death including *A*, but if *A* be the sole heir at law then heirs at law means those who would answer that description if the testator had died at the time of the death of *A*.

Authority is especially valuable where the problem of interpretation is one on which it is proper to assume the testator's mind never worked. In such cases the result (*prima facie*) re-

quired by the cases provides, like the statutory rules of descent, with certainty for a situation not covered by any inducement of the testator.[14] This is quite true of the example already used where an ultimate devise is made to my "heirs at law." The chances are very largely that this was merely a filling-in clause to prevent intestacy, that the testator had no one particularly in mind and that his attention was not at all directed to who might or might not take. There is, therefore, a real absence of any personal inducement on his part. It is most fitting, therefore, that authority should settle a primary meaning of the words which is not easily upset.

Authorities may be used to indicate the way in which courts skilled in interpretation have reasoned about a given problem of construction, or the weight or standing to be given to various considerations and arguments which may be available in a given case. This includes a multitude of counsels of caution such as that courts lean towards vested interests rather than contingent interests, that they lean against the construction of a residuary clause which would result in intestacy.[15] Authorities cited for such general propositions are obviously of the least value in controlling the ultimate conclusion in the case. Authorities so cited merely indicate the propriety and weight to be given to conflicting considerations. The results depend upon the weighing and valuing of the opposing considerations. It is frequently unnecessary to cite long lists of authorities in support of various arguments which are used in reaching a result. In any event authorities cited to establish the propriety or weight to be given to one partisan argument or consideration, or one set of them, should not in the face of contrary arguments and considerations, also supported by authority, be hurled at a court's head with the assertion that they compel a given result. This is what our Supreme Court means when it quotes with approval[16] from *Gulliver v. Poyntz*,[17] as follows: "Cases on wills may serve to guide us with respect to general rules in the construction of devises in wills, but

[14] Gray's "Nature and Sources of the Law," section 702, page 316.

[15] See also such considerations as are set out *post*, § 527, in dealing with the balancing of considerations in the case of O'Hare *v.* Johnston, 273 Ill. 458.

[16] See O'Hare *v.* Johnston, 273 Ill. 458, 466, and cases there cited.

[17] 3 Wils. 141.

unless a case cited be in every respect directly in point and agree in every circumstance with that in question it will have little or no weight with the courts, who always look upon the intention of the testator as the polar star to direct them in the construction of wills." Few cases are "in every respect directly in point." Few "agree in every circumstance with that in question." Indeed, the only cases that can be regarded as controlling are those where a single phrase or word in a regular form has been ruled upon or ruled upon repeatedly. The moment a context furnishes many considerations for and against a given meaning so that all must be weighed and balanced, it is practically impossible to find authorities which can be said to control the ultimate result of the balancing process.

When the language to be construed is *sui generis*—where the context has never occurred before and is not likely to again,—authority cannot control the result. It can seldom be of any value at all. Whatever effect it has is in establishing such general counsels of caution and suggestions as may be made use of in marshalling the arguments and considerations in favor of one interpretation or the other. Here again it is highly improper to insist upon a greater effect for cases than they really have.

When a judge says that one man's nonsense is not to be construed by reference to another man's nonsense it is a fair inference that he is being goaded to desperation by counsel who are demanding an interpretation on the basis of authority under circumstances where authorities are of the least if of any value at all. A just discrimination in the use of authority in matters of interpretation is recognized by courts from day to day as a matter of course. The importance of "accumulating a certain mass of decisions, in order to supply a uniform standard, and to fix the nearest approach to absolute correctness by striking an average of opinions through a long series of years" [18] is obvious.

[18] F. Vaughan Hawkins on the "Principles of Legal Interpretation," 2 Jurid. Soc. Papers 329.

BOOK III.

ESTATES.

CHAPTER IX.

FEE SIMPLE.

TITLE I.

HOW CREATED AT COMMON LAW AND UNDER THE STATUTES OF USES AND WILLS.[1]

§ 153. **In conveyances inter vivos:** To create a fee simple estate in a natural person, in a conveyance *inter vivos* at common law or under the Statute of Uses, it was necessary that the word "heirs" be used in connection with the words of conveyance so as to make the expression "to *A* and his heirs."[2] If the word "heirs" was not used, then only a life estate was created, no matter how clearly the intent to give a fee was expressed.[3] There were several exceptions to this requirement as to the use of the word "heirs."[4] One was that if the conveyance were to the "heirs of *B*" and the heir took at all, he had a fee. It was unnecessary to add "and to their heirs."[5] The Massachusetts Supreme Court introduced the further exception, that if the conveyance were to trustees and the intent expressed that they should take in fee and their duties required it, the fee would pass although the word "heirs" was not used.[6] Where the grantee was a corporation sole, it was necessary, after the words of transfer to the A corporation, to use the phrase "and its successors,"[7] except in the case where the grant

[1] *Ante*, § 11.

[2] Lit. § 1; Co. Lit. 8b; 3 Gray's Cases on Prop., 2nd ed. 304, 305.

[3] Lit. § 1; Co. Lit. 8b; 3 Gray's Cases on Prop., 2nd ed. 304.

[4] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 305, 307.

[5] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 307.

[6] Newhall *v.* Wheeler, 7 Mass. 189 (1810); 3 Gray's Cases on Prop., 2nd ed. 307.

[7] Co. Lit. 8b; 3 Gray's Cases on Prop., 2nd ed. 304.

was in free alms.[8] Where the grantee was a corporation aggregate, a conveyance "to the A corporation" was all that was necessary to transfer a fee.[9]

§ 154. Where the transfer was by devise: Here the use of the word "heirs" was not necessary. Any words which expressed an intent that the grantee should have a fee were effective to accomplish that purpose.[10] Still it should be observed that a life estate only was created unless the will showed affirmatively that a fee was intended.[11]

§ 155. The foregoing rules prevailed in this state until July 31, 1837: It was not until this date that the act which is now known as Sec. 13 of the Conveyancing Act became effective.[12] Prior to that time there was no legislation altering what may be referred to as the common law rules and these rules may, therefore, be assumed to have been in force.[13]

TITLE II.

UNDER SEC. 13, R. S. 1874, CH. 30.

§ 156. The statute: Section 13 of the Conveyancing Act first appeared in the statutory law of this state in 1837. It was approved and in force July 31st of that year.[14] It was subsequently incorporated into R. S. 1845, Ch. 24, Sec. 13.[15] It provided as follows: "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore

[8] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 306.

[9] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 306.

[10] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 305.

[11] Co. Lit. 9b, 10a; 3 Gray's Cases on Prop., 2nd ed. 305. For the many special contexts which were held sufficient to express an intent to devise a fee simple estate, see the earlier editions of Theobald on Wills (1st ed. 209 *et seq*, 2nd ed. 325 *et seq*). Also Jarman on Wills, 6th Amer. Ed. (Bigelow) *pp. 1131 *et seq*.

[12] See *Post*, § 156.

[13] Ackless *v.* Seekright, Breese (Ill.) 76, is not inconsistent with this statement, for though the will in that case took effect by the testator's death in 1806 and though the devise was to Rebecca without the further phrase "and her heirs" or other words indicating that a fee was intended, yet the plaintiff in error's contention that the gift over was void, depended upon Rebecca taking a fee. The position of the court, therefore, was that even assuming this to be so, the gift over was valid as an executory devise and that disposed of the case.

[14] Laws 1837 (Spe. Ses.) p. 14; A. & D. R. E. S. Vol. 1, p. 91.

[15] A. & D. R. E. S. Vol. 1, p. 124.

necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." This act causes all transfers to be primarily in fee by the mere designation of the transferee. This primary meaning or effect of the conveyance gives way if a less estate is limited by express words or by implication of law. It is fortified and confirmed if the common law formula, which includes the word "heirs," is used, or if any other expression be added which indicates a fee. The difficult cases are those where the context is not decidedly in favor of a less estate than a fee nor decidedly in favor of a fee, and where upon the special context a question arises as to whether the statutory primary meaning in support of a fee has been overcome, so that by construction a less estate than a fee is in fact limited.

§ 157. Cases where an estate less than a fee is limited by express words: The cases where a less estate than a fee is created by express words because such words are used as indicate an intent and are effective to create a fee tail (on which the Statute on Entails operates), or a life estate, will be hereafter dealt with.[16]

§ 158. Cases where the primary effect of the conveyance to create a fee was confirmed by the use of the common law word of limitation, i. e., "heirs": If words are used which were sufficient to create a fee at common law in a conveyance *inter vivos*, a fee is certainly limited under the statute.[17] The fact that there is a gift over is not in the least effective to cut down to a life estate the fee expressly limited.[18] Even where

[16] *Post*, §§ 194-203.

[17] Holliday *v.* Dixon, 27 Ill. 33; Pool *v.* Blakie, 53 Ill. 495; Murfitt *v.* Jessop, 94 Ill. 158; Friedman *v.* Steiner, 107 Ill. 125; Hageman *v.* Hageman, 129 Ill. 164; Wolfer *v.* Hemmer, 144 Ill. 554; Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386; Lambe *v.* Drayton, 182 Ill. 110; Kron *v.* Kron, 195 Ill. 181; Davis *v.* Sturgeon, 198 Ill. 520; Orr *v.* Yates, 209 Ill. 222; Burlet *v.* Burlet, 246 Ill. 563; Williams *v.* Elliott, 246 Ill. 548; Smith *v.* Dellitt, 249 Ill. 113; Wilson *v.* Wilson, 268 Ill. 270; Haight *v.* Royce, 274 Ill. 162; Blackstone *v.* Althouse, 278 Ill. 481.

[18] Wolfer *v.* Hemmer, 144 Ill. 554; Ewing *v.* Barnes, 156 Ill. 61; Wilson *v.* Wilson, 268 Ill. 270; Pitzer *v.* Morrison, 272 Ill. 291; Blackstone *v.* Althouse, 278 Ill. 481. In Sylva *v.* Hopkinson, 158 Ill. 386, a devise

there are gifts over on several contingencies which exhaust all possibilities,[19] the context has been held insufficient to overcome the inference from the words of limitation "to her and her heirs forever" that a fee was intended to be limited.[20] Even where the gift over was upon the intestacy of the first taker, or upon his failure to dispose of the property by deed in his life time, or by will at his death, so that the gift over was void if the first taker had a fee,[21] it was still held that a fee was created and the gift over void.[22] In some cases, where a devise has been made to "A and his heirs," the contention has been put forward that the gift was to A, but if A died before the testator then the property was to go to his heirs. Such a construction has not been sustained.[23] In a few cases, where the conveyance or devise was "to A and his heirs," the court has seemed to declare that A took the fee by the *Rule in Shelley's Case*.[24] The impropriety of applying the *Rule in Shelley's Case* to such a formula of words is commented on elsewhere.[25] That it is unnecessary to apply the *Rule in Shelley's Case* to secure the result reached should at this point be apparent.

§ 159. Cases where the primary effect of the transfer to create a fee was confirmed by the use of expressions other than the common law words of limitation: Where the limitations

to two children, A and B, equally share and share alike "and to their lawful heirs, but in the event of their death without issue" over to C, was said to give A and B life estates (probably by reason of the gift over) with the remainder to their heirs, which by the rule in Shelley's case would give A and B the fee. It would have been more in accordance with the cases if A and B had taken the fee by the words of limitation "and to their lawful heirs" without any reference to the rule in Shelley's case.

[19] See *post*, §§ 165, 167.

[20] Rissman *v.* Wierth, 220 Ill. 181.

[21] *Post*, §§ 717-725.

[22] Friedman *v.* Steiner, 107 Ill. 125; Ewing *v.* Barnes, 156 Ill. 61; Lambe *v.* Drayton, 182 Ill. 110; Kron *v.* Kron, 195 Ill. 181; Orr *v.* Yates, 209 Ill. 222; Williams *v.* Elliott, 246 Ill. 548; Wilson *v.* Wilson, 268 Ill. 270.

[23] Lynch *v.* Swayne, 83 Ill. 336; Burlet *v.* Burlet, 246 Ill. 563; Haight *v.* Royce, 274 Ill. 162. But see Golladay *v.* Knock, 235 Ill. 412, *post*, §§ 323, 382. In Siddons *v.* Cockrell, 131 Ill. 653, a limitation to a widow "and her heirs" was, upon the whole context, held to be only a life estate.

[24] Baker *v.* Scott, 62 Ill. 86; Lehndorf *v.* Cope, 122 Ill. 317; Wolfer *v.* Hemmer, 144 Ill. 554, 559; Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386; Davis *v.* Sturgeon, 198 Ill. 520.

[25] *Post*, § 415.

are to A "in fee,"[26] or "absolutely"[27] or "forever"[28] the statutory inference that a fee is created is emphasized. Even though the gift over (being on the intestacy of the first taker, or upon his failure to dispose of property by deed or will) is void if the first taker has a fee or absolute interest, yet where the transfer is in terms "in fee" or "absolutely," it has been held that the first taker has a fee or absolute interest and that the gift over is void.[29] Any context which was sufficient under the common law authorities to indicate that a *devise* was in fee, is now available (whether the conveyance is *inter vivos* or by will) to fortify the statutory *prima facie* inference of a fee. Thus, in a conveyance to A subject to a charge upon the property,[30] or in a conveyance to A of all the transferor's "estate,"[31] the special context confirms the statutory inference that a fee was intended.

§ 160. Cases where there is a transfer to A simpliciter and no context showing an intent that A shall or shall not take the fee, but where under the statute he nevertheless does so: If the transfer is to A *simpliciter* and there is no other context, A takes the fee by the statute.[32] Sometimes, however, the words used provide merely that A shall receive the rents and profits indefinitely. This is held to be equivalent to words of transfer of the corpus of the estate to A and A takes a fee by the statute.[33] In two cases the explicit words providing for a

[26] Stewart *v.* Stewart, 186 Ill. 60; Bowen *v.* John, 201 Ill. 292.

[27] Wilson *v.* Turner, 164 Ill. 398.

[28] Saeger *v.* Bode, 181 Ill. 514.

[29] Stewart *v.* Stewart, 186 Ill. 60; Wilson *v.* Turner, 164 Ill. 398. *Post*, §§ 717-725.

[30] Johnson *v.* Johnson, 98 Ill. 564, 571 (*semble*).

[31] Thomas *v.* Miller, 161 Ill. 60, 67.

[32] McConnel *v.* Smith, 23 Ill. 611 (original ed.); Leiter *v.* Sheppard, 85 Ill. 242; Green *v.* Grant, 143 Ill. 61 (*semble*); Congress Const. Co. *v.* Farson Co., 199 Ill. 398 (*semble*). See also cases cited, *post*, §§ 164, 166 where, upon a transfer to A *simpliciter* with a gift or gifts over, A is held to take the fee.

[33] Reid *v.* Voorhees, 216 Ill. 236, 241; Pease *v.* Davis, 225 Ill. 408; Dwyer *v.* Cahill, 228 Ill. 617; Defrees *v.* Brydon, 275 Ill. 530; Theobald on Wills, 7th ed. 480; Elton *v.* Sheppard, 1 B. C. C. 532; Philipps *v.* Chamberlaine, 4 Ves. 51; Boosey *v.* Gradner, 18 Beav. 471; Humphrey *v.* Humphrey, 1 Sim. N. S. 536; Haig *v.* Swiney, 1 S. St. 487; Watkins *v.* Weston, 32 Beav. 238, 3 De G. J. & S. 434; Penny *v.* Peppin, 15 W. R. 306; *In re* Tandy, Tandy *v.* Tandy, 34 W. R. 748; Davidson *v.* Kimpton, 18 Ch. D. 213; *In re* L'Herminier, Mounsey *v.* Buston,

transfer to A were not present, but they appeared implicitly because they were actually articulated by the other words which were used. Hence A had a fee by the statute.[34]

§ 161. Cases where the only special context tends to indicate that a less estate than a fee was intended, but where this context is deemed to be insufficient to overcome the primary statutory meaning: The most frequent case of this sort is where a gift over on a single contingency, or gifts over on several contingencies which do not exhaust all the possibilities, provide a context in support of an expressed intent to create only a life estate, and where it is, nevertheless, held that this is not sufficient to interfere with or overcome the statutory primary meaning that a fee was created.[35] In other cases miscellaneous contexts tending in some degree to indicate that a life estate was intended, have been held insufficient to overcome the statutory inference in favor of a fee.[36] Several examples of

[1894] 1 Ch. 675. But compare Guerin *v.* Guerin, 270 Ill. 239.

[34] Connor *v.* Gardner, 230 Ill. 258; Martin *v.* Martin, 273 Ill. 595.

[35] *Post,* §§ 164, 166. Smith *v.* Kimbell, 153 Ill. 368; Mayer *v.* McCracken, 245 Ill. 551; Terhune *v.* Commercial Safe Dep. Co., 245 Ill. 622; Forbes *v.* Forbes, 261 Ill. 424; Lachenmyer *v.* Gehlbach, 266 Ill. 11; Pitzer *v.* Morrison, 272 Ill. 291; Gavvin *v.* Carroll, 276 Ill. 478; Aloe *v.* Lowe, 278 Ill. 233.

[36] In Brownfield *v.* Wilson, 78 Ill. 467, where the testator devised to his wife a certain tract so as *prima facie* to create in her a fee, a subsequent clause giving "real estate" to the testator's children and requiring it to be sold after the wife's death, did not cut down the wife's interest to a life estate.

In Leiter *v.* Sheppard, 85 Ill. 242, where the gift was to A *simpliciter,* A was held to have the fee, although in the same instrument other devises were made with words of limitation expressly attached indicating a fee.

In Muhlke *v.* Tiedemann, 177 Ill. 606, the wife was held to have a fee although there was expressly superadded a power in her to make leases.

In Saeger *v.* Bode, 181 Ill. 514, the testator first devised his homestead to his wife in fee, and then to the daughter all the estate "not disposed of in the above bequeath, at the death of" the wife. The last clause was held to mean that the daughter was to take all the property except the homestead. Hence the widow took the homestead property in fee.

In Sandifer *v.* Sandifer, 229 Ill. 523, a conveyance by a husband to his wife, provided "it is hereby agreed * * * that upon the death of parties hereto the estate * * * shall be divided in severalty among our legal heirs equally." The wife took the fee.

In Weihe *v.* Lorenz, 254 Ill. 195, a conveyance which gave "10 feet wide for alley purposes" created a fee and not a mere easement.

In Read *v.* Adams, 280 Ill. 142,

contexts which were held insufficient to overcome the statutory inference that a fee was created are given post § 169.[37]

§ 162. Transfer to A simpliciter followed by a gift "at his decease": Here the context warrants the holding that a life estate is created.[38] The cases in this state where such a result has been reached are comparatively few.[39] Usually there is some further context which aids the construction that a life estate was intended to be created.[40] In *McClintock v. Meehan*,[41] the first taker was thought by the court to have a life estate although the gift over at his death was only to take effect on the expressed condition precedent that the one who took the gift over survived and the other gift over did not exhaust all the possibilities. This is a weak case to support the holding that a life estate is created. The full force of the gift over at the first taker's death, to confer on him only a life estate, arises[42] when the gift is certain to go over at his death in any event. If, therefore, the gift over is to take effect only on a contingent event, or on events which do not exhaust all the possibilities, the case is like one where the gift is to A, with the single gift over if he dies without leaving issue or some other similar single

there was a devise to A *simpliciter*, with a power to sell, but this did not cut down the estate to less than a fee.

See also Bowen *v.* John, 201 Ill. 292; Little *v.* Bowman, 276 Ill. 125.

[37] See also Rissman *v.* Wierth, 220 Ill. 181; *post*, § 182.

[38] Theobald on Wills, 7th ed. 658, 659.

[39] Hurt *v.* McCartney, 18 Ill. 129; Gaffield *v.* Plumber, 175 Ill. 521; Cover *v.* James, 217 Ill. 309; Hill *v.* Gianelli, 221 Ill. 286; McClintock *v.* Meehan, 273 Ill. 434.

[40] Routt *v.* Newman, 253 Ill. 185, where there was not only a gift over at the death of the first taker but a provision that payments be made personally to the first taker. See cases dealt with *post* § 168, where the gift over was on the first taker's death of what remains undisposed of; Bergan *v.* Cahill, 55 Ill. 160; Hamlin *v.* United States Express Co., 107 Ill. 443; Griffiths *v.* Griffiths, 198 Ill. 632; Bradley *v.* Jenkins, 276 Ill. 161. Observe also the cases dealt with *post*, §§ 165, 167, where the gift over is on the first taker's death and upon a double contingency of having children or not having children, one of which is certain to happen; Johnson *v.* Johnson, 98 Ill. 564; Healy *v.* Eastlake, 152 Ill. 424; Furnish *v.* Rogers, 154 Ill. 569; Thomas *v.* Miller, 161 Ill. 60; Johnson *v.* Askey, 190 Ill. 58; King *v.* King, 215 Ill. 100; Bauman *v.* Stoller, 235 Ill. 480; Kleinhans *v.* Kleinhans, 253 Ill. 620.

[41] 273 Ill. 434.

[42] *Post*, §§ 164, 166.

contingent event, and where the first taker is held quite regularly to take the fee or absolute interest.

§ 163. **Transfer to A simpliciter followed by a gift "in case of his death" or some other expression treating A's death as a contingent event:** If such limitations be made in a conveyance *inter vivos,* it is believed that A's interest should be held to be a life estate just as if the limitations were to A and "at A's death" to B.[43] On the other hand, if the gift is by will and of personal property, the fact that A's death is referred to as a contingent event—*i. e.,* one which may or may not happen—regularly causes "death" to be referred to death in the lifetime of the testator. The gift over is regarded as taking care only of the case of a lapse in the legacy by the death of the legatee before the testator.[44] Suppose now that the limitations are by will and that realty is involved. It can hardly be said that the English cases ever settled any construction regarding this context. If A were to take a fee, if he took at all, then "death" was referred to death before the testator.[45] If there was not enough in the context to give A a fee, so that he took a life estate in any event (and not necessarily by reason of the words "in case of A's death"), then "death" referred to A's death at any time.[46] Since the Will's Act,[47] which caused the devise to A to be taken *prima facie* as creating a fee, it might be supposed that the English judges would refer "death" to death before the testator, so that A, if he took at all, would take the fee and there would be no gift over.[48] Under Sec. 13 of our Conveyancing Act a similar result might be reached. In two cases [49] our court has recognized the distinction taken by the English cases between a devise "to A and *at his death* to B," and the devise "to A and *in case of* his death to B," and has held that, in the former instance A takes a life estate, while in the latter, A takes an absolute interest and "in case of his death" refers to death in the lifetime of the testator.[50]

[43] *Ante,* § 162, Cover *v.* James, 217 Ill. 309.

[44] Theobald on Wills, 7th ed. pp. 658, 659; Fifer *v.* Allen, 228 Ill. 507, 514; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486, 491; Jenne *v.* Jenne, 271 Ill. 526; *post,* § 530.

[45] Theobald on Wills, 7th ed. 660.

[46] *Id.*

[47] 1 Vic. ch. 26, sec. 28.

[48] See Rogers *v.* Rogers, 7 Weekly Rep. 541 (1859).

[49] Fifer *v.* Allen, 228 Ill. 507, 514; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486, 491.

[50] In Kleinhans *v.* Kleinhans, 253

§ 164. Effect of gifts over—(1) Where the limitations are to A simpliciter with a gift or gifts over on A's death and on one or more collateral contingencies, which, however, do not exhaust all the possibilities: Where the limitations are to A *simpliciter* with a gift over upon the single contingency that he dies without leaving issue or children, "die" refers to death at any time, either before or after the death of the testator, and A's estate is a fee or an absolute interest which is subject to be divested by the taking effect of the gift over upon the contingency named,[51] but is only divested by the happening of the event specified.[52] Where the only gift over is in case A dies without children or issue surviving, any other result would be very awkward because if A had only a life estate and died leaving children, they could not take,[53] while if A had the fee, they might take by descent or devise from him. The same results may be regularly expected where there are gifts over on more than one contingency, but all the possibilities are not exhausted.[54]

In *Palmer v. Cook*,[55] the deed conveyed land to A and B, and in case either died "without an heir," to the survivor. However wrong the court may have been in holding the gift over void as a fee on a fee by deed[56] it was clearly right in insisting that A and B had a fee. This result is not in conflict with *Cover v. James*,[57] where the gift over was in the event of the

Ill. 620, the gifts over were "in case of the death of" A, the first taker in remainder after a life estate, but there was also the further context that death referred to death at any time and not merely death in the life of the life tenant, whose life estate preceded A's interest. Furthermore, the gifts over were on contingencies which exhausted all the possibilities.

[51] Fifer *v.* Allen, 228 Ill. 507; Ahlfield *v.* Curtis, 229 Ill. 139; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486; Crocker *v.* Van Vlissingen, 230 Ill. 225; Brenock *v.* Brenock, 230 Ill. 519. See also Giles *v.* Anslow, 128 Ill. 187; Smith *v.* Kimbell, 153 Ill. 368; Strain *v.* Sweeny, 163 Ill. 603; Bradsby *v.* Wallace, 202 Ill. 239; Terhune *v.* Commercial National Safe Deposit Co., 245 Ill. 622; Forbes *v.* Forbes, 261 Ill. 424; Abbott *v.* Essex Co., 18 How. 202; Piatt *v.* Sinton, 37 Ohio St. 353.

[52] Terhune *v.* Commercial Safe Dep. Co., 245 Ill. 622.

[53] Under the decision in Bond *v.* Moore, 236 Ill. 576, there could be no estate by implication in favor of the children.

[54] Mayer *v.* McCracken, 245 Ill. 551; Stoller *v.* Doyle, 257 Ill. 369.

[55] 159 Ill. 300.

[56] *Post*, § 462.

[57] 217 Ill. 309, *ante*, § 163. Statements in Bauman *v.* Stoller, 235 Ill. 480, 490, and Buck *v.* Garber, 261 Ill. 378, 383, that Cover *v.* James, *supra*, is inconsistent with holding

death of the first taker *simpliciter,* no other contingency being mentioned. It is not in conflict with *Bauman v. Stoller,*[58] because, when the court finally adjudicated the character of the limitations involved in that case, it held that the first taker acquired a fee.[59]

In *McClintock v. Meehan,*[60] the limitations involved were to John H. "and at his death the title to said land shall vest in his sister Margaret if she shall then be living, and if the said John H. and Margaret shall both die leaving no children," then over to Charles. John H. filed a bill to quiet title in himself in fee, while Margaret was still alive and had six children living. A decree that John H. had a fee and that Margaret had no interest was clearly error and properly reversed regardless of whether John H. had a fee or a life estate. If John had a fee it was certain to be divested on the contingencies which might happen. The court, however, intimated that John had only a life estate. This like most conclusions regarding the construction of inartificially drawn wills may be justified on the special context and can be no precedent in other cases. It should be noted, however, that the contingencies here do not exhaust all the possibilities. If John survived Margaret, and Margaret died leaving issue, Charles could not take, Margaret could not take, and Margaret's issue could not take. If John took only for life, there would be an intestacy. The case would seem to be one of those where the statute placed the fee in John and no context sufficiently strong indicated that it should be cut down to a life estate.

§ 165. (2) **Where the limitations are to A simpliciter, with gifts over on several contingencies which exhaust all the possibilities:** It might be argued that such cases were in effect the same as where there was a devise to A and "in case of his death" to B and, therefore, "die" means die in the lifetime of the testator only, because if "die" meant die at any time, there would be the incongruity of speaking of an event as contingent which was sure to happen.[61] This argument, however, is fully met by the fact that where death is coupled with each

that a fee existed in the first taker in Palmer *v.* Cook, *supra,* cannot be sustained.

[58] 235 Ill. 480.

[59] Stoller *v.* Doyle, 257 Ill. 369.

[60] 273 Ill. 434.

[61] Fifer *v.* Allen, 228 Ill. 507, 514; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486, 491.

of two separate contingencies one of which will not happen, death in connection with each contingency is properly spoken of as a contingent event. The element of incongruity, therefore, which is sufficient in some cases to confine "die" to death in the life of the testator only, is absent. The moment, however, it is conceded that in the case put "die" means die at any time before or after the testator, in accordance with the general rule,[62] all the possible contingencies are exhausted. It is then arguable that the gift over is in effect the same as if it were to take effect certainly "at the death of" A and hence A takes only an estate for life.[63] Although the point may not have been strictly involved, our Supreme Court has several times referred to A's interest as a life estate.[64] Whether this is correct will become vitally important when an attempt is made to apply the doctrine of destructibility of contingent remainders to the gifts over. If the estates be legal and A takes merely an estate for life, the gifts over will be contingent remainders and destructible.[65] If, however, A takes the fee, the gifts over are shifting executory interests and not destructible.[66]

§ 166. (3) **Where the limitations are to X for life, remainder to A simpliciter, with a gift or gifts over on A's death and on one or more collateral contingencies, which do not exhaust all the possibilities:** If the limitations are by devise to X for life, remainder to A *simpliciter*, with a gift over on a single contingency, such as the death of A without leaving issue or children, to B, the English authorities have settled it that "die" still refers to death at any time, either before the testator, or afterwards, or after the death of X.[67] Recent decisions of our

[62] *Post*, § 531.

[63] Theobald on Wills, 7th ed. 658, 660.

[64] Johnson *v.* Johnson, 98 Ill. 564; Healy *v.* Eastlake, 152 Ill. 424; Thomas *v.* Miller, 161 Ill. 60; Johnson *v.* Askey, 190 Ill. 58; King *v.* King, 215 Ill. 100; Furnish *v.* Rogers, 154 Ill. 569. In Johnson *v.* Johnson, *supra*, the court was of opinion that the fact that a charge was laid upon the first taker would not overcome the inference from the gifts over that a life estate was created.

[65] Bauman *v.* Stoller, 235 Ill. 480; 3 Ill. Law. Rev. 383; Kleinhans *v.* Kleinhans, 253 Ill. 620; 9 Ill. Law Rev. 438.

[66] See Stoller *v.* Doyle, 257 Ill. 369.

[67] O'Mahoney *v.* Burdett, L. R. 7 Eng. & Ir. App. Cas. 388 (1874), overruling the fourth canon of Edwards *v.* Edwards, 15 Beav. 357.

Supreme Court, however, appear both to support and to contradict this proposition.[68] Whatever the court may hold as to the time to which "die" refers in this class of cases, A will take the fee so long as the gift over is on a single contingency [69] or is on several contingencies which do not exhaust all the possibilities.[70]

§ 167. (4) **Where the limitations are to X for life, remainder to A simpliciter with gifts over on several contingencies which exhaust all the possibilities:** Suppose, for instance, there is a gift over to A's children, if he has any, and if not, to B. Can we find in these gifts over and the special context an inference that "die" means die in the lifetime of the testator, or of the life tenant only?[71] If so, then all the contingencies will not have been exhausted, and no inference will arise that A takes a life estate. A will, therefore, take the fee. That is the result reached in *Lachenmyer v. Gehlbach.*[72] If "die" is not restricted to death in the lifetime of the life tenant the contingencies will exhaust all the possibilities, and an argument at once arises that the remainder to A is for life only. That was the position taken in *Kleinhans v. Kleinhans.*[73]

It is clear that whether in the case last put "die" refers to death before the death of the life tenant and that only and the remainderman takes a fee, or whether "die" refers to death at any time and the remainderman takes a life estate, is so delicately balanced a question that any special context which indicates the estate in the remainderman or the time to which death must be referred will be decisive of the result reached. In *Welch v. Crowe,*[74] the remainder to A was expressly limited in "fee simple." That settled A's estate as a fee, and the inference arose that the gifts over were not on every possible contingency and

[68] *Post,* § 533.

[69] Aloe *v.* Lowe, 278 Ill. 233.

[70] Pitzer *v.* Morrison, 272 Ill. 291.

[71] The Lord Chancellor, in O'Mahoney *v.* Burdett, L. R. 7 Eng. & Ir. App. Cas. 388 (1874) in distinguishing the cases of Da Costa *v.* Keir, 3 Russ. 360, and Galland *v.* Leonard, 1 Swanst. 161, noted the fact that in both there was a gift over in the double event of either leaving or not leaving children, and that, therefore, since one event or the other must happen the case was the same as those where the gift over is in the event of death *simpliciter.*

[72] 266 Ill. 11; *post,* § 533.

[73] 253 Ill. 620, *post,* § 533.

[74] 278 Ill. 244. See, also, Chapin *v.* Crow, 147 Ill. 219.

hence "die" meant "die only before the death of the life tenant," so that every contingency would not be provided for.

§ 168. Limitations to A with power in A to dispose of an absolute interest in the property, and upon failure to do so over to B: If A's interest is absolute or in fee, then the gift over to B is void.[75] If A takes only a life estate with power to dispose of the fee, a gift over on failure to dispose of the fee, is valid.[76] The rule of law by which the gift over is void if A's interest is absolute, is harsh, and, it is believed, indefensible on principle.[77] It is difficult, therefore, to escape the suspicion that the court, while vigorously proclaiming it, has sought to nullify it as far as possible by construing the first taker's interest to be a life estate. Where the limitations are to A *simpliciter,* with a power to dispose of the fee or absolute interest, and a gift over of what "remains undisposed of" at the first taker's death, the court has regularly held that A has only a life estate.[78] *A fortiori,* when, in this class of cases, the first taker's interest is expressly limited "for life," a life estate it remains.[79] The

[75] *Post,* §§ 717-725.

[76] *Post,* § 726.

[77] *Post,* §§ 721-723.

[78] Bergan *v.* Cahill, 55 Ill. 160; Hamlin *v.* United States Express Co., 107 Ill. 443; Healy *v.* Eastlake, 152 Ill. 424; Gruenewald *v.* Neu, 215 Ill. 132; Bradley *v.* Jenkins, 276 Ill. 161.

There is some justification for the results reached in these cases in the special context. No question of course can arise as to the part disposed of by the first taker. The part disposed of is (in all the above cases except Healy *v.* Eastlake, 152 Ill. 424) limited to take effect certainly at the first taker's death and, therefore, may be regarded as falling within the principle and scope of the cases referred to, *ante,* § 162. In Healy *v.* Eastlake, *supra,* there were two gifts over—one if the first taker died without leaving issue, and the other, if she did. The double contingency, therefore, furnished an argument in favor of the first taker having only a life estate in accordance with the principle and scope of the cases referred to, *ante,* § 165.

[79] Henderson *v.* Blackburn, 104 Ill. 227; Walker *v.* Pritchard, 121 Ill. 221; Ducker *v.* Burnham, 146 Ill. 9; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Welsch *v.* Belleville Savings Bank, 94 Ill. 191; Kaufman *v.* Breckinridge, 117 Ill. 305; *In re* Estate of Cashman, 134 Ill. 88; Griffin *v.* Griffin, 141 Ill. 373; Skinner *v.* McDowell, 169 Ill. 365; Mann. *v.* Martin, 172 Ill. 18; Bowerman *v.* Sessel, 191 Ill. 651; Griffiths *v.* Griffiths, 198 Ill. 632; Dickinson *v.* Griggsville Nat. Bank, 209 Ill. 350; Craw *v.* Craw, 210 Ill. 246; Riemenschneider *v.* Tortoriello, 287 Ill. 482. See also Fairman *v.* Beal, 14 Ill. 244; Boyd *v.* Strahan, 36 Ill. 355; Markillie *v.* Ragland, 77 Ill. 98; Funk *v.* Eggleston, 92 Ill. 515.

court never permits the fact that a power is given to dispose of the fee or absolute interest to enlarge the life estate into a fee or absolute interest.[80] When, however, the transfer is to A and "his heirs and assigns,"[81] or "in fee,"[82] or "absolutely"[83] it has been regularly held that the first taker had the absolute interest and the gift over was void. In a number of cases where the transfer was not to A "and his heirs," or to A "in fee," or to A "absolutely," it has been held that A took a fee or absolute interest by reason of a strong special context supporting the creation of a fee.[84]

§ 169. **Miscellaneous contexts only superficially related—Limitations to A and his children and their children:** In *Leiter v. Sheppard*,[85] the testator devised the residue of his real and personal estate to A "to be held by her in her own right, then to her children, heirs and assigns forever," and "to C, and to her children, heirs and assigns after her." The court held that A and C took indefeasible estates in fee simple and not life estates with the remainders in fee to their children. This is correct. By the statute the primary effect of the devise gave A and C a fee. The question was whether there was any context which justified a construction which would produce a life estate.

[80] Welsch *v.* Belleville Savings Bank, 94 Ill. 191; Henderson *v.* Blackburn, 104 Ill. 227; Skinner *v.* McDowell, 169 Ill. 365; Griffiths *v.* Griffiths, 198 Ill. 632.

Compare, however, the cases where a trustee whose active duties require him to take a legal estate only for the life of a beneficiary, is held to take a fee where a general power of sale is conferred upon him. *Post*, § 191.

Compare also the general rule stated that a limitation to A with a general power to dispose of the fee indicates a fee simple. Markillie *v.* Ragland, 77 Ill. 98, 101; Funk *v.* Eggleston, 92 Ill. 515, 533; Fairman *v.* Beal, 14 Ill. 244, 245.

[81] Friedman *v.* Steiner, 107 Ill. 125; Ewing *v.* Barnes, 156 Ill. 61; Lambe *v.* Drayton, 182 Ill. 110; Kron *v.* Kron, 195 Ill. 181; Orr *v.* Yates, 209 Ill. 222; Williams *v.* Elliott, 246 Ill. 548; Wilson *v.* Wilson, 268 Ill. 270.

[82] Stewart *v.* Stewart, 186 Ill. 60.

[83] Wilson *v.* Turner, 164 Ill. 398.

[84] In Burton *v.* Gagnon, 180 Ill. 345, the devise was of a residue "according to the laws of descent of the State of Illinois." In Koeffler *v.* Koeffler, 185 Ill. 261, the devise was "my natural son * * * shall be my principal heir." In Dalrymple *v.* Leach, 192 Ill. 51, the gift over failed because it was precatory and too indefinite as to subject matter, and the gift to the first taker was to a wife "of all my property, real and personal, and of every character whatsoever." See *ante*, § 159.

[85] 85 Ill. 242.

The word "then" in the devise to A, and "thereafter" in the devise to C, furnished an argument that the devise was to A and C respectively and then, or at their death, to their children. On the other hand, the words "heirs and assigns forever" were regular words of limitation which went with the gifts to A and C and in both cases the word "children" seems to have been used as part of the formula of words of limitation and not as a separate word of purchase. Assuming that one of these considerations balanced the other, we have left gifts to A and C *simpliciter*, which under the statute are in fee. The result reached and the reasoning of the Court are valuable as emphasizing the *prima facie* effect of a devise to A *simpliciter* and that the context which overcomes it must be decisive and not doubtful.

In *Schaefer v. Schaefer*,[86] real estate was devised to a daughter "for her sole use and benefit, and of her children and their children thereafter—but in the event that my daughter * * * should die and leave no children as heirs" over to J and his heirs. It was held that the daughter took only an estate for life. Here the word "children" is not included in the words of limitation applicable to the gift to the daughter. The phrase is "children and their children." This suggests that the children are to take in fee. The second use of the word "children" is in effect an attempt to use a word of limitation. Hence the devise is to the daughter and in fee to her children thereafter—*i. e.*, after the daughter's death. This brings the gift to the daughter within the class of cases where the limitations are to A and "at his death" to B, and where A regularly takes a life estate.[87] Then too, the gift over is really on two contingencies, one of which must happen—if A has children and if she does not. Under the authorities already noted, this furnished an argument that the first taker had only a life estate.[88]

In *Strawbridge v. Strawbridge*,[89] the devise was to several children (naming them) "and to their children forever." The placing of this last clause and the word "forever" clearly indicate an attempted use of words of limitation. Hence there was no ground for departing from the *prima facie* effect of the statute conferring a fee upon the children named.[90]

[86] 141 Ill. 337.
[87] *Ante*, § 162.
[88] *Ante*, § 165.
[89] 220 Ill. 61.
[90] See also Dick *v.* Ricker, 222 Ill. 413, 417.

In *Conner v. Gardner*,[91] after a devise, expressed only by implication from the whole instrument, to the testator's daughter, this provision occurred: "the shares or portions of my estate falling to my daughters, respectively, shall be theirs and *their child's* or *children's exclusively.*" The italicized words were held to be merely attempted words of limitation, so that the daughters took the fee. Other elements of the context aided this result.

In *Barclay v. Platt*,[92] the devise was "for the benefit of" M and J, "for them and their children, should they have any." This was construed to give M and J life estates with a remainder in fee to their children, which vested in those born, and opened to let in those afterwards born. The inference from the phrase used, that "children" was not an attempted word of limitation, may readily be approved. The basis, however, for holding that the children did not take as tenants in common with M and J is not so clear. There is no phrase which suggests that at the death of M and J the children are to take. If the statute had been effective to create a fee, M and J and their children would have taken as tenants in common. This would have prevented any after born children from sharing and the context and circumstances here presented were such as to indicate that after born children were to share.

Suppose that personalty be limited to A "and the issue of her body," are the words "issue of her body" attempted words of limitation so that an estate tail in personal property is intended, with the result that an absolute interest in the personal property is created in A? Or is "issue" used as a word of purchase? If so, do the issue living take jointly with A, or does A take a life interest with a gift over to such issue as may be born to her in her lifetime? The preceding authorities suggest the possibility of any one of these results and yet cannot be said to be decisive in favor of any. The proper result to be reached where personalty is limited to A and the "issue of her body" rests upon considerations which can best be dealt with in the chapter on estates tail.[93]

[91] 230 Ill. 258.
[92] 170 Ill. 384.
[93] See *post*, § 200.

TITLE III.

LIMITATIONS TO "A OR HIS HEIRS."

§ 170. (1) **Where there is no preceding estate—In a conveyance inter vivos:** It was said by Coke[94] that, if real estate were conveyed *inter vivos* to "A or his heirs," A had "but an estate for life, for the uncertainty." An early Massachusetts case[95] suggests that "or" be read "and"[96] and that A take the fee. Under Sec. 13 of our Conveyancing Act, A would clearly take the fee and the words "or his heirs" would be inoperative as words of purchase, or would be looked upon as an effort to use informal words of limitation intended to create a fee.

§ 171. **By way of devise:** If A, in the case put, survives the testator, he takes the absolute interest in personalty, and, since Sec. 13 of our Conveyancing Act, a fee in real estate.[97] If A dies before the testator, the question arises whether "or his heirs" is merely an informal expression indicating words of limitation intended to carry a fee (in which case there would be a lapsed devise or bequest[98]), or does it mean that the heirs of A are to take in his place. The latter seems to have been the usually accepted construction.[99]

Where the gift is to a class of persons, as the children of A, "or their heirs," and the heirs of a child are regarded as taking if the child dies before the testator, the further question arises whether the heirs of a child of A, who died before the will was made, take. This is said to depend upon whether the phrase "or their heirs" was merely substitutionary or a special original gift. If the former, the heirs of the children dying before the will was executed, do not take; if the latter, they do. The English cases seem regularly to have held a devise or bequest to a class "or their issue" to be properly substitutionary, so that the issue of members of the class, dead at the date of the will, could

[94] Co. Lit. 8b, 3 Gray's Cases on Prop., 2nd ed. 304.

[95] White *v.* Crawford, 10 Mass. 183, 188 (1813).

[96] See the following cases where "or" construed "and:" Kindig's Executors *v.* Smith, 39 Ill. 300; Olcott *v.* Tope, 213 Ill. 124; Ayers *v.* Chicago Title & Trust Co., 187 Ill. 42; Smith *v.* Dellitt, 249 Ill. 113.

[97] Theobald on Wills, 7th ed. 676; Adshead *v.* Willetts, 29 Beav. 358.

[98] Sloan *v.* Hanse, 2 Rawle (Pa.) 28.

[99] Straw *v.* Barnes, 250 Ill. 481.

not take.[1] In *Straw v. Barnes*,[2] however, where the devise was to "my brother and sister or their heirs," the court reached a different result and the heirs of a brother and sister, who died before the will was executed, were held to be entitled.

§ 172. (2) **Where there is a preceding life or other estate —Limitations in a conveyance inter vivos:** Suppose the limitations are to X for life, remainder to "A or his heirs." If this be in a conveyance *inter vivos,* operating at common law, or under the Statute of Uses, A would, it is believed, take only a remainder for life with a contingent remainder over to his heirs if A died before X. But A would take only a life estate in remainder, while his heirs, if they became entitled, would take the fee. What results (if any) the English cases reached, are unknown to the writer. Under Sec. 13 of our Conveyancing Act, A would take the fee if he took at all. But the question arises whether "or his heirs" will not be treated as words of limitation so that A alone takes the fee without any gift over, if he dies before the death of the life tenant. One would suppose that since shifting gifts over by deed were valid, and since there was an obvious reason for a gift over in the fact that A might die before the death of the life tenant, the construction adopted where bequests of personalty were concerned[3] would be followed, and "or his heirs" would be construed as a gift to A's heirs if he died before the death of the life tenant.

§ 173. **By way of devise:** It seems to have been usually held, where the limitations were of personalty, that A took absolutely if he survived the life tenant. If he survived the testator but died before the life tenant, his heirs took absolutely.[4] Such was the holding in *Ebey v. Adams*.[5] The same result has been reached where real estate was involved.[6]

[1] Theobald on Wills, 7th ed. 673.

[2] 250 Ill. 481.

[3] *Post,* § 173.

[4] Doody *v.* Higgins, 2 K. & J. 729; Finlason *v.* Tatlock, L. R. 9, Eq. Cas. 258; *In re* Craven, 23 Beav. 333; Parsons *v.* Parsons, 8 Eq. 260; Neilson *v.* Monro, 27 W. R. 936; *In re* Stannard, Stannard *v.* Burt, 52 L. J. Ch. 355; Jacobs *v.* Jacobs, 16 Beav. 557; Gittings *v.* M'Dermott, 2 M. & K. 69; Reiff *v.* Strite, 54 Md. 298, 304.

[5] 135 Ill. 80.

[6] Robb *v.* Belt, 12 B. Mon. [Ky.] 643. See also Bates *v.* Gillett, 132 Ill. 287, where the limitations were to A for life, then to her child or its descendants, the descendants of each child to take one share. See also the special concurring opinion of Cartwright, J., in Preston *v.* John-

There are good reasons in support of these results. *First:* The turning of "or" into "and," so as to make the gift "to A and his heirs," is a forced and unnatural process which *prima facie* does violence to the express language. On the face of it the phrase "to A or his heirs" has the meaning which has always been attributed to it where the subject matter of the gift was personal property,—namely to create alternative limitations. Since *Straw v. Barnes*,[7] in which it was held that a devise of real estate to brothers and sisters "or their heirs" naturally and primarily created distinct gifts to the brothers and sisters on the one hand, or to their heirs, if the brothers and sisters died before the testator or were dead at the date of the will, there is no reason for not taking the same phrase in the same way where the same limitations follow a life estate. *Second:* The reason given for construing "A or his heirs" as "A and his heirs" where real estate is involved, was that if this had not been done when the question first arose in the 18th century, A, if he took, would have had only a life estate. This was regarded as so far from the expressed intent as to warrant the change of "or" into "and." Since the Wills Act of 1 Victoria, however, and since legislation on similar lines in this country, which make a gift to A *simpliciter prima facie* a fee, this reason fails, for now A, if he takes in possession at all, will take the fee, which will be indefeasible. If A does not take in possession, his heirs will take the indefeasible fee. Today, therefore, there is no more reason for not taking the language as it stands in its primary meaning than there was formerly where the subject matter of the gift was personal property. *Third:* Hawkins on Wills[8] and Theobald on Wills[9] both assume that for the reasons just indicated, the courts in England would today give the same construction to "A or his heirs" where the subject matter was real estate, as they regularly did where it was personal property. *Fourth:* This position is clearly maintained by *Wingfield v. Wingfield*,[10] where there was a life estate

son, 226 Ill. 447. In Golladay *v.* Knock, 235 Ill. 412, a remainder to "Moses and his heirs," was treated as if it were to "Moses or his heirs." See *post*, §§ 323, 382. In Brechbeller *v.* Wilson, 228 Ill. 502, the remainder was to children or issue.

[7] 250 Ill. 481.

[8] p. 180.

[9] 6th ed. 400.

[10] L. R. 9 Ch. Div. 658.

in a mixed fund of real and personal property, and a remainder after the life estate to the testator's brothers and sisters then living "or their heirs." It was held that the gift was substitutionary. Hall, V. C., suggested that before the Wills Act the remaindermen might have had a fee, because otherwise they would have had only a life estate if they took possession at all, and that a different rule should obtain after the Wills Act. The earlier cases of *Wright v. Wright* and *Lachlan v. Reynolds* were distinguished.[11]

There are, of course, cases where courts have been persuaded by a special context,[12] or the fact that the testator was obviously illiterate,[13] to hold that "or" was to be read "and" and that A took the fee without any alternative or substitutionary gift over.[14] It happens in these cases that real estate was involved and recently our Supreme Court seems to have proceeded as if, where real estate was involved, these cases not only represented the general course of decision (apart from any special context), but also established a rule of construction which it would be difficult for a special context to overturn. In *Ortmayer v. Elcock*,[15] there was presented for construction the phrase "or their heirs, if deceased," where the limitations were in substance to A for life, then to B, C, D and E, "or their heirs, if deceased." The court held that B, C, D and E took at once vested and indefeasible interests in fee, subject to the life estate,

[11] See also Flournoy *v.* Flournoy, 1 Bush (Ky.) 515; Taylor *v.* Conner, 7 Ind. 115, and Robb *v.* Belt, 12 B. Mon. (Ky.) 643, for cases tending in the same direction as Wingfield *v.* Wingfield, *supra.*

[12] Wright *v.* Wright, 1 Ves. Sr. 409; Lachlan *v.* Reynolds, 9 Hare Ch. 796.

[13] Miller *v.* Gilbert, 144 N. Y. 68.

[14] See also Williams *v.* Williams, 91 Ky. 547; Brasher *v.* Marsh, 15 Ohio St. 103.

Where the gift was "to A or the heirs of his body" or "to A or his issue," it has been held that A had an estate tail. Read *v.* Snell, 2 Atk. 642; Harris *v.* Davis, 1 Coll. 416; Greenway *v.* Greenway, 2 De G. F. & J. 128; Parkin *v.* Knight, 15 Sim. 83. It made no difference in the above cases that the gift of real estate was included in a mixed fund of real and personal property, as where the gift was a residue of real and personal property "to B for life, and then to A or his heirs." Greenway *v.* Greenway, 2 De G. F. & J. 128; Parkin *v.* Knight, 15 Sim. 83; Sloan *v.* Hanse, 2 Rawle (Pa.) 28. The rule seems to have obtained after the passage of the Wills Act of Victoria, making a simple gift to A *prima facie* the gift of a fee simple. Harris *v.* Davis, 1 Coll. 416; Greenway *v.* Greenway, 2 De G. F. & J. 128.

[15] 225 Ill. 342.

and that there was no gift over to their heirs in case any of them died before the termination of the life estate.[16] Even, however, if the distinction should obtain in this state that a gift "to A or his heirs" means one thing with regard to realty, and another with regard to personalty, and that the same language may have two different meanings when applied to a mixed fund of realty and personalty, still the decision reached in *Ortmayer v. Elcock* is inexplicable. The special context may always make it clear that a substitutionary or alternative gift was provided. Thus, in *Speakman v. Speakman*[17] there was a gift to A for life with a remainder to B, C and D "or their heirs of anyone that might happen to be dead." It was held that the language here was too explicit to avoid construing "or their heirs" as introducing a substitutionary gift. It is submitted that the addition of the words "if deceased" in *Ortmayer v. Elcock* presents a special context in all respects similar and quite as strong as that appearing in *Speakman v. Speakman*.[18]

§ 174. Meaning of "or his heirs" where the words introduce a substitutionary gift: Having determined that "or his heirs" makes a substitutionary gift where the limitations are to A for life, then to B or his heirs, the phrase "or his heirs" must be expanded to "or in case of," or "at" B's death, to his heirs. The question then arises, to what period does "death" refer. If it refers to death at any time it might cut A's interest down to a life estate, which is out of the question. Nor can it be confined to the death of B during the testator's life only. It means death of B before the period of distribution. Hence if A renounces the life estate so that B's remainder is accelerated, no gift over can occur.[19]

§ 175. (3) **Where there is a preceding life estate with gifts over on contingencies with an ultimate gift over to "A or his heirs":** In such a case the context raises a legitimate inference that the ultimate gift is really to A and that "or his heirs" is merely an informal effort to add words of limitation which signify that if A's heirs take, they take by descent from

[16] See, however, the special concurring opinion of Cartwright, J., in Johnson *v.* Preston, 226 Ill. 447.

[17] 8 Hare 180.

[18] See also Horseman *v.* Abbey, 1 Jac. & W. 381; Richey *v.* Johnson, 30 Ohio St. 288; Bates *v.* Gillett, 132 Ill. 287.

[19] Sherman *v.* Flack, 283 Ill. 457.

him and not as independent purchasers. Such a result has been reached in this state where the limitations were created by will.[20]

§ 176. (4) **Where the ultimate gift is to the grantor "or his heirs"**: In such a case, a reversion is created in the grantor.[21] So where the provision is that the land is to revert back to the grantor's heirs, a reversion is created in the grantor.[22]

TITLE IV.

CONFLICTING PROVISIONS—CONFLICT BETWEEN THE PREMISES AND THE HABENDUM.

§ 177. **Courts attempt to reconcile apparently conflicting clauses:** [23] Where the same land was devised to two different persons, both took as tenants in common.[24] So where A was devised a life estate in lands and later, without reference to the life estate, the same lands were devised to B in fee, B took only a remainder.[25] So where A was devised forty acres and then all the testator's lands were devised to a named person in fee, with a direction that they be sold after A's death, A took the fee to the forty acres and the later clause was held to devise only the lands excepting the forty acres.[26] Where the premises of a deed granted to "A and the heirs of his body" and the *habendum* was to "A and his heirs," the opinion of Lord Coke was that A took a fee tail with a remainder in fee.[27] Our Supreme Court would hardly regard similar limitations as reconcilable in this manner for the reason that estates tail have long since been abolished in this state and turned into estates for life with remainder to the life tenant's children in fee [28]

[20] Smith *v.* Dellitt, 249 Ill. 113.

[21] Hobbie *v.* Ogden, 178 Ill. 357.

[22] Akers *v.* Clark, 184 Ill. 136.

[23] Eckhart *v.* Irons, 128 Ill. 568.

Observe the following cases where it was held that there was no conflict between the premises and the habendum. Jones *v.* King, 25 Ill. 334; Cooper *v.* Cooper, 76 Ill. 57.

Where there was a devise to the widow during widowhood, to hold absolutely, the court reconciled the apparent conflict by holding that it was the life estate which the widow was to hold absolutely. Kratz *v.* Kratz, 189 Ill. 276.

[24] Day *v.* Wallace, 144 Ill. 256.

[25] Rickner *v.* Kessler, 138 Ill. 636; Rountree *v.* Talbot, 89 Ill. 246.

[26] Brownfield *v.* Wilson, 78 Ill. 467.

[27] Co. Lit. 21a; see also Corbin *v.* Healy, 20 Pick. 514 (Mass. 1838).

[28] *Post*, § 406.

and the gift over or remainder in fee after the estate tail may be regarded as destroyed by the statute.[29]

§ 178. Where an actual conflict occurs—(1) The rule as to deeds—The view of the common law: It was a well settled common-law rule of long standing that if the premises and *habendum* of a deed contain different express limitations of the estate which are repugnant to each other, the construction which is most beneficial to the grantee will be adopted.[30] Pursuant to this rule the *habendum* where such repugnance occurs may enlarge an estate expressly contained in the premises, but may not abridge or make void any such estate.[31] The clearest case for the application of this rule seems to have been where the premises contained an express grant of a fee simple by the use of the words "to the grantee and his heirs," while the *habendum* was "to the grantee for life" or for a term of years. In such a case the grantee took the fee.[32] From the English writers and cases it would appear that this rule was one of marked rigidity. If the premises expressly designated the fee and the *habendum* a life estate, no extended argument from the surrounding circumstances that the grantor meant a life estate would have been effective to prevent the creation of the fee. As Challis[33] states it: "The *habendum* cannot abridge any estate contained in the premises, unless such estate either is not expressly contained, or else is not capable of taking effect." This he shows is the result of the authorities.[34] The same rule has often been referred to by our Supreme Court.[35]

§ 179. The common law rule, how far modified—Where the premises provide for the lesser estate and the habendum for the larger: Suppose the premises grant an estate to A and

[29] Kolmer *v.* Miles, 270 Ill. 20; 13 Ill. Law Rev. 132; *post,* § 411.

[30] Elphinstone, Interpretation of Deeds, Rule 66, p. 217.

[31] Challis, Real Property, ch. 30.

[32] Winter *v.* Gorsuch, 51 Md. 180; Robinson *v.* Payne, 58 Miss. 690; Ratliffe *v.* Marrs, 87 Ky. 26; Smith *v.* Smith, 71 Mich. 633; Wood *v.* Taylor, 30 N. Y. Supp. 433.

[33] Real Property, ch. 30.

[34] See also Owston *v.* Williams, 16 U. C. Q. B. 405; Langlois *v.* Lesperance, 22 Ont. Rep. 682.

[35] Baulos *v.* Ash, 19 Ill. 187; Riggin *v.* Love, 72 Ill. 553, 555; Jones *v.* King, 25 Ill. 334, 337; Cooper *v.* Cooper, 76 Ill. 57, 61; Eckhart *v.* Irons, 128 Ill. 568, 580; Lambe *v.* Drayton, 182 Ill. 110, 113; Sassenberg *v.* Huseman, 182 Ill. 341, 350; Welch *v.* Welch, 183 Ill. 237, 238; Anderson *v.* Stewart, 285 Ill. 605, 611.

the heirs of his body, while the *habendum* provides for an estate to A and his heirs and assigns forever, and suppose these clauses cannot be regarded as reconcilable.[36] It has been held that A takes the fee.[37]

In *Griswold v. Hicks*,[38] the deed in question recited that it was between A, party of the first part, and B, C and D "and the heirs of their bodies, party of the second part." By the premises the conveyance was to B, C and D "and their heirs and assigns, *as aforesaid*, forever * * * meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives and at their death to go to their children; should they die without issue to their legal representatives;" *habendum* to the party of the second part "their heirs and assigns forever." It was held that B, C and D took life estates with the remainder to their children. One ground for this was that "heirs and assigns as aforesaid" meant "heirs of the body," as aforesaid. Hence by the premises an estate tail was created which the statute turned into a life estate with a remainder to the donee's children. The case, therefore, is not an instance of the premises conveying the lesser estate prevailing over the *habendum* which designated the larger. Another ground for the decision was that on the whole context it was the expressed intent that B, C and D should have only life estates with the remainder to their children and that this actually expressed intent must prevail. This ground is hardly consistent with the strict and artificial rule that the *habendum* which described the larger estate would prevail over the premises which described the lesser.

In *Coogan v. Jones*[39] the deed conveyed and warranted to A "and her bodily heirs," reserving a life estate in the grantor, and "at his death, then the above described tract of land to go into full ownership and control" of the said A "or her heirs." If "full ownership and control" meant a fee, then the latter clause conflicted with the former but enlarged its meaning. Under the common law rule the *habendum* could be used to enlarge but not restrict the estate designated by the premises.

[36] *Ante*, § 177.

[37] Tennison *v.* Walker, 190 S. W. 9 (Mo. 1916).

[38] 132 Ill. 494.

[39] 278 Ill. 279.

By that rule a fee would have been created.[40] But the court held that a fee tail was created. This may proceed upon the ground that "full ownership and control" meant only full ownership and control of the estate already created, *namely*, a fee tail, and that A or her heirs, meant A or the heirs of her body.

§ 180. **Where the premises provide for the larger and the habendum the lesser estate—Modification of the common law rule by statute:** Where a statute provides "if two clauses in a deed be utterly inconsistent, the former must prevail, but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect,"[41] the *habendum* which mentions a life estate prevails, as a matter of course, over the premises designating a fee simple by the use of the words "to the grantee and his heirs."[42] So also where the fee in the premises is created by the force of Sec. 13 of our Conveyancing Act without the use of the word "heirs," then, since the statute throws the whole deed open to take effect according to the expressed intent, the *habendum* may be relied upon almost as a matter of course to create a life estate.[43]

§ 181. **Tendency apart from statute to modify the strictness of the common law rule:** In this country, the courts have seemed disinclined to follow the common law rule in all its strictness. Even where the court held that a fee had been created according to the premises by the use of the word "heirs" as a word of limitation, it will be found asserting its authority to find that a life estate had been created by the *habendum* if from the whole context such was the expressed intent.[44] In several cases courts have supported the holding that a fee had

[40] *Compare,* Duffield *v.* Duffield, 268 Ill. 29.

[41] Ga. Code 1867, sec. 2655.

[42] Remshart *v.* Ham, 40 Ga. 344.

[43] Humphrey *v.* Foster, 13 Gratt (Va.) 653; Riggin *v.* Love, 72 Ill. 553; Welch *v.* Welch, 183 Ill. 237; Sassenberg *v.* Huseman, 182 Ill. 341; Coogan *v.* Jones, 278 Ill. 279, 285; Anderson *v.* Stewart, 285 Ill. 605, 611.

In Dick *v.* Ricker, 222 Ill. 413, the granting clause of the deed was ineffective to create a fee tail. If effective to create a fee in accordance with the view expressed, *post*, § 198, by the operation of sec. 13 of the Conveyancing Act, then it was proper for the court, in accordance with the above cited cases, to resort to the habendum to determine the character of the estate created.

[44] Robinson *v.* Payne, 58 Miss. 690, 709; Ratliffe *v.* Marrs, 87 Ky. 26.

been created according to the premises, not upon the rule of construction alone, but also on the ground that such on the entire context was the expressed intent of the grantor.[45] It has been held that where the premises grant to another "his heirs and assigns forever subject to the limitations hereinafter expressed as to part thereof" the *habendum* directing a life estate as to one-half prevailed over the premises.[46] Repeated instances are to be found where the premises contain an express grant of a fee, but where the lesser estate expressed in the *habendum* prevailed because it was deemed to express the actual intent of the grantor.[47] Where a fee tail was created according to the premises, but the *habendum* indicated a fee, a holding that A took the fee has been supported upon the ground that all parts of the deed were equally to be considered in determining the expressed intent.[48]

In *Miller v. Mowers*[49] the deed in question reads as follows: The grantor granted unto the party of the second part "her heirs and assigns" certain described real estate "to have and to hold the said premises above bargained and described with the appurtenances, unto the said party of the second part, *her* heirs and assigns *during her natural lifetime.*" The words italicized were written in longhand and the other words were part of the printed form. There was not here a mere repugnance between the premises and the *habendum*, but the premises and the first half of the *habendum* both were equally appropriate for the creating of a fee simple estate and the words suggesting the limitation of a life estate were really part of the *habendum* and inconsistent with the beginning of the *habendum* itself. The holding of the court then that the grantee took only a life estate was a particularly striking failure to apply in all its original rigidity the rule of construction. The action of the court was rested wholly upon the fact that the surrounding circumstances and inferences from the face of the deed showed that the creation of a life estate was expressly

[45] Smith *v.* Smith, 71 Mich. 633; Winter *v.* Gorsuch, 51 Md. 180.

[46] Tyler *v.* Moore, 42 Pa. St. 374.

[47] Berridge *v.* Glassey, 112 Pa. St. 442; Moss *v.* Sheldon, 3 W. & S. (Pa.) 160; Henderson *v.* Mack, 82 Ky. 379; Higgins *v.* Wasgatt, 34 Me. 305.

[48] Tennison *v.* Walker, 190 S. W. 9 (Mo. 1916), 16 Law Series Missouri Bulletin 31.

[49] 227 Ill. 392.

intended. The court laid special stress upon the fact that the words of the *habendum* "during her natural lifetime" were written into the printed form, and applied the rule that, where there is a conflict between the written and printed portions, the written must prevail.[50] This last was not so strong because before the word "heirs" in the premises and *habendum* the word "her" was written in full, showing that the word heirs had been read and noted, and this was fortified also by the fact that the word "forever" after "heirs and assigns" in the *habendum* was crossed out. The decision of the court would seem then to come very near holding that the rule relating to a conflict between the premises and the *habendum* gives way readily to what the court on all the evidence deems the true expressed intent.

In *Doney v. Clipson*[51] the deed ran to *A* and the heirs of his body, to have and to hold to *A* for life and then to the heirs of his body. The only question was whether *A* had a life estate or a fee. It was clear that he did not have a fee. He had a life estate whether the granting clause or the *habendum* prevailed.

§ 182. (2) Where devises are involved: Where inconsistent expressions creating different estates occur in a will, there never has been any rigid rule that what might correspond to the *habendum* of a deed should not be permitted to cut down or abridge an estate devised by language which might correspond to the premises of a deed. Not only was there no mention of such a rule relating to the construction of devises in Jarman on Wills or Theobald on Wills, but at least one English judge has particularly noted the fact that, in a deed, of two repugnant provisions the first prevails, while in a will the rule is that the last will be taken.[52] Furthermore, the older and more artificial rules regarding the effect of language in a conveyance *inter vivos* have never been operative where the transfer was

[50] American Express Co. *v.* Pinckney, 29 Ill. 392; People *v.* Dulaney, 96 Ill. 503; Loveless *v.* Thomas, 152 Ill. 479; McNear *v.* McComber, 18 Ia. 12; Reed *v.* Hatch, 55 N. H. 327.

[51] 285 Ill. 75.

[52] Doe *v.* Biggs, 2 Taunt. 109, *per* Sir James Mansfield, C. J. See also Hamlin *v.* United States Express Co., 107 Ill. 443; Jenks *v.* Jackson, 127 Ill. 341, 350; Harris *v.* Ferguy, 207 Ill. 534, 539.

by devise.[53] The principle always applied has been that the expressed intent as it appears from the whole instrument must prevail. To this has been added the rule that in case of irreconcilable conflict, the later expressions in the will are preferred to the earlier as indicating the intention expressed.[54] Thus in *Siegwald v. Siegwald*,[55] the testator devised to his wife all his real and personal estate "in fee simple absolutely forever, that is to say,—that my said wife shall have all of the benefits thereof until the expiration of her life," at which time the testator's son should be the only heir of what might be left. It was held that the wife took a life estate only. So in *Wallace v. Bozarth*[56] the testator devised all the residue of his property "absolutely and in fee simple to my wife, Samantha Poole, for life, after her death to be equally divided between my three heirs."[57] This was held to give the wife only a life estate. Since *Miller v. Mowers*,[58] these results should be regarded as in line with the court's usual course of decision on contexts presenting similar conflicts.

Two cases, however, appear in the reports which seem to be out of line and to require special notice.

In *Lambe v. Drayton*[59] a will was presented to the court for construction which contained a devise to the testator's wife and "her heirs and assigns * * * To have and to hold * * * to my said wife * * * (during) her lifetime." It was held that the wife took by this an estate in fee and the court seemed to go not upon what it deemed the expressed intent of the testator, but upon the hard and fast rule of construction relating to the effect of the *habendum* of a deed when it conflicts with the premises and purports to give a less estate. Such a rule never did prevail in regard to wills, and, since *Miller v. Mowers*,[60] it must be doubtful whether it still applies in this state as to deeds.

[53] Co. Lit. 9b, 10a.

[54] Hamlin *v.* United States Express Co., 107 Ill. 443; Jenks *v.* Jackson, 127 Ill. 341, 350; Harris *v.* Ferguy, 207 Ill. 534, 539; Murfitt *v.* Jessop, 94 Ill. 158; Rountree *v.* Talbot, 89 Ill. 246, 249. Compare, however, Little *v.* Bowman, 276 Ill. 125.

[55] 37 Ill. 431.

[56] 223 Ill. 339.

[57] Siddons *v.* Cockrell, 131 Ill. 653.

[58] 227 Ill. 392; *ante*, § 181.

[59] 182 Ill. 110.

[60] 227 Ill. 392; *ante*, § 181.

In *Rissman v. Wierth*[61] "all the rest, residue and remainder of my estate both real and personal" was devised to the testator's "beloved wife," Sibilia "to hold and to have" "to her, my said wife, and to her heirs and assigns forever." Other clauses of the will appear in the report marked 2nd, 3rd and 4th. If we stop with the words "heirs and assigns forever" Sibilia clearly took the fee. The premises carried the fee and the *habendum* confirmed it. If, however, we stop at the end of the clause marked 2nd, or the clause marked 3d, then Sibilia took a fee subject to an executory devise over on her marriage, which, however, never occurred and, therefore, this gift over never took effect. When, however, we add the 4th clause we find a gift if Sibilia does not marry, to her "until her death and after her death the residue shall be devided" to named persons. This clause makes the case not only one where the last expressed intent is that the wife shall have a life estate, but also one where there is a gift over on two contingencies which exhaust all the possibilities,—*i. e.*, Sibilia marrying or not marrying,—so that under the rule already discussed[62] Sibilia would have had only a life estate. The court, however, reached the result that Sibilia had an indefeasible estate in fee simple. This defeats and disregards a clearly expressed gift over. The discussion of the *Rule in Shelley's Case* by the court is, it is submitted, without justification. The handling of the language of the will in question represents a course which cannot be relied upon to be repeated.

TITLE V.

ESTATE WHICH A TRUSTEE TAKES.

§ 183. **Introductory**: In many cases where courts venture an opinion as to the estate which the trustee takes, the point will be found on analysis not to be material.[63] Much *dicta* may thus be discarded.

A few of the instances where the estate which the trustee takes becomes of vital importance are as follows: If the trustee takes the fee in trust for *A* for life and then in trust for *A's* heirs, so that all the beneficial interests are equitable, the *Rule in*

[61] 220 Ill. 181.

[62] *Ante*, §§ 165, 167.

[63] See Ebey *v.* Adams, 135 Ill. 80, 85.

Shelley's Case applies.[64] If, however, the trustee takes only an estate for the life of the equitable life tenant, and the remainder to the equitable life tenant's heirs is legal, the *Rule in Shelley's Case* does not apply.[65] It makes a difference on the question of the survival of powers whether the trustee takes a fee with a trustee's power to dispose of the fee or only a limited estate.[66] If the trustee has a fee and has been *disseised* for twenty years, it may be that all the *cestuis* will be barred, while if the trustee has only a legal estate for years or for the life of an equitable life tenant and the remainder is legal, then the Statute of Limitations cannot begin to run against the remainderman until the termination of the preceding limited estate and probably not until the actual time fixed for the termination of the preceding limited estate, such as the end of the term for years or the death of the tenant for life.[67] If an equitable interest in real estate cannot be taken on execution under the statutes of this state,[68] then it becomes important when judgment is had against the holder of a future interest to determine whether the trustee has a fee so that the future interest is equitable, or whether the trustee has only a limited estate, so that the future interest is legal.[69] If the trustee takes the fee then there will be less necessity for the beneficiary being made a party to a suit to construe the terms of the trust instrument than if the beneficiary has a legal future interest.[70] When the beneficiary ultimately entitled brings ejectment after the period of the active trusts has terminated, he fails if the trustee took a fee. He succeeds where the trustee has only a limited estate which has come to an end.[71] In determining whether the trustee has the right to file a bill to construe a will and determine the beneficial interests it may become important to determine whether the trustee takes any estate at all or has merely a naked power.[72]

In determining what estate the trustee has, it will be found

[64] *Post*, § 429; Nowlan *v.* Nowlan, 272 Ill. 526.

[65] *Post*, § 413; Harvey *v.* Ballard, 252 Ill. 57.

[66] *Post*, § 626; Watson *v.* Pearson, 2 Exch. 581.

[67] See Watkins *v.* Specht, 7 Coldw. (Tenn.), 585; *post*, §§ 383 *et seq.*

[68] See Potter *v.* Couch, 141 U. S. 296; Wallace *v.* Monroe, 22 Ill. App. 602; *post*, § 728.

[69] Moll *v.* Gardner, 214 Ill. 48.

[70] Green *v.* Grant, 143 Ill. 61, 73; Smith *v.* Hunter, 241 Ill. 514.

[71] Walton *v.* Follansbee, 131 Ill. 147; *id.*, 165 Ill. 480.

[72] Emmerson *v.* Merritt, 249 Ill. 538.

important to observe a possible distinction between the case where the trust is created by deed *inter vivos* and where it is created by will.

§ 184. Testamentary trusts—Cases where there are no explicit words of devise to the trustee: If there are no words at all of devise to the executor or trustee and no direction that the executor or trustee shall manage and control the estate from which words of direct devise may be inferred, as hereinafter noted, then the fact that a power is conferred to sell and dispose of the fee [73] or to divide the estate among the beneficiaries [74] will not cause any estate to vest in the executor or trustee. The power is a real or naked power and may be exercised as such.[75]

Suppose that while there are no explicit words of devise to an executor or trustee, there are words of direction that the executor or trustee take possession of the real estate and hold or manage it and collect the rents. Such expressions indicate that the executor or trustee is to take some legal estate.[76] To a certain extent the rules [77] applicable where there are explicit words of devise to the trustee will control. For instance, the trustee

[73] Baker *v.* Scott, 62 Ill. 86, 103; Lambert *v.* Harvey, 100 Ill. 338; West *v.* Fitz, 109 Ill. 425, 435, *semble;* Ebey *v.* Adams, 135 Ill. 80, *semble;* Smith *v.* Hunter, 241 Ill. 514; Emmerson *v.* Merritt, 249 Ill. 538; Hill *v.* Dade, 68 Ark. 409.

[74] See Drake *v.* Steele, 242 Ill. 301, *semble.*

[75] See notes 73 and 74, *supra.* Of course, a trust may be created without any designation of a trustee, in which case the legal title passes to the heir at law. Kolb *v.* Landes, 277 Ill. 440.

[76] Wicker *v.* Ray, 118 Ill. 472; Hale *v.* Hale, 146 Ill. 227; Olcott *v.* Tope, 213 Ill. 124; Kemmerer *v.* Kemmerer, 233 Ill. 327 (as explained in Emmerson *v.* Merritt, 249 Ill. 538, 541, 542); Fenton *v.* Hall, 235 Ill. 552 (as explained in Emmerson *v.* Merritt, 249 Ill. 538, 541, 542).

It is in this connection that it is proper to say that a power to lease which the trustee has by necessary implication from his power to manage and control indicates that the trustee is to have some legal estate. Such a power to lease is a power to make leases to last only during the term of the active trusts (*post,* § 192). But since it is inferred that the leaseholds created are to come out of the estate of the trustee it is a necessary conclusion that the trustee is to take some estate. Hale *v.* Hale, 146 Ill. 227, 248-249. This correct reasoning should not be confounded with the proposition that the trustee takes a fee when he has an express power to make leases which will continue beyond the period of the active trusts.

[77] *Post,* § 185.

will take only such legal estate as will satisfy the purposes of the trust. If his active duties are to continue only during a term for years it may be assumed that he will take such a term. If his active duties are to continue during the life of an equitable tenant for life it may be assumed that he will take at least a legal estate for the life of such equitable life tenant.[78] Can it be said, however, that the words which direct the trustee or executor to hold, manage, control and rent are the precise equivalent of direct words of devise to the executor or trustee? It is believed that the matter is a delicate one of construction about which it is dangerous for courts, as well as the writer, to dogmatize. It may be that the language directing the trustee to control and manage would be clearly equivalent to words of devise to the trustee and if a power of sale[79] or a direction to divide at the termination of the trusts[80] or both[81] were added, the trustee would take the fee according to the rules hereinafter set out.[82] On the other hand, it might be that the absence of direct words of devise, together with other language used, would show an express design to limit the trustee's legal estate as much as possible and the power to sell the fee might properly be taken as a real power and as not at all effective to confer a fee upon the trustee.

§ 185. **Cases where there are explicit words of devise to the trustee—Effect of R. S. 1874, Ch. 30, Sec. 13:**[83] Under this act a conveyance or devise to a trustee without words of limitation is put upon the same footing as if words of limitation were in fact used.[84] The last phrase of the act, "if a less estate * * * do not appear to have been granted, conveyed or devised by construction or operation of law," would seem to preserve all the rules as developed at common law for determining the estate which the trustee takes. Such rules were clearly rules of construction for determining the estate conferred. Such is the view actually assumed by the Supreme Court in this state.[85] In other states, also, under similar acts, the assump-

[78] Hutcheson *v.* Hodnett, 115 Ga. 990.

[79] Fenton *v.* Hall, 235 Ill. 552 (as explained in Emmerson *v.* Merritt, 249 Ill. 538, 541, 542).

[80] Wicker *v.* Ray, 118 Ill. 472; Hale *v.* Hale, 146 Ill. 227.

[81] Olcott *v.* Tope, 213 Ill. 124.

[82] *Post*, §§ 185 *et seq.* See Nixon *v.* Nixon, 268 Ill. 524, 535.

[83] This is substantially the same as R. S. 1845, p. 105, sec. 13.

[84] West *v.* Fitz, 109 Ill. 425, 436.

[85] See common law rules followed

tion has been the same and recourse is regularly had to the English cases prior to the Wills Act for the rule which determines what estate a trustee takes.[86]

§ 186. Where real estate is devised to trustees and an estate in the trustee for the life of the beneficiary is expressly indicated: If in addition, the property at the end of the period of the active duties of the trustee is to "descend and be divided among" the children, and there is no power to sell the fee out of the trust estate, the trustee will probably take an estate only for the period specified.[87]

§ 187. Where real estate is devised to trustees, although with words of inheritance, or where such words are supplied in effect by R. S. 1874, Ch. 30, Sec. 13, prima facie the trustees take only so much of the legal estate as the purposes of the trust require: Such is the rule stated by Hawkins [88] in summarizing the effect of the English cases prior to the Wills Act.[89] The results actually reached in many jurisdictions in this country [90] and in this state [91] are consistent with this rule. Thus, where there is a devise of lands to trustees and their heirs

by the Illinois cases, *post*, §§ 187 *et seq.*

[86] See cases cited from other states, *post*, §§ 187 *et seq.*

[87] Hull *v.* Ensinger, 257 Ill. 160.

[88] Wills, p. 143.

[89] Cooke *v.* Blake, 1 Exch. 220; Shapland *v.* Smith, 1 Brown, C. C. 75; Silvester *v.* Wilson, 2 T. R. 444; Baker *v.* Parson, 42 L. J. Ch. N. S. 228; *Ex parte* Wynch, 5 De G. M. & G. 188.

[90] Brantley *v.* Porter, 111 Ga. 886; Brown *v.* Wadsworth, 168 N. Y. 225; Vogt *v.* Vogt, 26 App. (D. C.) 46; Zuver *v.* Lyons, 40 Ia. 510; Ware *v.* Richardson, 3 Md. 505, 546-554; Hardy *v.* McKim, 64 Md. 560; Thurston *v.* Thurston, 6 R. I. 296; Payne *v.* Sale, 22 N. C. 455; Shackelford *v.* Bullock, 34 Ala. 418; Griffith *v.* Plummer, 32 Md. 74; Shreve *v.* Shreve, 43 Md. 382; Mercer *v.* Safe Dep. Co., 91 Md. 102; Vanderheyden *v.* Crandall, 2 Denio 9, 1 N. Y. 491; Eshbach's Estate, 197 Pa. St. 153; Xander *v.* Easton Trust Co., 217 Pa. St. 485; Kountzleman's Estate, 21 W. N. C., Pa., 467; Turner *v.* Ivie, 5 Heisk. (Tenn.) 222; Hemphill's Estate, 5 Pa. Dist. 690; Little *v.* Wilcox, 119 Pa. St. 439, 449; Estate of Mannerback, 133 Pa. St. 342; *Re* Tompkins, 154 N. Y. 634.

[91] West *v.* Fitz, 109 Ill. 425, 436, 437; Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480; Ure *v.* Ure, 185 Ill. 216; Moll *v.* Gardner, 214 Ill. 248; Emmerson *v.* Merritt, 249 Ill. 538; Monast *v.* Letourneau, 87 Ill. App. 300; Harvey *v.* Ballard, 252 Ill. 57; Nowlan *v.* Nowlan, 272 Ill. 526; Nixon *v.* Nixon, 268 Ill. 524, 536; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238; Defrees *v.* Brydon, 275 Ill. 530, 544.

"upon trust to collect the rents, issues and profits and to pay the same to *A* for his life and then I devise the same to *B* and his heirs," there can be no doubt that the trustee would take an estate only for the life of *A* and that *B* would have a legal remainder in fee.[92] This is considered the clear case, because not only are the purposes of the trust satisfied with an estate in the trustee for the life of *A*, but the remainder to *B* is limited by independent words of devise. The same result is reached if after the words "to *A* for life" the will reads: "then to pass to and become the absolute property of *B* and his heirs,"[93] or "inure and vest in *B* and his heirs,"[94] or "to vest in,"[95] or "descend and vest in,"[96] or "descend to,"[97] or "go and be held by *B* and his heirs,"[98] or then "to revert to *B* and his heirs,"[99] or then "to be paid to *B* and his heirs,"[1] or then "to *B* and his heirs,"[2] or then "upon trust for *B* and his heirs,"[3] or "for the use of *B* and his heirs."[4] In some cases the estate of the trustee has been confined to a term for years.[5]

It will be observed that in the rule as stated by Hawkins the estate which the trustee *prima facie* takes depends upon the re-

[92] Cooke *v.* Blake, 1 Exch. 220; Silvester *v.* Wilson, 2 T. R. 444; Baker *v.* Parson, 42 L. J. Ch. N. S. 228.

[93] Brantley *v.* Porter, 111 Ga. 886; Estate of Mannerback, 133 Pa. St. 342; Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. St. 474; Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480.

[94] Zuver *v.* Lyons, 40 Ia. 510.

[95] *In re* McCaffrey's Estate, 50 Hun. (N. Y.) 371.

[96] Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480.

[97] Harvey *v.* Ballard, 252 Ill. 57.

[98] Little *v.* Wilcox, 119 Pa. St. 439, 449.

[99] Ure *v.* Ure, 185 Ill. 216. See also Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480.

[1] Vogt *v.* Vogt, 26 App. (D. C.) 46.

[2] Hardy *v.* McKim, 64 Md. 560; Thurston *v.* Thurston, 6 R. I. 296; Payne *v.* Sabe, 22 N. C. 455; Hemphill's Estate, 5 Pa. Dist. 690.

[3] Brown *v.* Wadsworth, 168 N. Y. 225.

[4] Shapland *v.* Smith, 1 Brown, C. C. 75; Ware *v.* Richardson, 3 Md. 505, 546, 554.

[5] See Moll *v.* Gardner, 214 Ill. 248; Bush *v.* Hamill, 273 Ill. 132.

The English cases prior to the Wills Act regularly held that where there were words of devise to a trustee upon trust to pay debts or make certain specified payments out of the rents and a gift over when that was done, the trustee took only a chattel interest or term for years till the debts or payments were made. Cordal's Case, Cro. Eliz. 316; Doe *v.* Simpson, 5 East. 162; Ackland *v.* Lutley, 9 A. & E., 879; Heardson *v.* Williamson, 1 Keen's Ch. 33.

quirements or purposes of the trust. Our Supreme Court has, however, several times declared that the mere words of devise to the trustee *prima facie* gives the trustee a fee.[6] It is believed that there is no inconsistency in these two statements. The court seems only to mean that if you stop with the words of devise to the trustee, *prima facie* the trustee takes the fee, but if upon reading on you find that the purposes of the trust will be satisfied with a less estate, the *prima facie* inference is rebutted and the trustee takes a less estate. In short, the inference from the purposes of the trust and the active duties of the trustee is a test of the trustee's estate superior to words of devise and inheritance. Thus, in *West v. Fitz* [7] the court, after declaring that *prima facie* the devise to the trustee gives him the fee, goes on to declare what it means by "*prima facie*": "But the giving of a trustee the application of the rents does not necessarily confer on him the fee. The quantity of the estate in each case will depend upon the exigencies of the trust and the terms of the limitation. If required to collect and pay the rents for a definite period of time, or during the life of an individual, he will take an estate for years, or life, as the case may be." In short, after declaring that the trustee *prima facie* takes the fee, the court then concedes the usual rule that the trustee will take a less estate even where words of inheritance are used, if a less estate will satisfy the purposes of the trust.[8] The purposes of the trust are, therefore, after all, the predominating source for the determination of the estate which the trustee takes. Whether, then, you say, as our Supreme Court has done, that *prima facie* the trustee takes the fee, but that this *prima facie* fee will be cut down if the purposes of the trust are satisfied with a less estate, or whether you take Hawkins' statement that *prima facie* the trustee takes so much of the legal estate as the purposes of the trust require, the rule is, in effect, the same.

Section 30 of the Wills Act [9] provided that a devise to a trustee or executor "shall be construed to pass the fee simple" unless a term for years or an estate of freehold "shall thereby be given to him expressly or by implication." In *Baker v. Par-*

[6] West *v.* Fitz, 109 Ill. 425, 436, 437; Green *v.* Grant, 143 Ill. 61, 70; Harvey *v.* Ballard, 252 Ill. 57, 62.

[7] 109 Ill. 425, 437.

[8] To the same effect see Harvey *v.* Ballard, 252 Ill. 57, 62.

[9] 1 Vict. Ch. 26.

son [10] this act was apparently taken as making no change in the law. In effect the *prima facie* fee which the trustee would take under the statute was "cut down by implication" where the purposes of the trust would be satisfied with a less estate. The same will involved in *Baker v. Parson* afterwards came before Jessel, M. R.[11] He declined to follow the prior decision and held in substance that it took something more than the fact that the purposes of the trust could be satisfied with an estate less than the fee to cut down the *prima facie* fee of the trustee which he took by reason of the Wills Act.

To avoid confusion it is important to observe that when our Supreme Court says that the trustee *prima facie* takes the fee it means that the fact that the purposes of the trust will be satisfied with a less estate is still sufficient to overcome this *prima facie* inference. When Jessel, after the Wills Act, says the trustee *prima facie* has the fee, he means that the fact that the purposes of the trust may be satisfied with a less estate is not alone sufficient to overcome the *prima facie* inference. If our Supreme Court should some time overlook this, it might, while apparently following the language of *West v. Fitz*,[12] in fact be overruling a line of decisions which have come to be relied upon.

§ 188. A fortiori, where no words of inheritance are used and no statute like R. S. 1874, Ch. 30, Sec. 13, exists, the trustee takes only such estate as the purposes of the trust require: This proposition follows so clearly from the rule stated in the previous section that it needs no comment or support from the cases.

§ 189. Where there are words of devise to the trustee and the trustee is given power to sell and convey the fee and is directed to wind up the trusts by making an actual division among the beneficiaries and conveyances to them: Under these circumstances the trustee will take the fee.[13] It is some-

[10] 42 L. J. Ch. N. S. 228.

[11] Baker *v.* White, 20 Eq. 166.

[12] 109 Ill. 425.

[13] Kirkland *v.* Cox, 94 Ill. 400; Green *v.* Grant, 143 Ill. 61, 71; Olcott *v.* Tope, 213 Ill. 124 (see *ante*, sec. 2); Burbach *v.* Burbach, 217 Ill. 547; Lord *v.* Comstock, 240 Ill. 492; Bergman *v.* Arnhold, 242 Ill. 218; Simpson *v.* Erisner, 155 Mo. 157. But see Bush *v.* Hamill, 273 Ill. 132.

Bacon's Appeal, 57 Pa. 504, is not *contra*, because in Pennsylvania the direction to the trustee to convey to the ultimate beneficiary seems generally not to impose any active duty upon the trustee.

times rather glibly said that both the power of sale and the direction to convey require the trustee to take the fee. But this is not quite so, for both the transfer of the fee upon a sale and upon a distribution may in fact be made by the trustee pursuant to a real power, the trustee taking no estate at all or only a limited estate.[14] The fact is, the power of sale and the direction to convey only require the trustee to take the fee when the fee simple estate to be transferred upon a sale or upon a distribution is expressly declared to come out of the estate which the trustee himself has. In short, there is theoretically a difference between a devise to a trustee upon trust to sell and convey the fee devised to him and a devise to a trustee upon certain trusts which would be satisfied by a limited estate in the trustee and an added power in the trustee to sell the fee and to distribute and convey to the ultimate beneficiaries. Practically, however, this distinction does not exist because there is in all cases of an actual devise to the trustee a real as well as a artificial inference that the trustee is to convey or to distribute out of an estate which is vested in him. It is the addition of this real and artificial inference that enables the prediction to be confidently made that where there are words of devise to the trustee, together with a power to sell and convey the fee and distribute the estate by conveyances to the ultimate beneficiaries, the trustee will always take the fee.[15]

§ 190. **Where there are words of devise to the trustee and he is to make conveyances upon the termination of the trusts, but has no power of sale:** Still the trustee takes the fee simple. It is enough that the words require a conveyance by the trustee

[14] *Ante*, § 184; Matter of Tompkins, 154 N. Y. 634; *In re* Opening of 110th Street, 81 N. Y. S. 32.

[15] In New York, however, they seem to have reversed the usual rule and the trustee's estate is always cut down and the powers of sale and distribution are regularly construed to be real powers. Matter of Tompkins, 154 N. Y. 634; In re Opening of 110th St., 81 N. Y. S. 32. This view is necessary in New York state in order to avoid the effect of the New York statutory rule against perpetuities, and the existence of that rule and the necessity under it of taking such a position with regard to the trustee's estate in order to sustain the beneficial interests, are probably responsible for rules which seem unusual in the extreme in a state where the common law rules prevail. The New York cases on what estate the trustee takes are in reality anomalous from the point of view of the common law premises accepted by most courts.

of the fee, which he himself has, by way of winding up the trusts.[16]

§ 191. Where there are words of devise to the trustee and he is given power to sell but not directed to convey to the beneficiaries at the termination of the trusts: If there be a devise to a trustee upon trust to pay rents and profits to *A* for life and then the estate devised is to go to *B* and his heirs, the trustee takes an estate only for the life of *A*, in trust for *A* for life, with a legal remainder to *B* in fee.[17] Is the result different where there is added a power in the trustee to sell and convey the fee? Logically much would seem to depend upon whether the devise was to the trustee "upon trust to sell" so that the sale is expressed to be made out of the trustee's estate, or whether the power is conferred in an isolated clause so as to cause an inference to arise that a real power is being conferred. In the former case the trustee would take the fee, but if only a real power is conferred the trustee would not. The actual inference usually is that the fee to be transferred by the trustee is to come out of the estate transferred to the trustee. This, it is believed, is fortified by a somewhat artificial inference to the same ef-

[16] McFall *v.* Kirkpatrick, 236 Ill. 281; Leary *v.* Kerber, 255 Ill. 433; King *v.* King, 168 Ill. 273; Lawrence *v.* Lawrence, 181 Ill. 248, *semble.* See also Wicker *v.* Ray, 118 Ill. 472 (as explained, *ante*, § 184); Hale *v.* Hale, 146 Ill. 227 (as explained, *ante*, § 184); Cushing *v.* Blake, 30 N. J. Eq. 689; *In re* Youman's Will [1901], 1 Ch. 720; Doe *v.* Edlin, 4 Ad. & El. 582; Doe *v.* Field, 2 B. & Ad. 564; Ames *v.* Ames, 15 R. I. 12; Henson *v.* Wright, 88 Tenn. 501; Ayer *v.* Ritter, 29 S. C. 135; Huckabee *v.* Newton, 23 S. C. 291.

The following cases might be taken to be *contra:* Slater *v.* Rudderforth, 25 App. (D. C.) 497; Bacon's Appeal, 57 Pa. 504; Eley's Appeal, 103 Pa. St. 300, and other cases cited, *ante*, § 69, note 62. They proceed, however, on the ground (now untenable in this state) that the direction to convey does not in fact impose any active duty upon the trustee, with the consequence that the trustee's estate is limited to the life of the equitable tenant for life, or (what is now also an untenable view in this state, *ante*, § 69) that the Statute of Uses executes the use in the ultimate beneficiaries upon the death of the equitable life tenant when the trustee's active duties cease.

In Lynch *v.* Swayne, 83 Ill. 336; Moll *v.* Gardner, 214 Ill. 248; Cary *v.* Slead, 220 Ill. 508, and Drake *v.* Steele, 242 Ill. 301, it may have been held that directions that the estate be divided, conveyed, or paid over to those ultimately entitled did not place upon the trustee any active duty.

[17] *Ante*, § 187.

fect.[18] The existence of the two inferences is the foundation for the general statement that where there is a direct devise to the trustee and a power to sell the fee is added, the trustee takes the fee. In the *dicta* of our Supreme Court this conclusion has been approved.[19] Recently *Nowlan v. Nowlan*,[20] has so held. Cases are to be found, however, where the power of sale in the trustee is treated as a real power and where the trustee in consequence took only a limited estate.[21]

§ 192. Where there are words of devise to the trustee and power to make leases, but no power to sell the fee and no direction to convey to the beneficiaries at the termination of the trusts: If the power to lease is "indefinite"—that is, if it is a power to lease for any term, however long, or for a term extending beyond the period of the trusteeship, and, in addition, it can be inferred that the trustee is to make such leases out of the estate which he has as trustee—then the trustee must take the fee simple.[22] Just as in the case where the trustee has a power of sale there is usually an actual inference that the trustee is to make the conveyance out of the estate which he has, so where the trustee has an indefinite power of leasing there is usually an actual inference that the trustee is to make the lease out of the estate which he has.[23] Hence he takes the fee. There is, it is believed, also a somewhat artificial inference indulged in that the trustee is to lease out of his estate so that even when the power to lease for any term is given in an isolated clause at the end of a will and in language conferring a mere naked power, it may still be made the basis for the trustee taking the fee.[24] This artificial inference is not, however, very firmly established

[18] Watson *v.* Pearson, 2 Exch. 581.

[19] Kirkland *v.* Cox, 94 Ill. 400; West *v.* Fitz, 109 Ill. 425; Green *v.* Grant, 143 Ill. 61, 73; Flanner *v.* Fellows, 206 Ill. 136; Spengler *v.* Kuhn, 212 Ill. 186; Olcott *v.* Tope, 213 Ill. 124, 133; Lord *v.* Comstock, 240 Ill. 492, 501, 502; Bergman *v.* Arnhold, 242 Ill. 218, 225; McNair *v.* Montague, 260 Ill. 465, 472; Boston Safe Deposit Co. *v.* Mixter, 146 Mass. 100.

[20] 272 Ill. 526. See also Dime Savings Co. *v.* Watson, 254 Ill. 419.

[21] Vogt *v.* Vogt, 26 App. (D. C.) 46; Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. St. 474; Crosby *v.* Davis, 2 Clark (Pa.) 403; Ward *v.* Amory, 1 Curtis (Cir. Ct. U. S.) 419.

[22] Doe *v.* Willan, 2 Barn. & Ald. 84; Collier *v.* Walters, 17 Eq. 252.

[23] *Id.*

[24] Doe *v.* Walbank, 2 Barn. & Adol. 554.

since cases may be found where the power to lease was taken as a real power and the trustee's estate restricted.[25]

If the power to lease is only an authorization to make leases during the term of the active trusts, it has no effect whatever to raise any inference that the trustee is to take a fee.[26] If the power to lease is only a *power* to make leases (whether there is any power to lease beyond the term of the trusteeship or not) the power cannot be made the basis of a holding that the trustee takes the fee. It seems settled that a general devise to trustees upon trust to collect the rents, issues and profits and pay the same to the equitable tenant for life does not give the trustee any power to make leases beyond the term of the active trusts and hence the trustees will not take the fee.[27] So a power to lease conferred in explicit language is regularly construed as a power to make leases to last only during the term of the active trusts, and hence furnishes no basis for a holding that the trustee takes the fee.[28] A power to make leases extending beyond the

[25] Doe *v.* Cafe, 7 Exch. 675.

It seems to be the fashion in New York state to restrict the trustee's estate and to hold many of the trustee's acts to be in the exercise of real powers. The exigencies of the New York Rule against Perpetuities are probably responsible for this. See *In re* Opening of 110th St., N. Y. S. 32.

[26] Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480; Bergengren *v.* Aldrich, 139 Mass. 259; Hutcheson *v.* Hodnett, 115 Ga. 990; Cooke *v.* Blake, 1 Exch. 220; Shapland *v.* Smith, 1 Brown, Ch. 75; Silvester *v.* Wilson, 2 T. R. 444; Baker *v.* Parson, 42 L. J. Ch. N. S. 228; Thurston *v.* Thurston, 6 R. I. 296; Brown *v.* Wadsworth, 168 N. Y. 225; Ware *v.* Richardson, 3 Md. 505; Handy *v.* McKim, 64 Md. 560, 567; Slater *v.* Rudderforth, 25 App. (D. C.) 497; In Hemphill's Estate, 5 Pa. Dist. 690; Ure *v.* Ure, 185 Ill. 216; Ward *v.* Amory, 1 Curt. C. C. 419; Bacon's Appeal, 57 Pa. 504; Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. 474; *In re* McCaffrey's Estate, 50 Hun. (N. Y.) 371; Ackland *v.* Lutely, 9 A. & E. 879; Doe *v.* Simpson, 5 East. 162.

[27] Cooke *v.* Blake, 1 Exch. 220; Shapland *v.* Smith, 1 Brown, Ch. 75; Silvester *v.* Wilson, 2 T. R. 444; Baker *v.* Parson, 42 L. J. Ch. N. S. 228; Thurston *v.* Thurston, 6 R. I. 296; Brown *v.* Wadsworth, 168 N. Y. 225; Ware *v.* Richardson, 3 Md. 505; Handy *v.* McKim, 64 Md. 560, 567; Slater *v.* Rudderforth, 25 App. (D. C.) 497; In Hemphill's Estate, 5 Pa. Dist. 690; Ure *v.* Ure, 185 Ill. 216; Ward *v.* Amory, 1 Curtis (Cir. Ct. U. S.) 419; Bacon's Appeal, 57 Pa. 504; Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. 474; *In re* McCaffrey's Estate, 50 Hun. (N. Y.) 371.

[28] Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480; Ackland *v.* Lutely, 9 A. & E. 879; Doe *v.* Simpson, 5 East, 162; Bergengren *v.* Aldrich, 139 Mass. 259; Hutcheson

term of the active trusts so as to be an incumbrance upon the estate which the ultimate distributee takes must be conferred in explicit terms.

In arguing that the trustee does not take a fee because there is no indefinite power to make leases, care must be taken not to make the reasoning circular. It must not be said that there is no indefinite power to make leases because the trustee takes only a limited estate and therefore the inference is that the power to lease is one to make leases for that limited estate. The power to make leases must be determined apart from the estate which the trustee has. Luckily this can be done, because the scope of the power to lease is regularly determined with reference not to the estate which the trustee takes but the period of the active trusts. It is conceivable, however, that the language might be so evenly balanced that if the trustee had a fee the power to lease would be indefinite, while if the trustee had an estate limited for the life of the *cestui* it would be a power to lease only for the term of the *cestui's* life. In such a case the real question is which of two conflicting inferences is the stronger—that which arises from the fact that the purposes of the trust require only an estate for life in the trustee, or the inference that a general power of leasing is being conferred by very broad language? The two cases of *Walton v. Follansbee*[29] come near to presenting this dilemma. Our Supreme Court seems to have held that the inference from the purposes which the trust require is the stronger.

§ 193. Where the trusteeship is created by a conveyance inter vivos: Here at common law, unless there were words of inheritance used, the trustee could not take the fee. At least one American jurisdiction, however, has taken the position that even without words of inheritance, trustees would take the fee if the purposes of the trust indicated that a fee was required.[30] Clearly, R. S. 1874, Ch. 30, Sec. 13, makes it unnecessary in this state to use words of inheritance in a conveyance *inter vivos* to trustees.

At common law, in a conveyance *inter vivos* to a trustee, if

v. Hodnett, 115 Ga. 990; Crosby *v.* Davis, 2 Clark (Pa.) 403; *In re* Hubbell Trust, 135 Ia. 637.

[29] 131 Ill. 147; 165 Ill. 480.

[30] Newhall *v.* Wheeler, 7 Mass. 189. See also Angell *v.* Rosenbury, 12 Mich. 241, 266; *ante*, § 153.

words of inheritance were used, a fee was conveyed and could not be cut down by the fact that an estate less than a fee was sufficient to serve the trusts.[31] R. S. 1874, Ch. 30, Sec. 13, does not seem to have altered this rule in the least, yet our Supreme Court has entirely ignored it and applied to the construction of conveyances *inter vivos* the rules applicable to devises in determining what estate the trustee takes. Thus, in both cases of *Walton v. Follansbee*,[32] in spite of the fact that there was an express conveyance to the trustees and their heirs, the trustees' estate was limited to an estate for the life of the equitable life tenants.[33]

[31] Lewis *v.* Rees, 3 K. & J. 132; Colmore *v.* Tyndall, 2 Y. & J. 605; Watkins *v.* Specht, 7 Coldw. (Tenn.) 585; Bates *v.* Winifrede Coal Co., 4 Ohio N. P. N. S. 265.

[32] 131 Ill. 147; 165 Ill. 480.

[33] To the same effect see Ware *v.* Richardson, 3 Md. 505, 553 and Handy *v.* McKim, 64 Md. 560.

CHAPTER X.

FEE TAIL.

§ 194. **The Statute on Entails:** Since 1827 there has been in force in this state a statute on entails, which is known as Sec. 6 of the Act on Conveyances.[1] It provides in part: "in cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, etc." It may be regarded as settled that "by the common law" means "under the statute *de donis.*"[2] It follows that in all cases where under the statute *de donis* a fee tail would have been created, our statute on entails operates.

§ 195. **Words sufficient under the Statute De Donis to create an estate tail[3]—In conveyances inter vivos:** In conveyances *inter vivos* the use of the word "heirs" was absolutely necessary.[4] No other word would do. Once used, however, it may be followed by any words of procreation such as "of his body,"[5] "issue of his body," etc. A conveyance to *A* "and his bodily heirs" is sufficient to create an estate tail.[6] If, after the use of the word "heirs" and sufficient words of procreation, there are added further words such as "male," or "female," or "on the body of" a certain wife or husband "begotten," an estate tail special is created.[7]

[1] R. S. 1874, Ch. 30, Sec. 6.

[2] Walker, C. J., in Frazer *v.* Board of Supervisors of Peoria Co., 74 Ill. 282, 287, 288.

[3] For the creation of estates tail:

(a) By the application of the rule in Shelley's case see *post*, § 412.

(b) By gifts over on failure of issue see *post*, § 549.

(c) By the rule in Wild's case see *post*, §§ 561, 562.

[4] Lehndorf *v.* Cope, 122 Ill. 317, 328; Dick *v.* Ricker, 222 Ill. 413, 415; *ante*, § 16.

[5] Voris *v.* Sloan, 68 Ill. 588; Butler v. Huestis, 68 Ill. 594, 600; Lehndorf *v.* Cope, 122 Ill. 317, 328; Doney *v.* Clipson, 285 Ill. 75.

[6] Kyner *v.* Boll, 182 Ill. 171; Dinwiddie *v.* Self, 145 Ill. 290; Coogan *v.* Jones, 278 Ill. 279.

[7] Lehndorf *v.* Cope, 122 Ill. 317. Observe, however, that in Webbe *v.* Webbe, 234 Ill. 442, limitations to A and B and their "personal and lawful heirs" did not create an estate tail. "Personal" did not mean lineal.

§ 196. By devise: The same expressions which were effective to create an estate tail in a deed were appropriate to create an estate tail by devise.[8] The rule requiring the use of the word "heirs" was, however, so far relaxed that any other words or expressions which indicated lineal descendants, as a word of limitation, were sufficient.[9] Thus a devise to *A et semini suo;*[10] to *A* and his seed;[11] to *A* and his issue;[12] to *A* and his offspring;[13] and to *A* and his lineal descendants,[14] creates an estate tail in *A*. "Descendants" alone means properly and primarily offspring, and excludes collateral heirs.[15] "Descendants" is so used in our Act on Descent. If "descendants" be confined to those who actually inherit under the laws of descent, it means "heirs of the body" strictly. A devise to "children and their descendants," therefore, creates an estate tail unless prevented by some special context.[16] The use of the word "forever"

[8] Blair *v.* Vanblarcum, 71 Ill. 290; Kyner *v.* Boll, 182 Ill. 171; Metzen *v.* Schopp, 202 Ill. 275; Baker *v.* Baker, 284 Ill. 537; Lewin *v.* Bell, 285 Ill. 227.

[9] Kolmer *v.* Miles, 270 Ill. 20.

[10] Co. Lit. 9b; Jarman on Wills, 6th ed. star p. 1133; 5th ed. vol. 2, star p. 328.

[11] Webbe *v.* Webbe, 234 Ill. 442, 448.

[12] Jarman on Wills, 5th ed. vol. 2, star p. 413; Webbe *v.* Webbe, 234 Ill. 442, 448.

[13] Young *v.* Davies, 2 Dr. & Sm. 167 ("to my surviving daughters and their lawful offspring"); Allen *v.* Markle, 36 Pa. St. 117 (to A for life and at his decease to descendants of his legitimate offspring forever, but in case the said A's issue should become extinct, then over to B in fee); Webbe *v.* Webbe, 234 Ill. 442, 448.

[14] Webbe *v.* Webbe, 234 Ill. 442, 448, and Schmaunz *v.* Goss, 132 Mass. 141, 144, seem to assume that a devise to A and B and their descendants creates an estate tail. On the special context of the will under consideration it did not do so.

[15] Century Dictionary: "Descendant;" Bates *v.* Gillett, 132 Ill. 287, 297, and cases there cited.

[16] See Walker *v.* Walker, 25 Ga. 420.

If, however, there be added the phrase "the descendants of a deceased child to take the parent's share," we have a context which indicates that descendants is used as a word of purchase and not of limitation. Knight *v.* Pottgieser, 176 Ill. 368. So where the testator uses the phrase "children or descendants," descendants is a word of purchase and there is a devise over to descendants upon certain contingencies. Bates *v.* Gillett, 132 Ill. 287. So if the devise is to "my children and their descendants at their death," "descendants" is a word of purchase and the children take estates for life with a remainder to descendants. Robinson *v.* Robinson, 89 Va. 916.

The suggestion might be made

after descendants helps to make it clear that descendants is used as a word of limitation and not of purchase. At the same time it is not such a special context as will cause descendants to mean heirs generally so that a fee will be created.[17] An estate tail special is devised by a limitation to the testator's wife "and her heirs by me."[18]

§ 197. In several cases where the context contained the phrase "heirs of the body" an estate tail was upon the whole context held not to have been created: In *Baulos v. Ash*,[19] the grantee, party of the second part, was described as Amanda "and the heirs of her body," but the grant was to the "party of the second part, her heirs and assigns," *habendum* to Amanda "and the heirs of her body." The granting clause prevailed and Amanda took the fee.

In *Cooper v. Cooper*,[20] the grantees were described as husband and wife and the heirs of the body of the latter, but the granting clause and *habendum* both indicated a fee and prevailed.

In *Griswold v. Hicks*,[21] the grantees, party of the second part, were described as *A*, *B* and *C* "and the heirs of their bodies." The grant was "to the party of the second part, their heirs and assigns as aforesaid forever"—"meaning and intending by this conveyance to convey to my said children" for life with certain gifts over; *habendum* to "party of second

that since estates tail have long since been abolished in this state, a devise to "children and their descendants" ought naturally and primarily to mean that both the children and their descendants are intended to take as purchasers; that since the children can have no descendants during their lifetime (Tucker *v.* Billings, 2 Jur. N. S. 483), the children and their descendants cannot take jointly and hence descendants as purchasers were intended to take in the case of any children who died in the lifetime of the testator, or before the death of some life tenant, or period of distribution. *In re* Coulden, L. R. [1908] 1 Ch. 320.

[17] Leake, Land Laws, 165, citing Vernon *v.* Wright, 7 H. L. Cas. 35; Davie *v.* Stevens, Dong. 324. But see Strawbridge *v.* Strawbridge, 220 Ill. 61.

[18] Welliver *v.* Jones, 166 Ill. 80; Anderson *v.* Anderson, 191 Ill. 100. Observe, however, Murfitt *v.* Jessops, 94 Ill. 158, where a limitation to the wife and her and my heirs gave the wife a fee.

[19] 19 Ill. 187.

[20] 76 Ill. 57.

[21] 132 Ill. 494; *ante*, § 179.

part, their heirs and assigns forever." This was held to give *A*, *B* and *C* life estates with gifts over.

In *Duffield v. Duffield*,[22] the grantee was described as Henry "and the heirs of his body." The conveyance was to "said grantee" with a further context imposing conditions on the grantee and providing that upon the grantor's death the grant should "become unconditional and absolute." It was held that Henry took the fee.[23] It was also intimated that "heirs of the body" were words of purchase [24] making a gift to a class which would be ineffective because none were *in esse* when the deed took effect.[25]

In *Hempstead v. Hempstead* [26] several pieces of land were devised to several devisees respectively by different clauses which, by themselves, created a fee. A subsequent clause provided: "It is my intention and express desire that all property, of every kind and character, herein bequeathed shall go directly to each of my said daughters as described herein and to the heirs of their bodies or direct descendants and to no one else, and if either of my said daughters shall decease before inheriting under this will and leaving surviving no children or descendants of children, such share shall go to the survivors of the legatees herein." Upon the whole context this was held not to create a fee tail.

§ 198. Suppose the words used are not sufficient under the Statute De Donis, to create an estate tail but are sufficient to express an intention to create such an estate: Suppose for instance in a conveyance *inter vivos* the limitations are to *A* "in fee tail," or to "*A* and the issue of his body in fee tail." Three difficulties at once arise: Is an estate tail created? If so, is it one upon which the statute on entails operates? If no estate tail is limited, what estate is created?

First: Under the rule of the common law no estate tail would be created because the word "heirs" was not used.[27] Nor

[22] 268 Ill. 29.

[23] Compare the result reached in Coogan *v.* Jones, 278 Ill. 279, *ante*, § 179.

[24] Compare this with cases, *ante*, § 158, where it was contended that in a limitation to A and his "heirs," "heirs" was a word of purchase. See also, Seymour *v.* Bowles, 172 Ill. 521.

[25] *Post*, §§ 475 *et seq.*

[26] 285 Ill. 448.

[27] *Ante*, §§ 195, 16.

would it have been permissible to turn the word "issue" into "heirs" by any process of construction.[28] If an estate tail is limited, it must be by virtue of Sec. 13 of the Act on Conveyances. That provides that a fee is created "if a less estate be not limited by express words or do not appear to have been granted, conveyed, or devised by construction." Does this permit a less estate than a fee, namely, a fee tail to be limited *inter vivos* "by express words," or "by construction" without the technical use of the word "heirs"?[29]

Second: If an estate tail is created it would come within the operation of the statute on entails. That act while still referring to "cases where, by the common law, any person or persons might hereafter become seized in fee tail," would properly be regarded as amended by the later act known as Sec. 13 in the Act on Conveyances so as to include an estate tail created by language sufficient for that purpose under Sec. 13.

Third: If no estate tail were limited, what estate would *A* take? It must be either a fee or a life estate, depending upon the effect of Sec. 13 of the Act on Conveyances. That would operate to give *A* a fee if it were not for the words "in tail," or the words and the "issue of his body in tail." These expressions indicate an intention to create an estate less than a fee, while at the same time (*ex hypothesi*) failing to do so. Sec. 13 provides that the fee will be created "if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." Does this mean that the statute fails to create a fee when there is merely an expressed intent that an estate less than a fee shall be created without that less estate actually being created, or does the statute mean that a fee is created unless the less estate, which is expressly intended, is in fact created and takes effect as such lesser estate? Certainly the latter view would be open to the courts. Under it, *A* would take the fee. This may be justified by the fact that an intent to create a fee tail is more nearly satisfied by giving a fee than by giving a life estate with a reversion to the grantor. A fee tail was permitted by the courts and by statutes to be turned into

[28] But see Dick *v.* Ricker, 222 Ill. 413.

[29] See Dick *v.* Ricker, 222 Ill. 413.

a fee simple by fines and recoveries.[30] Under modern statutes it may be turned into a fee by a simple disentailing conveyance.[31] Some statutes have abruptly turned the estate tail into a fee simple.[32]

§ 199. Suppose personal property is limited with such expressions as, if used in a conveyance or devise of real estate, would create an estate tail—Suppose the limitations of personal property are to "A and the heirs of his body," or to "A for life and then to the heirs of his body": It is settled that an expressed intention to create an estate tail in personal property fails of effect because no such thing as an estate tail in personal property is recognized. Such an expressed intention operates to confer an absolute interest in personal property.[33] Whether, however, such an expressed intent exists is a matter of construction. In handling it, the manners and customs of the country must be given some consideration. For instance, in England where estates tail have been a conspicuous feature of conveyances and devises, and well known in practice, it would be most natural to assume that wherever personal property was transferred, whether *inter vivos,* or on death to "*A* and the heirs of his body," the phrase "heirs of his body" would be taken as words of limitation indicating an intent to create a fee tail in personalty. The absolute interest, therefore, would pass to *A* by operation of law. Such would seem to be the result actually reached in England.[34] So in England in the eighteenth century, when the *Rule in Shelley's Case* was looked upon as a rule of construction, and perhaps as such actually applied to personal property, it became settled in such a way as not afterwards to be changed, that limitations of personal property to *A* for life and then to the heirs of *A's* body amounted to an attempt to create an estate tail in personal property and therefore *A* took the absolute interest.[35] It is not surprising that in some jurisdictions in this country, merely through the habit of following English precedents, courts have

[30] *Ante,* § 17.

[31] *Ante,* § 19.

[32] *Ante,* § 19.

[33] Hempstead *v.* Hempstead, 285 Ill. 448, 454.

[34] Attorney General *v.* Hall (5 July 1731) Fitzg. 9, 314, W. Kel. 13.

[35] Butterfield *v.* Butterfield, 1 Ves. Sr. 133; Richards *v.* Bergavenny, 2 Vern. 324; Elton *v.* Eason, 19 Ves. 73; *post,* § 437.

held that limitations of personal property to *A* and the heirs of his body,[36] and to *A* for life and then to the heirs of his body,[37] were attempts to create an estate tail and conferred by operation of law an absolute interest. Other courts in this country, however, have recognized the now settled proposition that the *Rule in Shelley's Case* does not apply to personal property,[38] and that estates tail are so far unknown to our habits and customs of conveyancing that it was absurd to infer that any one had, as a matter of actual intention, attempted to create such an estate, especially in personal property. Such courts have accordingly refused to regard the words "heirs of the body" as words of limitation, either where the limitations were to *A* and the heirs of his body, or to *A* for life and then to the heirs of his body. "Heirs of the body" in both cases have been held to be words of purchase, resulting in both cases alike, in an estate to *A* for life with a gift over to the heirs of the body of the life tenant.[39] Once "heirs of the body" are taken as words of purchase, the court is confronted with the fact that *A* can have no heirs of his body until his death. Hence, if "heirs of his body" is to be given any effect as words of purchase, the limitations must be to *A* and at his death to the heirs of his body. This gives *A* a life estate[40] with a gift over to the heirs of his body absolutely. Our Supreme Court has definitely held that the *Rule in Shelley's Case* does not apply to personal property where the limitations are to *A* for life and then to *A's heirs*.[41] The same ruling is to be expected where the limitations are to *A* for life and then to the heirs of

[36] Duncan *v.* Martin, 7 Yerg. (Tenn.) 519.

[37] Denson *v.* Thompson, 19 Ark. 66; Dott *v.* Cunnington, 1 Bay (S. C.) 453; Account of William R. Tillinghast, 25 R. I. 338; King's Heirs *v.* King's Adm., 12 Ohio 390; Williamson *v.* Daniel, 12 Wheaton 568; Stockton *v.* Martin, 2 Bay (S. C.) 471; Hughes *v.* Nicklas, 70 Md. 484; Polk *v.* Faris, 9 Yerg. (Tenn.) 209; Pressgrove *v.* Comfort, 58 Miss. 644; Hampton *v.* Rather, 30 Miss. 193; Powell *v.* Brandon, 24 Miss. 343; Smith *v.* McCormick, 46 Ind. 135; Watts *v.* Clardy, 2 Fla. 369; Mason *v.* Pate's Exr., 34 Ala. 379; Machen *v.* Machen, 15 Ala. 373.

[38] *Post*, §§ 434-439.

[39] State *v.* Welch, 175 Mo. App. 303 ("to my beloved daughter Agnes Farley, and the heirs of her body"); Crawford *v.* Wearn, 115 N. C. 540 (to A for life and then to the heirs of A's body); Clemens *v.* Heeksecher, 185 Pa. St. 476.

[40] *Ante*, § 162. But see Duffield *v.* Duffield, 268 Ill. 29.

[41] 4 Ill. Law Rev. 642.

A's body, so that *A* would have a life estate with a gift over to the heirs of his body. What the court will do where personal property is limited "to *A* and the heirs of his body" remains in doubt.[42]

§ 200. Suppose the limitations of personalty are to "A and his issue" or to "A and the issue of his body": When the courts in England and in this country have had to deal with limitations to "*A* and his issue" (or to "*A* and the issue of his body," which is the same), they have regularly declined to regard the words "and his issue" or "and the issue of his body" as words of limitation indicating an attempt to create an estate tail. They have, on the contrary, taken these expressions as primarily words of purchase.[43] Usually *A* and his issue who are *in esse* have been held to take absolutely as tenants in common.[44] In a few instances a special context has seemed to require that *A* take an estate for life with a gift over to the issue of *A* at his death.[45] Where the gift is to a class of persons "and their issue" at a future period of distribution, the "issue" have been held to take only in place of members of the class dying before the period of distribution.[46]

[42] It should be observed, however, that in Duffield *v.* Duffield, 268 Ill. 29 (*ante*, § 196), where in a deed conveying real estate the grantee was described as Henry "and the heirs of his body" and the grant was to "said grantee," our Supreme Court intimated that "heirs of the body" was used as words of purchase, and that an attempt was made to create a joint estate in Henry and the heirs of his body; that Henry took the fee alone because "heirs of his body" could not be ascertained until his death and the attempted conveyance to grantees not *in esse* when the deed took effect failed, according to a doctrine followed in this state. See *post*, §§ 475, 476.

[43] *In re* Coulden L. R., [1908] 1 Ch. 320; 2 Jarman on Wills, 6th ed. by Sweet, vol. 2, 1930; Theobald on Wills, 7th ed. p. 478; Hawkins on Wills, 2nd ed. by Sanger, 241.

In Parkin *v.* Knight, 15 Sim. 83, where a different result was reached, real and personal property were given together and as to the real estate, the words "and issue" were regarded as intended to create an estate tail and were capable of so doing in England at the time. Nevertheless, the soundness of the case as applied to personal property is now doubted in Hawkins on Wills, 2nd ed. by Sanger, 241. See also Howston *v.* Ives, 2 Eden 216.

[44] Hawkins on Wills, 2nd ed. by Sanger, 241; Theobald on Wills, 7th ed. 478; McDavid *v.* Bohn, 212 Ill. App. 534.

[45] Cleveland *v.* Havens, 13 N. J. Eq. 101. See also Seymour *v.* Bowles, 172 Ill. 521.

[46] *In re* Coulden L. R., [1908] 1 Ch. 320.

CHAPTER XI.

ESTATES FOR LIFE.

TITLE I.

BY EXPRESS WORDS.

§ 201. **Life estate defined:** A life estate is one for an uncertain duration and not an estate at will or a fee simple determinable. An estate at will is one at the will of both parties.[1] An estate at the will of one party is usually construed to be at the will of both parties.[2] If, however, an estate is at the will of one party only, it is an estate for an uncertain period and not an estate at will. It is therefore classified with life estates as a freehold.[3]

§ 202. **Life estates created—By words explicitly:** Any words which indicate explicitly that one is to hold for an uncertain period, but not at the will of both the grantor or reversioner and the transferee, will create a freehold or life estate. Practically the usual formula is to limit an estate "to *A* for his life."[4] A devise to a wife during widowhood,[5] or so long as she remains unmarried[6] creates a life estate in the wife for the period indicated.[7] It makes no difference that the gift

[1] Co. Lit. 55a; 3 Gray's Cases on Prop., 2nd ed. 315.

[2] Co. Lit. 55a.

[3] Beeson *v.* Burton, 12 C. B. 647 (1852); 3 Gray's Cases on Prop., 2nd ed. 311.

[4] Fairman *v.* Beal, 14 Ill. 243; Batterton *v.* Yoakum, 17 Ill. 288; Boyd *v.* Strahan, 36 Ill. 355; Mulberry *v.* Mulberry, 50 Ill. 67; Newman *v.* Willetts, 52 Ill. 98; Mather *v.* Mather, 103 Ill. 607; Railsback *v.* Lovejoy, 116 Ill. 442; Kaufman *v.* Breckinridge, 117 Ill. 305; Walker *v.* Pritchard, 121 Ill. 221; Siddons *v.* Cockrell, 131 Ill. 653; Roberts *v.* Roberts, 140 Ill. 345; Springer *v.* Savage, 143 Ill. 301; Gaffield *v.* Plumber, 175 Ill. 521; Bowerman *v.* Sessel, 191 Ill. 651; Radebaugh *v.* Radebaugh, 266 Ill. 199; The People *v.* Freese, 267 Ill. 164; Geist *v.* Huffendick, 272 Ill. 99.

[5] Green *v.* Hewitt, 97 Ill. 113; Kratz *v.* Kratz, 189 Ill. 276.

[6] Cowman *v.* Glos, 255 Ill. 377.

[7] But in Cummings *v.* Lohr, 246 Ill. 577, where the devise was to the wife "provided she remains my widow," the widow took a fee subject to an executory devise over.

over is "after her death."[8] A lease for ten years after the death of *A*,[9] or for five years and as much longer as oil and gas is produced by the land[10] create freehold or life estates for the periods indicated.

In *Geist v. Huffendick*[11] where land was devised to two daughters for their lives and the interest of each to descend to her heirs, it was held that each took an estate for the life of the longest liver as tenants in common and that on the death of either, her interest till the death of the other descended to her heirs.

§ 203. **Expressly by construction:** The cases of life estates expressly created by construction have been largely dealt with in drawing the line between language which creates a life estate and that which is sufficient to limit a fee simple.[12] In addition to the cases already referred to, notice should be taken of the following.

In *Thompson v. Mason*,[13] there was in question a devise of the net income to the wife until the majority of the testator's youngest child, "which one-third is to be for her dower in my estate." This was held to give the wife a life estate, which ceased at her death, before the youngest child reached twenty-one. The special context relied upon was that the income was to be for her dower. That indicated, by reference to the primary meaning of dower, an estate for not longer than the widow's life.

In *Des Boeuf v. Des Boeuf*,[14] the testator provided that the balance of his estate, both real and personal, should "descend to my wife, Julia, and my son [naming him], as the statutes of the state of Illinois provide." Under the statute, the son being the only heir, took the fee and the wife had only her dower interest in one-third during her life. It was held that the wife and the son took interests in this manner. The reference to the statutes of the state of Illinois was sufficient not only to fix the proportion of the whole estate which each took, but also to determine the character of the estate of each.

[8] De Vitto *v.* Harvey, 262 Ill. 66.
[9] Hull *v.* Ensinger, 257 Ill. 160.
[10] Daughetee *v.* Ohio Oil Co., 263 Ill. 518.
[11] 272 Ill. 99.
[12] *Ante*, §§ 160 *et seq.*
[13] 61 Ill. 208.
[14] 274 Ill. 594.

In *Lomax v. Shinn,*[15] there was a devise to a wife of certain described real estate in general terms sufficient to confer the fee under Section 13. There followed a devise of "all the personal property" and a further devise of "the balance of my estate" to the wife for life, with gifts over. Upon proof that the testator had no other real estate except that particularly described, it was held that "balance of my estate" referred to the real estate already specifically described and gave the wife only a life estate in it.

In *Rose v. Hale,*[16] on a very special context, words limiting personal property to a widow during widowhood were held to apply also to a previous devise of real estate.

In *Morrison v. Schorr,*[17] the testator devised specifically described real estate to his wife for life "also all rents, income and profits arising from all my real estate" except the specifically described property already devised, until "the eldest one of my children has attained the age of eighteen * * * after which my wife shall recover one-third only of the net rents and income of such real estate, the other two-thirds to be paid to and equally divided among my children." In a subsequent clause, the testator devised, "all my real estate to my children by my present wife in equal shares." It was held that while a gift of rents and profits to the wife was equivalent to a gift of an estate of some sort, and while under Section 13 that estate would, *prima facie,* be a fee simple, yet on the whole context the estate devised was only for life. The gift of all the testator's real estate to his children indicated that the wife's estate was restricted. The word "also" was read "in like manner," so that the wife took the same estate by the gift of the income that she had taken in the specifically described real estate.[18]

In *Swaim v. Swaim,*[19] where the devise was of real estate to the wife *simpliciter,* followed by these words: "I also bequeath" personal property "to be held by her until her death," the wife took a life estate only in the realty.

[15] 162 Ill. 124.

[16] 185 Ill. 378.

[17] 197 Ill. 554.

[18] In Guerin *v.* Guerin, 270 Ill. 239, it was intimated by the Court that a direction that the share of a daughter should "always remain in trust" meant a trust only during the life of the daughter.

[19] 284 Ill. 105.

TITLE II.

IMPLICATION OF LIFE ESTATES, DISTRIBUTIVE CONSTRUCTION AND DISPOSITION OF INTERMEDIATE INCOME.

§ 204. The problems stated: Suppose a testator makes a devise or bequest to take effect after the death of *A*, without, however, expressly giving any interest to *A*. Does *A* take a life estate by implication? If not, what happens to the income or the rents and profits?

Suppose a testator devise Blackacre to *A* for life and after the death of *A* Blackacre together with other property is devised to *B*. Here three questions at once arise. Does *A* take a life estate by implication in the property other than Blackacre? If not, then are the words "after the death of *A*" to be taken distributively so that they will apply only to Blackacre, thus making a devise of the rest of the estate to take effect in *B* immediately upon the testator's death? If there is no implication of a life estate to *A* and no distributive construction, then what becomes of the intermediate income of the property other than Blackacre until *A's* death?

These cases show the way in which the questions to be considered may arise and also the way in which three apparently unconnected subjects may in fact come up for consideration in a given case. Obviously also the difficulties presented in the cases put must in most instances be caused by the failure of the testator's mind to work upon the effect of the language used under the circumstances which will probably be presented. Clearly the circumstances surrounding the making of the instrument can be of no particular benefit in throwing light upon the expressed intent. The rules, therefore, established by the cases must be regarded as supplying results independently of any actual intention on the part of the testator. They should, therefore, be adhered to as establishing definite rules of construction, not to be departed from unless a real special context warrants it.

§ 205. Implication of the life estate where there is a gift after death of A: Where the gift after the death of A is to all of the testator's heirs at law (if real estate is involved), or to all the next of kin (if personalty be involved)—no more and no less—and there is no special context affecting the mat-

ter, a life estate in *A* is regularly found.[20] The reason for this was that since the heir was expressly excluded till the death of *A*, an incongruity or absurdity would arise if, before the death of *A*, the heir were let in to enjoy the estate because of an intestacy. The only way to prevent this absurdity or incongruity was to give a life estate to *A*. The basis for the regular implication of the life estate in these cases is the incongruity which would otherwise arise. Any circumstances, therefore, which eliminate that incongruity necessarily prevent the application of the general rule in favor of the implication of the life estate. For instance, if the gift after the death of *A* be to one who is not the testator's heir at law, and there be no special context, no estate for life in *A* can be implied.[21] However plausible it may be that *A* was intended to take a life estate, that inference is mere speculation and conjecture, and insufficient as a basis for implying the life estate in *A*. Suppose a gift be made to all the testator's heirs at law and no others from and after the death of *A*, and thereafter a residuary clause is added, so that if it be held that there is no gift to *A* by implication the residuary devisee will be entitled. If the residuary devisee is not the same as the heir or heirs at law it would seem that no gift to *A* for life could be implied, for again the incongruity has been eliminated.[22] The same is true if property

[20] (a) Cases where real estate was involved and the gift after the death of A was to the testator's heirs at law: 1 Jarman on Wills (6 ed. Bigelow), *498, 499, and many cases there cited, to which may be added the following: Doughty *v.* Stillwell, 1 Bradf. (N. Y.) 300, 310; White *v.* Green, 1 Ired. Eq. (N. C.) 45; Macy *v.* Sawyer, 66 How. Pr. 381; Kelly *v.* Stinson, 8 Blackf. (Ind.) 387; Rathbone *v.* Dyckman, 3 Paige, Ch. 8, 27.

(b) Cases where personalty was involved: 1 Jarman on Wills (6 ed. Bigelow), *510, 511; James *v.* Shannon, Ir. R. 2 Eq. 118. *Contra, dictum* of White *v.* Green, 1 Ired. Eq. (N. C.) 45.

[21] Aspinall *v.* Petvin, 1 S. & St. 544 (1824); Barnet *v.* Barnet, 29 Beav. 239 (1861); Harris *v.* Du Pasquier, 26 L. T. 689 (1872); Greene *v.* Flood, 15 L. R. Ir. 450 (1885); Doughty *v.* Stillwell, 1 Bradf. 300, 310 (1850). But see Willis *v.* Lucas, 1 P. Wms. 472, of which case Jarman says (1 Jarman, 6 ed. Bigelow, *499, n. b.): It "seems inconsistent with, and is overcome by the mass of authorities. The point indeed was not definitely disposed of."

[22] Cranley *v.* Dixon, 23 Beav. 512; Hudleston *v.* Gouldsbury, 10 Beav. 547.

is appointed from and after the death of *A*, but there is a gift in default of appointment which will take effect as to the interest prior to *A's* death.[23] Again, suppose that the gift after the death of *A* is itself a residue of personalty or a mixed residue of realty and personalty, so that according to the usual rule [24] if *A* does not take a life estate by implication the intermediate income must accumulate and pass to the one ultimately entitled. Here the fact that the one entitled after the death of *A* is the testator's heir at law or next of kin—no more and no less—presents no incongruity whatever. Hence there can be no basis for the implication of a life estate according to any general rule.[25]

If the gift after the death of *A* is to part only of the heirs at law or next of kin of the testator, or to all the heirs at law or next of kin and to a stranger there is less incongruity than in the case where the gift after the death of *A* is to the heirs at law or next of kin—no more and no less. There is less incongruity in all the heirs at law being let in during the life of *A* and then part only allowed to take after the death of *A*, or all allowed to take together with a stranger after the death of *A*, than there is where the heirs at law are let in until *A's* death and then the same heirs at law take after *A's* death. At first there was an inclination to imply the life estate in *A* readily, even where the gift after the death of *A* was to part only of the heirs at law or to all the heirs at law and a stranger. This seems to have been the attitude of the English judges in the eighteenth century.[26] In the first three-quarters of the nineteenth century we have a period of clearly conflicting opinions. In 1862, Kindersley, V. C., in *Stevens v. Hale*,[27] held that where the gift after the death of *A* was to the testator's heirs and strangers, no life estate would be implied. On the other hand, in 1867, Stuart, V. C., in *Humphreys v. Humphreys*,[28] held that where the gift was to part only of the next of kin of the testator the

[23] Henderson *v.* Constable, 5 Beav. 297.

[24] *Post*, § 208.

[25] *Cf.* Ralph *v.* Carrick, 5 Ch. Div. 984, per Hall, V. C.

[26] Roe d. Bendale *v.* Summerset, 5 Burr, 2608; Bird *v.* Hunsdon, 2 Swanst. 342.

[27] 2 Dr. & Sm. 22. See also Romilly, M. R., in Barnet *v.* Barnet, 29 Beav. 239.

[28] L. R., 4 Eq. 475.

life estate would be implied.[29] Finally in 1879 *Ralph v. Carrick*[30] seems to have settled the law in England that where the gift is to all the heirs at law or next of kin of the testator and a stranger after the death of *A*, no life estate in *A* will be implied. Thereafter it was held with equal firmness where the gift after the death of *A* was to less than all the next of kin or heirs at law that the life estate would not be implied.[31] Thus the English judges, from implying the life estate loosely as the result of what they guessed to be a probable intention on the part of the testator, came to regard such implication as rather the result of speculation and conjecture and as leaving the rights of parties too much in the discretion of individual judges. Accordingly they substituted in its place a definite rule designed to supply a recognized gap either in the testator's intention or in his expression of intention, or both.

There may, of course, be cases containing a special context sufficient to support the inference of a life estate in *A* apart from the application of any rule by which such life estate is regularly implied.[32] So there will be cases where all the elements are present for the regular implication of a life estate but where a special context will negative any such implication.[33] This is very likely to be the case where a particular property is given to *A* for life and then after the death of *A* that, together with other property, is given to the testator's heirs at

[29] See also Blackwell *v.* Bull, 1 Keen. 177 (1836) and Cockshott *v.* Cockshott, 2 Coll. 432 (1846) where, however, the implication of the life estate when the gift was to part of the testator's heirs or next of kin has been justified upon the special context of the wills there involved according to Hall, V. C., in Ralph *v.* Carriek, 5 Ch. Div. 984, 994; 11 Ch. Div. 873. See also Doughty *v.* Stillwell, 1 Bradf. (N. Y.) 300, 311 (*semble*); Macy *v.* Sawyer, 66 How. Pr. (N. Y.) 381; Holton *v.* White, 23 N. J. L. 330.

[30] 5 Ch. Div. 984, 987 (1877); before Hall, V. C., 11 Ch. Div. 873 (1879); before the Court of Appeal, James, L. J., Brett, L. J. and Cotton, L. J.; Ralph *v.* Carrick approved in Greene *v.* Flood, 15 L. R. Ir. 450 (1885).

[31] Woodhouse *v.* Spurgeon, 52 L. J. Ch. 825 (1883) (gift to five out of six who would take as next of kin of testator); *In re* Springfield, Chamberlin *v.* Springfield, [1894] 3 Ch. 603.

[32] Blackwell *v.* Bull, 1 Keen. 177 (1836); Cockshott *v.* Cockshott, 2 Coll. 432 (1846) as explained in Ralph *v.* Carrick, 5 Ch. Div. 987 (1877).

[33] Isaacson *v.* Van Goor, 42 L. J. Ch. N. S. 193; Rathbone *v.* Dyckman, 3 Paige 8.

law. Here the incongruity of *A* taking a life estate in the whole when he is expressly given a life estate in part only is matched against the incongruity of the heirs at law, who are expressly excluded until the death of *A*, taking the estate at once on the testator's death. It may be safely affirmed that in the ordinary case the incongruity of *A's* taking a life estate in the whole where he is expressly given only a life estate in part, is sufficient to prevent the implication of a life estate in *A*.[34] But that does not permit the incongruity of the heir at law who was expressly excluded until *A's* death, taking in the meantime. Both incongruities are avoided by adopting what is known as the distributive construction.[35]

§ 206. **The distributive construction**: Suppose a particular estate be devised to *A* for life and after the death of *A* the same property together with other property is devised to *B*. Suppose also that *B* is the testator's sole heir at law. Here then we have the usual situation where, to avoid an incongruity, a life estate will be implied in *A*. But the fact that *A* is already expressly given a life estate in part tends to indicate that *A* was to have no further interest in the whole.[36] In short, there is about as much incongruity in *A's* being let in for a life estate in the whole, when he is expressly given a life estate in part only, as there is in *B's* being let in as heir at law at once on the testator's death when he was expressly excluded until the death of *A*. In the case put both incongruities may be avoided by taking the words "after *A's* death" in a distributive sense—that is, applying them only to the property in which *A* takes an express life estate. Thus *B* will take immediately on the testator's death excepting as to the property given to *A* for life, and as to that property he will take upon *A's* death. Whether in the case put a life estate will be implied to *A* or the distributive construction adopted seems not to be the subject of any rule,[37] and yet it is believed that in order to avoid the two

[34] Boon *v.* Cornforth, 2 Ves. Sr., 277; Dyer *v.* Dyer, 19 Ves. 612; Stevens *v.* Hale, 2 Dr. & Sm. 22; Sympson *v.* Hornsby, Finch's Prec. Ch. 439; James *v.* Shannon, Ir. R. 2 Eq. 118; White *v.* Green, 1 Ired. Eq. (N. C.) 45; Rathbone *v.* Dyckman, 3 Paige 8. *Cf.* however, Bird *v.* Hunsdon, 2 Swanst. 342; Macy *v.* Sawyer, 66 How. Pr. (N. Y.) 381.

[35] *Post*, § 206.

[36] *Ante*, § 205.

[37] Hawkins on Wills, 177.

incongruities presented a court would incline at once to the distributive construction.

Observe, however, that the distributive construction is resorted to to avoid two incongruities. Whenever, therefore, the circumstances are such that these incongruities are not presented this argument for the adoption of the distributive construction loses its force. For instance, when the gift after the death of *A* is not to the heirs at law of the testator and those alone, there is no incongruity whatever in an intestacy until the death of *A*. Hence no life estate would be implied in *A* and the inclination would be against the adoption of the distributive construction, in the absence of a special context supporting it.[38] In the same way, if the gift after the death of *A* be to the heirs at law of the testator, but an intestacy, until the death of *A*, may be avoided under well settled rules without adopting the distributive construction or the implication of a life estate in *A*, the argument from incongruity again fails. Thus, if the gift of the whole property after the death of *A* is of a mixed residue of realty and personalty, so that under the usual rule hereafter mentioned[39] there will be no intestacy, but the intermediate income in the mixed funds will accumulate and be added to the principal and pass to *B* on the death of *A*, all argument from incongruity in favor of the distributive construction is removed and that construction, if it be adopted, must be founded upon the special context.[40] If, however, a special context supports the distributive construction, it has been adopted where the gift after the death of *A* was to a stranger, or to the heirs at law of the testator and a stranger, or to a part only of the heirs at law or next of kin of the testator.[41] Of course, where there are explicit words postponing the gift until after the death of *A* the distributive construction is defeated.[42] So if

[38] Rex *v.* Inhabitants of Ringstead, 9 Barn. & Cr. 218; Aspinall *v.* Petvin, 1 S. & St. 544; Davenport *v.* Coltman, 12 Sim. 588; Attwater *v.* Attwater, 18 Beav. 330.

[39] *Post*, § 208.

[40] Lill *v.* Lill, 23 Beav. 446; Rathbone *v.* Dyckman, 3 Paige 8.

[41] Cook *v.* Gerrard, 1 Saund. 181; Hutton *v.* Simpson, 2 Vern. 722; Doe *v.* Brazier, 5 B. & A. 64; Rex *v.* Inhabitants of Ringstead, 9 Barn. & Cr. 218; Lill *v.* Lill, 23 Beav. 446; Rhodes *v.* Rhodes, 7 App. Cas. 192; Dyer *v.* Dyer, 19 Ves. 612; Drew *v.* Killick, 1 De. G. & S. 266.

[42] See Ralph *v.* Carrick, 5 Ch. Div. 984; 11 Ch. Div. 873 (as commented on in 1 Jarman on Wills, 6 ed. Bigelow, * 505).

there is a distinct separation of the contingencies so that the devise of all the property is expressed to be made "at the testator's death and after the death of *A*," the distributive construction would naturally be adopted.[43]

§ 207. Intermediate income[44]—Introductory: In the cases considered in the two preceding sections, where a life estate cannot be implied and the distributive construction cannot be adopted, there is left a gift to take effect *in futuro* after the death of *A* with no apparent disposition in the meantime. What then is to become of the rents and profits or intermediate income prior to the time the gift after the death of *A* takes effect? The same question, of course, arises in all cases where there is a gift to take effect *in futuro* and apparently no disposition of the property in the meantime.

§ 208. The rules established by the cases: If the subject matter of the devise be specific lands or specific personal property, there is an intestacy or the residuary devisee or legatee is entitled.[45] If, however, a residue of personalty alone be bequeathed, the intermediate income must accumulate and be added to the principal and pass to the one ultimately entitled.[46] This is based upon the proper meaning of the word "residue." Thus, when a devise or bequest is made to *A* to take effect *in futuro* and then the residue of real and personal property is given to *B*, *B* will be entitled to the intermediate income by

[43] See Rex *v.* Inhabitants of Ringstead, 9 Barn. & Cr. 218, 227, per Bailey, J. referring to a case from Moore's Reports.

[44] This is often, and always should be, explicitly disposed of, 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.

[45] 1 Jarman on Wills, 6 ed., Bigelow, 614; Theobald on Wills, 7 ed. 180, 181; Hopkins *v.* Hopkins, Cas. temp. Talb. 44, Hawkins on Wills, App. 1; Haughton *v.* Harrison, 2 Atk. 329; Doughty *v.* Stillwell, 1 Bradf. (N. Y.) 300, 310.

[46] Fearne, C. R. 546; 1 Jarman on Wills, 6 ed., Bigelow, * 614; Theobald on Wills, 7 ed. 182; Green *v.* Ekins, 2 Atk. 473; Hodgson *v.* Bective, 1 Hem. & M. 376; 10 H. L. C., 656; Marriott *v.* Turner, 20 Beav. 557; Bullock *v.* Stones, 2 Ves. Sr. 521 ("all my real and personal estate"); *In re* Drakeley's Estate, 19 Beav. 395 ("all my real and personal estate"); Studholme *v.* Hodgson, 3 P. Wms. 300. Note that Hopkins *v.* Hopkins, Cas. temp. Talb. 44, so far as it held the contrary has been overruled. Hodgson *v.* Bective, 1 Hem. & M. 376; per Wood, V. C. at 399, and 10 H. L. C., p. 356, per Westbury at p. 666.

reason of the gift of the "residue."[47] Hence when a residue itself of personal property is devised to *A in futuro* the intermediate income must accumulate and ultimately pass to *A*.[48] On the other hand, if the devise be of a residue of realty alone, the English cases hold that there is an intestacy, and the heir at law is entitled to the intermediate rents and profits.[49] Here obviously enough the courts refused to give to the word "residue" the same meaning and effect as was given to it where a residue of personalty was involved.

If, however, the devise be of a mixed residue of real and personal property the intermediate income must, in the absence of a special context requiring a different result,[50] be accumulated and paid over to the one ultimately entitled. This rule has been given a wide application under varying circumstances. It has been applied where an express trust was created and the gift was of the "residue" of real and personal property.[51] It

[47] Stephens *v.* Stephens, Cas. temp. Talb. 228, 233; *In re* Eddels' Trusts, L. R. 11 Eq. Cas. 559; *In re* Mowlem, L. R. 18 Eq. 9; Harris *v.* Lloyd, Turn. & R. 310; *In re* Tharel's Trusts, 13 L. R. Ir. 337; Wyndham *v.* Wyndham, 3 Bro. C. C. 58; Guthrie *v.* Walrond, L. R. 22 Ch. Div. 573; Sanford *v.* Blake, 45 N. J. Eq. 247.

[48] See cases cited, *supra,* note 46 and especially Green *v.* Elkins, 2 Atk. 473, 475. Also Gibson *v.* Montfort, 1 Ves. Sr. 485; Rogers *v.* Ross, 4 Johns. Ch. (N. Y.) 388, 399.

[49] Hopkins *v.* Hopkins, Cas. temp. Talb. 44; Hawkins on Wills, App. 1; Hodgson *v.* Bective, 1 Hem. & M. 376; 10 H. L. C. 656; Wade-Gery *v.* Handley, 1 Ch. Div. 653; 3 Ch. Div. 374; Wills *v.* Wills, 1 D. & War. 439; Davenport *v.* Coltman, 12 Sim. 605; Chambers *v.* Brailsford, 18 Ves. 368; *Re* Williams; Spencer *v.* Brighouse, 54 L. T. 831; Bullock *v.* Stones, 2 Ves. Sr. 521 ("all my real and personal estate"); Duffield *v.* Duffield, 1 Dow & Clark, 268.

[50] For instance, in *In re* Townsend's Estate, Townsend *v.* Townsend, 34 Ch. Div. 357, the gift of the residue of real and personal property was upon trust to pay the income to W. S. T. for life and then to W. S. T.'s children in equal shares. The gift of the life estate to W. S. T. was void because his wife witnessed the will. The gift to the children of W. S. T. could not be accelerated because there were no children *in esse.* It was held that the income of the real estate would not be accumulated but must go in the meantime to the heirs at law. The preceding life estate expressly given negatived any inference that the children who were to take *in futuro* were to have the accumulations of income.

[51] Glanvill *v.* Glanvill, 2 Meriv. 38. In the following cases there was not only a gift of the residue of real and personal property and a trusteeship, but other facts which aided the theory that the gift of the residue *in futuro* was intended to

makes no difference, however, that there is no trusteeship but a devise of legal interests only.[52] 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 of a residuary character.[53] On the other hand, when a testator begins to enumerate property specifically and to designate both real and personal property, but does not include them together in a single blended fund, it may be that, while the income of the personal property will accumulate because the personal property mentioned is in fact a residue, the rents of the real estate will go to the heir at law as intestate property.[54]

The rule applicable to a mixed residue of real and personal property has been justified on the ground that when the testator devises *in futuro* a mixed or blended fund of real and personal property he expresses an intention that the rule in regard to personalty shall operate upon both.[55] But obviously enough

carry accumulations. Gibson *v.* Montford, 1 Ves. Sr. 485; Ackers *v.* Phipps, 3 Cl. & Fin. 665.

[52] Genery *v.* Fitzgerald, Jac. 468; Rogers *v.* Ross, 4 Johns. Ch. (N. Y.) 388.

[53] *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"); Dough erty *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 intermediate income from both realty and personalty was accumulated). Bullock *v.* Stones, 2 Ves. Sr. 521, so far as it is *contra* seems to be overruled. Ackers *v.* Phipps, 3 Cl. & Fin. 665, per Lord Brougham, p. 697. 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.

[54] *In re* Drakeley's Estate, 19 Beav. 395 (devise of "freehold. copyhold and all his real estate, and bequeathed all his ready money, securities for money, stock and personal estate, etc.").

[55] Genery *v.* Fitzgerald, Jac. 468,

this is an arbitrary assumption, for why may not the inference as well be that the testator intends the rule in regard to realty to prevail both as to realty and personalty? The reason for the rule with respect to the mixed residue of realty and personalty must be that, of the two opposing rules regarding a residue of realty and a residue of personalty, the latter is more in accordance with the natural and proper meaning of the language used than the former.

§ 209. Criticism of the rule that the intermediate rents and profits of a residue of realty go to the heir at law: Three reasons have been urged for construing the word "residue" differently when applied to personalty alone and when applied to realty alone.

First: It has been said that if the heir did not take so as to be entitled to the rents and profits until the future event happened, the freehold would be in abeyance.[56] This is not strictly true for the fee may descend to the heir at law and his seisin should satisfy, in these times at least, any surviving requirement of the feudal land law. If it be said that the heir cannot take the legal estate and at the same time be deprived of the rents and profits, the answer is that that is exactly what Lord Eldon did in *Genery v. Fitzgerald*,[57] where a mixed residue and realty and personalty was involved. Furthermore, Chancellor Walworth in *Rogers v. Ross*,[58] met the objection by declaring that a court of chancery would make the heir at law a constructive trustee[59] of the rents and profits for the one ultimately entitled, or would appoint a receiver to take the rents and profits.

Second: It has been said that the heir cannot be disinherited without express words. Logically this assumes the very point at issue, since the question is, has the testator expressed an intention to give the rents and profits to the devisee who is to take *in futuro?* Practically this second reason expresses merely a prejudice in favor of the heir founded upon the recognition

per Lord Eldon; Ackers *v.* Phipps, 3 Cl. & Fin. 665, per Lord Brougham, p. 699.

[56] Hodgson *v.* Beetive, 10 H. L. C. 656, per Lord Westbury, p. 664.

[57] Jac. 468.

[58] 4 Johns, Ch. (N. Y.) 388, 402.

[59] 4 Kent. Com. *387, 14th ed.; Dougherty *v.* Dougherty, 2 Strob. Eq. (S. C.) 63, 66 accord.

by the English courts of the prevailing English custom of permitting the eldest son to take the ancestor's or settlor's entire landed property.[60] Such a prejudice has no place in American jurisdictions today. It is entirely inconsistent with our manners and customs.

Third: It has been said that prior to the time when after-acquired real estate could be devised, a residuary devise of real estate was looked upon as a specific devise of real estate. Hence the rule applicable to a specific devise of real estate applied and the rents and profits could not be accumulated.[61] The rule, having become established on this logical ground, could not be regarded as repealed by implication when after-acquired real estate was made devisable by the Wills Act.[62] The premise in this reasoning is defective because the material question is not whether the devise was one of specific real estate, but what meaning shall be given to the word "residue" when specific real estate was described as a "residue?" Of course, in an American jurisdiction where the question comes up for the first time, long after statutes have made after-acquired real estate devisable, there is the same opportunity for ignoring the rule of the English cases based upon the fact that after-acquired real estate was not devisable that there is where the question is whether a lapsed devise falls into the residue or goes to the heir at law.[63]

The unsatisfactory character of the rule that the heir at law was entitled to the intermediate income of a residue of realty

[60] Hodgson *v.* Bective, 1 Hem. & M. 376, per Wood, V. C., p. 397: "The rule which gives the intermediate rents to the heir is the artificial result of our peculiar doctrine in this country in favor of the heir's position."

[61] Hodgson *v.* Bective, 1 Hem. & M. 376, per Wood, V. C., p. 396; 10 H. L. C. 656, per Lord Cranworth, p. 669.

[62] Hodgson *v.* Bective, 1 Hem. & M. 376, per Wood, V. C., p. 396.

[63] In the following cases it was held that a lapsed devise of real estate went to the residuary devisee and not to the heir at law as a result of the fact that after acquired real estate might be devised in the same way as after acquired personal property. Molineaux *v.* Raynolds, 55 N. J. Eq. 187; Thayer *v.* Wellington, 9 Allen (Mass.) 283, 295; Reeves *v.* Reeves, 5 Lea (Tenn.) 653; Cruikshank *v.* Home for the Friendless, 113 N. Y. 337, 354. *Contra,* Massey's Appeal, 88 Pa. 470; Rizer *v.* Perry, 58 Md. 112, 134.

alone and the weakness of the reasons upon which that rule is based, have been pointed out by eminent judges.[64]

[64] In Gibson *v.* Montford, 1 Ves. Sr. 485, 490, Lord Hardwicke said: "It is pretty hard to say, that in any case where one devises all the rest and residue of his real estate, the heir should be enabled to claim anything out of it; for how can he claim or take these intermediate profits? He must claim [them] as part of the real estate undisposed [of] and not by any particular trust." This passage Chancellor Walworth quotes with approval in Rogers *v.* Ross, 4 Johns, Ch. (N. Y.) 488, 500. In Ackers *v.* Phipps, 3 Cl. & Fin. 665, 691, Lord Brougham, referring to the same passage from Lord Hardwicke, says: "It does seem difficult to understand a residuary devise, even when confined to real estate, in any other than this general and absolute sense. For what can it mean, but to give away from the heir whatever had not before been given away from him?" Again (p. 699), he says, after approving the rule with respect to a mixed residue of real and personal property: "But I am also of the opinion that the gift of a real residue, without blending it with a personal residue, would of itself, have the same effect upon another ground, namely the meaning of 'residue'."

CHAPTER XII.

JOINT INTERESTS.

§ 210. **Of real estate—Joint tenancies other than those in trustees and executors—The Statutes:** At common law a conveyance *inter vivos* or by devise to several created *prima facie* a joint tenancy. In 1821 [1] the right of survivorship between joint tenants was abolished by language broad enough to apply to real property as well as personal. In 1827,[2] however, the present Section 5 of the Act on Conveyances was passed, which reads as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise, or conveyance, whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned, shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees, (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common." Since the passage of this act, Section 2 of the Act of 1821, which has continued in the various revisions of the statutes, has been held not to apply to real estate.[3] The re-enactment of the Act of 1821 with an amendment relating to bank deposits would not, it is believed, operate to abolish the right of survivorship in joint tenants of real estate. That part of the Act of 1917, which was merely a re-enactment of Sec. 2 of the Act of 1821, would be construed, as it had been in connection with the Act of 1827, not to apply to real estate.

§ 211. **Construction:** Under the Act of 1827 (now Sec. 5 of the Act on Conveyances), it is important to determine what language is sufficient to enable one to find an expressed intent to create a joint tenancy. The exact words of the statute "not

[1] Gale's Ill. Stats. 514, 515, § 2; R. S. 1845, Ch. 56, § 1; R. S. 1874, Ch. 76, § 1.

[2] Gale's Ill. Stats. 149, § 5; R. S. 1845, Ch. 24, § 5; R. S. 1874, Ch. 30, § 5.

[3] Mette *v.* Feltgen, 148 Ill. 357.

in tenancy in common, but in joint tenancy'' are clearly sufficient for the creation of a joint tenancy.[4] It has been said a number of times by our Supreme Court [5] and actually held in at least one case [6] that it is not necessary to use the exact words of the statute in order to create a joint tenancy. It is only necessary that some words be used which show a clear intent to create such interests. Nevertheless, it should be observed that it requires a very clear expression of intent to create a joint tenancy. The inclination of the court has been entirely against its creation.

In *Mittel v. Karl*,[7] the deed ran to a husband and wife and "the survivor of them, in his or her own right.'' It was held that this did not confer an estate by the entirety. The court said: "The declaration which the statute requires to establish the estate [*i. e.*, the exact words of the statute 'not in tenancy in common, but in joint tenancy'] is nowhere found in the deed, and in the absence of such a declaration we are inclined to hold that the estate was not created.'' There could be no tenancy in common because of the clause concerning survivorship. The court, therefore, seemed driven to the construction that the husband and wife took life estates with a contingent remainder over to the survivor. Later *dicta* and at least one decision [8] indicate that the court laid down too strict a rule when it intimated that, in order to create a joint tenancy, the precise language of the statute must be used. With the more liberal view of the later cases that any language is sufficient which shows a clear intention to create a joint tenancy, it would seem that the language of the deed in this case might be held to have created a joint tenancy, rather than life estates with contingent remainder subject to be destroyed by the action of the life tenants and reversioner.

In *Slater v. Gruger*,[9] the deed referred to the husband and wife "and the survivor of them, in his or her own right,'' as party of the second part. The granting clause was "unto said party of the second part, their heirs and assigns forever.'' Following the description of the property granted, the deed

[4] *Id.*

[5] Cover *v.* James, 217 Ill. 309, 315; Gaunt *v.* Stevens, 241 Ill. 542, 548.

[6] Slater *v.* Gruger, 165 Ill. 329.

[7] 133 Ill. 65.

[8] *Supra*, notes 5 and 6.

[9] 165 Ill. 329.

declared that the "conveyance herein is made to said grantees in joint tenancy" and the *habendum* was "unto the said party of the second part, their heirs and assigns forever." It was held that a joint tenancy had been created. The court made it clear that any words indicating an intent to create a joint tenancy were sufficient, and that it was not necessary to follow the exact words of the statute.

In *Mustain v. Gardner*,[10] there was a devise to the testator's daughter and his wife "jointly" of certain described property "to them and their heirs and assigns forever." This was held to create a tenancy in common and not a joint tenancy. The mere use of the word "jointly" was not sufficient to indicate a joint tenancy.

In *Cover v. James*,[11] the deed ran to a husband and wife and after the description of the property and the release of the homestead, there appeared this clause: "in case of the death of either A. Ford or Bessie Cover, the other to have the whole of said property without litigation." It was held that the husband and wife took life estates with contingent remainder to the survivor. Reliance may have been placed upon the phrase "in case of the death" as indicating a separate gift in any event upon the death of either.[12] The court, however, seems to have relied very largely upon the result reached in *Mittel v. Karl*.[13]

In *Gaunt v. Stevens*,[14] the limitations were by will to the testator's wife and two named daughters "and to the survivor or survivors of them, share and share alike." It was held that a tenancy in common and not a joint tenancy was created. The fact that a devise was involved made it possible to construe "survivor or survivors of them" as meaning those who survived the testator, and "share and share alike" as giving to those who survived the testator a tenancy in common in fee. This course the court regarded as required by the settled disinclination to find a joint tenancy, if any other explanation of the language used was permissible.

§ 212. **Joint tenancies in executors and trustees**: The Act of 1821,[15] which in Sec. 1 permitted the partition of joint tenancies and then provided in Sec. 2 that if no partition was

[10] 203 Ill. 284.
[11] 217 Ill. 309.
[12] *Ante*, §§ 162, 163.
[13] 133 Ill. 65.
[14] 241 Ill. 542.
[15] Gale's Ill. Stats. 514, 515.

made there should be no right of survivorship, by the terms of Sec. 1, applied only to joint tenants "in their own right, or in the right of their wives." It has been suggested that it, therefore, did not apply to joint estates held by executors and trustees in the right of another.[16] The Act of 1827 [17] made it clear that limitations of real estate to executors or trustees were subject to the common law rule that a joint tenancy was *prima facie* created in such executors or trustees. Since no right of survivorship was ever taken away, such right continued as an attribute to the joint tenancies of executors and trustees. The fact that the Act of 1827 was construed as providing for the continuance of the right of survivorship where a joint tenancy was created pursuant to this act in real estate, confirms the view that trustees and executors who take as joint tenants do so with the common law right of survivorship.[18]

§ 213. **Estates by the entirety in husband and wife:** Before the Married Women's Act of 1861,[19] a conveyance to a husband and wife in fee created in both, estates by the entirety.[20] Each had a right to the whole property upon surviving the other, and this right of survivorship neither one alone could extinguish by any act during the marriage. Since that act, they are tenants in common.[21] It has yet to be decided whether an estate by the entirety in the husband and wife can be created if an intention to do so is fully expressed.

§ 214. **Tenancy in common:** Since 1827 a transfer *inter vivos* or by devise has, in this state, been sufficient *prima facie* to make the grantees tenants in common. This rule applies regularly where there is a conveyance or devise to named persons, or to a class of persons. In cases, however, where the conveyance is to a named person or persons, together with a class of persons, such as a conveyance to A and his children, there has been a disposition by our Supreme Court to permit a slight additional special context to give rise to the inference that "chil-

[16] Mette *v.* Feltgen, 148 Ill. 357, 363; Gaunt *v.* Stevens, 241 Ill. 542, 547.

[17] Now R. S. 1874, Ch. 30, § 5.

[18] Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238, 244.

[19] Laws Ill. 1861, p. 143.

[20] Mariner *v.* Saunders, 5 Gilm. (Ill.) 113; Lux *v.* Hoff, 47 Ill. 425.

[21] Cooper *v.* Cooper, 76 Ill. 57, 64; Mittel *v.* Karl, 133 Ill. 65, 68.

dren'' was used as an informal word of limitation so that A alone took the fee.[22]

§ 215. **In personal property:** Since the Act of 1821 and until its recent amendment in 1917, the right of the survivor or survivors of joint tenants to take the whole has been abolished.[23] The amendment of 1917[24] made a special exception in the case of bank deposits if certain formalities were observed. It has been suggested, however, that the Act of 1821, by the terms of Sec. 1, applied only to joint tenants ''in their own right or in the right of their wives,'' and hence Sec. 2 did not apply to joint interests in trustees or executors, or joint tenants holding in the right of another.[25] Sec. 1 of the Act of 1821 appears to have been dropped out of the Revised Statutes of 1845 or else it must be regarded as having been rewritten and incorporated into Sec. 1 of Ch. 79 on Partition, and in Sec. 1 of Ch. 106 of the Revised Statutes of 1874 on Partition. Nevertheless, it may be assumed in accordance with the rule of construction laid down in Sec. 2, Ch. 131 of R. S. 1874 that Sec. 2 of the Act of 1821 appearing as Sec. 1 of Ch. 56, R. S. 1845, and Sec. 1, Ch. 76, R. S. 1874 will be construed as a mere continuation of the original statute with the same construction which it originally had.[26] By this process it will still be ineffective to eliminate the common law right of survivorship in the case of joint tenancies of personal property in executors and trustees and those holding in the right of another.

[22] See *ante*, § 169. As to gifts to A and ''his descendants'' see *ante*, § 196. As to gifts of personalty to ''A and the heirs of his body,'' or to ''A and the issue of his body'' see *ante*, §§ 199, 200.

[23] Hay *v.* Bennett, 153 Ill. 271. But see Erwin *v.* Felter, 283 Ill. 36, where the above rule and the statute seems to have been entirely overlooked.

[24] Laws 1917, p. 557.

[25] Mette *v.* Feltgen, 148 Ill. 357, 363.

[26] *Id.*, 367.

BOOK IV.
FUTURE INTERESTS.

CHAPTER XIII.
RIGHTS OF ENTRY FOR CONDITION BROKEN.

TITLE I.
ESTATES WHICH MAY BE SUBJECT TO A CONDITION SUBSEQUENT.

§ 216. **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 in favor of 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 was reversed. The only questions discussed, were the construction of the condition and its legality.[3]

§ 217. **Mortgages:**[4] It seems worth observing that a mortgage, so often considered as a conveyance wholly in a class by

[1] Gray's 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*, §§ 662, 711 *et seq.*, 749 *et seq.*

[2] 189 Ill. 400. See also in accord: Wakefield *v.* Van Tassell, 202 Ill. 41; Wilson *v.* Galt, 18 Ill. 431, 437; Sherman *v.* Town of Jefferson, 274 Ill. 294; Green *v.* Old People's Home, 269 Ill. 134; Latham *v.* I. C. R. R. Co., 253 Ill. 93. An equitable interest in personalty may also be subject to a condition subsequent: Green *v.* Old People's Home, *supra.*

[3] *Dedication:* The nature of the interest of the dedicator upon a statutory dedication will be considered *post*, §§ 284, 285.

[4] It is not proposed here to in-

itself, is, fundamentally, merely the transfer of a fee simple, subject to a condition subsequent.[5] If the debt be paid according 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 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 in this state 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 the 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] There is,

dicate how far the 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. ch. 5, § 332, note (1); Butler and Hargrave's notes, 1st American ed. from 19th London ed.

[6] See the exposition of the English doctrine to be found in Barrett *v.* Hinckley, 124 Ill. 32, 41 *et seq.*, and Kransz *v.* Uedelhofen, 193 Ill. 477, 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 mortagee from setting up the legal title before default.

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

[11] Delahay *v.* Clement, 3 Scam. (Ill.) 201, 203 (*semble*); Kruse *v.* Scripps, 11 Ill. 98; Vansant *v.* All-

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]

§ 218. **Terms for years:** A term for years is the interest most commonly subject to a condition 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]

TITLE II.

CONCERNING THE EXISTENCE AND CHARACTER OF THE CONDITIONS.

Topic 1.

Conditions Created by Act of the Parties.

§ 219. **What words are effective to create a right of entry for condition broken—Effect of a re-entry clause:** The clearest way to make a conditional fee is to use words of condition and

mon, 23 Ill. 30 (*semble*); Carroll *v.* Ballance, 26 Ill. 9; Fisher *v.* Milmine, 94 Ill. 328; Esker *v.* Heffernan, 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 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 beomes 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 a 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*, §§ 443 *et seq.* See also Forlouf *v.* Bowlin, 29 Ill. App. 471.

[13] See cases cited and dealt with, *post*, §§ 233-239, 241, 245-253.

also insert a re-entry clause.[14] When the conveyance is for certain express purposes or upon a motive expressed, or upon a certain consideration, with a re-entry clause, or if there is a covenant with a re-entry clause the estate is upon a condition subsequent.[15] Not infrequently there is created both a covenant by the grantee and a condition subsequent, and the grantor may proceed by way of enforcing the covenant or declaring a forfeiture. Sometimes, however, a condition subsequent, and that alone, is created, so that if the breach of the condition be waived there can be no claim at all for damages which may have occurred prior to the waiver of the breach of condition.[16]

§ 220. Where the conveyance is for certain express purposes, or upon a motive expressed,[17] or upon a certain consideration[18] or "upon the express agreement,"[19] or

[14] Gray *v.* C., M. & St. P. Ry. Co., 189 Ill. 400; Sanitary Dist. *v.* Chicago Title & Trust Co., 278 Ill. 529; Trustees of Union College *v.* City of New York, 73 N. Y. Supp. 51; Moss *v.* Chappell, 126 Ga. 197; Minard *v.* Delaware, L. & W. R. Co., 139 Fed. 60; Brown *v.* Tilley, 25 R. I. 579; Austin *v.* Cambridge Port Parish, 21 Pick. (Mass.) 215; Houston & T. C. R. Co. *v.* Ennis-Calvert Co., 23 Tex. Civ. App. 441; Hoyt *v.* Ketcham, 54 Conn. 60.

[15] Atty. Gen. *v.* Merrimack Manufacturing Co., 80 Mass. 586; Woodruff *v.* Water Power Company, 10 N. J. Eq. 489; Hamel *v.* Minneapolis, St. P. & S. S. M. Ry., 97 Minn. 334; Sherman *v.* Town of Jefferson, 274 Ill. 294; Hart *v.* Lake, 273 Ill. 60; Green *v.* Old People's Home, 269 Ill. 134; Latham *v.* I. C. R. R. Co., 253 Ill. 93; Springfield, etc. Traction Co. *v.* Warrick, 249 Ill. 470.

[16] Sanitary Dist. *v.* Chicago Title & Trust Co., 278 Ill. 529. As between holding a condition to be precedent to the transfer of title, or subsequent, divesting a title which has passed, the courts lean toward the latter construction: Phillips *v.* Gannon, 246 Ill. 98; Nowak *v.* Dombrowski, 267 Ill. 103.

[17] Tinker *v.* Forbes, 136 Ill. 221, 239; Thornton *v.* Natchez, 88 Miss. 1; *Id.*, 129 Fed. 84; Barker *v.* Barrons, 138 Mass. 578; Long *v.* Moore, 19 Tex. Civ. App. 363; Faith *v.* Bowles, 86 Md. 13; Field *v.* Providence, 17 R. I. 803; Horner *v.* C., M. & St. P. Ry. Co., 38 Wis. 165, 175; Rawson *v.* School District, 7 Allen (Mass.) 125. See also Greene *v.* O'Connor, 18 R. I. 56; Avery *v.* U. S., 104 Fed. 711; Kilpatrick *v.* Mayor, 81 Md. 179; Collins *v.* Brackett, 34 Minn. 339. In O'Donnell *v.* Robson, 239 Ill. 634, the court assumed the existence of a condition subsequent only for the purposes of argument.

[18] Letchworth *v.* Vaughan, 77 Ark. 305 (in consideration of building a railroad to be completed by a certain date). See, however, *contra*, Close *v.* Burlington, etc., R. R. Co., 64 Ia. 149 (in consideration of establishing a railroad station, held to create an estate upon condition); Indianapolis, etc. R. R. Co. *v.* Hood, 66 Ind. 580 (same sort of case).

[19] Hawley *v.* Kafitz, 148 Cal. 393

"provided, however, the grantee shall do" thus and so,[20] and there is no re-entry clause: Here the cases are overwhelmingly in favor of the proposition that the estate is not upon condition.

Nevertheless, upon a conveyance to school trustees expressed to be for school purposes, 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.[21] 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.[22] On the other hand, where a deed was made to supervisors "for court house and other county buildings," no condition was created.[23] 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.[24] 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.[25]

(upon the express agreement to build a house to cost a certain sum); Mackey *v.* Kerwin, 222 Ill. 371; Nowak *v.* Dombrowski, 267 Ill. 103; O'Neil *v.* Caples, 257 Ill. 528.

[20] King *v.* Norfolk & Western Ry. Co., 99 Va. 625; Cassidy *v.* Mason, 171 Mass. 507; Village of Ashland *v.* Greiner, 58 Ohio 67.

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

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

[23] Supervisors Warren Co. *v.* Patterson, 56 Ill. 111.

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

[25] 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 contractural restriction upon the use of the premises conveyed. Observe that the Court lays stress upon the fact that there is no clause of re-entry. That, however, is not necessary if the condition is clearly expressed.

Clearly where property is conveyed to a church there is no ground of forfeiture when it ceased to be

§ 221. Cases where a grantee is to support the grantor for the remainder of his life [26] or pay him an annuity: [27] 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 reconveyance. In three cases where the contract was for personal support,[28] which the grantee failed to furnish under shameful circumstances, our Supreme Court said there were equitable grounds for sustaining the prayer of the bill.[29] This holding does not, however, in any way proceed upon the ground that the estate is conditional. In a recent case,[30] 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 said 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 [31] the court said there was no condition and no equitable grounds for rescission and a decree for the grantor was reversed.

§ 222. Cases where words of condition are used, but there is no re-entry clause—The primary meaning of the words of condition: Words of condition without a re-entry clause are *prima facie* effective to create an estate upon condition.[32] In

used for the church edifice: King *v.* Lee, 282 Ill. 530. So where the property was conveyed for a "church location," the unrestricted fee was held to have been conveyed: Downen *v.* Rayburn, 214 Ill. 342.

[26] Frazier *v.* Miller, 16 Ill. 48; Oard *v.* Oard, 59 Ill. 46; Jones *v.* Neely, 72 Ill. 449; Stebbins *v.* Petty, 209 Ill. 291; Cooper *v.* Gum, 152 Ill. 471; Fabrice *v.* Von der Brelie, 190 Ill. 460; Cumby *v.* Cumby, 240 Ill. 235.

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

[28] *Supra*, note 26.

[29] See also O'Neil *v.* Caples, 257 Ill. 528; De Costa *v.* Bischer, 287 Ill. 598.

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

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

[32] Hays *v.* St. Paul Church, 196 Ill. 633; Supervisors Warren Co. *v.*

many of the cases, the courts note the absence of the re-entry clause and declare that its presence is not necessary to make an estate upon condition where there are express words of condition.[33] All the decisions noted were made in spite of the fact that the court leaned against construing the deed as one upon condition with a right of re-entry in the grantor. In several this attitude of the court was very forcibly expressed.[34] Even in the leading case of *Post v. Weil*,[35] where the court, relying upon all the circumstances surrounding the execution of the deed, held that the words of condition did not make an estate upon condition, but merely a promissory obligation on the part of the grantee, it concedes that the primary and accepted meaning of words of condition without a re-entry clause creates an estate upon condition which it takes special circumstances or a special context to overcome. It is clear also that this same leading case does not regard the absence of a re-entry clause as significant against the creating of a conditional estate by virtue of the words of condition.[36] It is no doubt true that in cases where the court holds that words of condition create merely a promissory obligation on the part of the grantee, the absence of a re-entry clause may be commented upon. Nevertheless, in all of these cases the absence of a re-entry clause is mentioned simply as a circumstance which makes it possible for the court to resort to the surrounding circumstances in aid

Patterson, 56 Ill. 111, 120; Harris *v.* Shaw, 13 Ill. 456; Gray *v.* Blanchard, 8 Pick. (Mass.) 283; Blanchard *v.* The Detroit, Lansing & Lake Michigan Railroad Co., 31 Mich. 43; Hammond *v.* Port Royal and Augusta Railway Co., 15 S. C. 10; Taylor *v.* Cedar Rapids and St. Paul R. R. Co., 25 Ia. 371; May *v.* Boston, 158 Mass. 21; Papst *v.* Hamilton, 133 Calif. 631; Adams *v.* Valentine, 33 Fed. Rep. 1; Reichenbach *v.* Washington, etc., Ry. Co., 10 Wash. 357; Mills *v.* Seattle, etc., Ry. Co., 10 Wash. 520; Brown *v.* Chicago & N. W. Ry. Co., 82 N. W. Rep. (Ia.) 1003; Underhill *v.* Saratoga and Washington R. R. Co., 20 Barb. (N. Y.) 455; Mead *v.* Ballard, 74 U. S. 290; Hooper *v.* Cummings, 45 Me. 359; Chapman *v.* Pingree, 67 Me. 198; Weinreich *v.* Weinreich, 18 Mo. App. 364; Parsons *v.* Miller, 15 Wend. (N. Y.) 561.

[33] Gray *v.* Blanchard, 8 Pick. (Mass.) 283; Papst *v.* Hamilton, 133 Calif. 631; Brown *v.* Chicago & N. W. Ry. Co., 82 N. W. 1003 (Ia.).

[34] Weinreich *v.* Weinreich, 18 Mo. App. 364; Adams *v.* Valentine, 33 Fed. Rep. 1.

[35] 115 N. Y. 361, 369.

[36] Post *v.* Weil, 115 N. Y. 361, 371.

of construction, and not as a fact which of itself in any way controls the construction. This is brought out with exactness and precision by Gray, J., in *Post v. Weil.*[37] In *Stilwell v. St. L. & H. Ry. Co.*,[38] the court says that "some of the authorities hold that such words [words 'on condition'] when used in private grants, are not sufficient [to create an estate upon condition,] unless conjoined with others giving a right to re-enter, or declaring a forfeiture in a specified contingency." This is the only suggestion of any such rule which has been found. It is borne out by no authorities whatever so far as is known. The court itself says: "This, probably, is too broad a statement of the rule." It would seem therefore, that the first principle established by the cases is that words of condition without a re-entry clause, according to their normal and accepted meaning, create an estate upon condition and not a mere promissory obligation on the part of the grantee.

Of course, the special context of the whole instrument has been allowed to turn the condition into a covenant. Thus, if the conditional words require the grantor, instead of the grantee, to do something, it has never been taken as a condition, but always as a covenant.[39] So, if the word "condition" is used in a will, the context frequently shows that it was used as a word designating the trusts of a fund or the charging of a gift with the payment of legacies.[40] The cases of unclassified special contexts where the word "condition" has meant "covenant" are of course legion.[41]

§ 223. How far resort may be had to circumstances surrounding the making of the deed to impose upon words of condition alone the effect of creating a covenant only—Introduc-

[37] 115 N. Y. 361, 371.

[38] 39 Mo. App. 221, 227-228.

[39] Paschall *v.* Passmore, 15 Pa. St. 295, 307, 309; Woodruff *v.* Woodruff, 44 N. J. Eq. 349.

[40] Stanley *v.* Colt, 5 Wall. 119; Wright *v.* Wilkin, 2 B. & S. 232 (110 Eng. Com. Law Rep.); Attorney-General *v.* Corporation of Southmolton, 14 Beav. 357; Attorney-General *v.* Wax Chandlers Co., 42 L. J. Ch. N. S. 425; Sohier *v.* Trinity Church, 109 Mass. 1; Spangler *v.* Newman, 239 Ill. 616. But in Nevius *v.* Gourley, 95 Ill. 206, 97 Ill. 365, and Jacobs *v.* Ditz, 260 Ill. 98, *post*, § 442, the payment was held to be a condition precedent to the taking effect of the gift.

[41] Eckhart *v.* Irons, 128 Ill. 568; Portland *v.* Terwilliger, 16 Ore. 465; Minard *v.* Delaware, L. & W. R. Co., 139 Fed. 60; Los Angeles University *v.* Swarth, 107 Fed. 798. *A fortiori*, where there are merely words of agreement.

tory: So long as the words "on condition," without a re-entry clause, have the legal primary meaning of words of condition and not of covenant, hardly any resort, as a practical matter, can be had to extrinsic circumstances.[42] This is the view of some courts still.[43] Other courts, however, have in effect denied the words "on condition," without a re-entry clause, any such legal primary meaning and have treated such words as inherently ambiguous. The result is that a resort to the extrinsic circumstances becomes necessary in every case. The question then arises, what character of extrinsic circumstances are helpful in showing that a condition was meant, or that a covenant only was meant.[44]

§ 224. **A strong circumstance that a condition is created**: If the conveyance is for a special purpose which excludes all beneficial use by the grantee excepting in the line of the special purpose, so that there must be a natural desire when the special purpose is fulfilled or the land no longer required for it, that the grantor should have his land back, the words of condition will usually be taken in their primary meaning. This is especially apt to be the case where land is conveyed for a particular charitable purpose,[45] or for highway purposes.[46]

[42] *Ante*, §§ 128 *et seq.*

[43] Gray *v.* Blanchard, 8 Pick. (Mass.) 283; Adams *v.* Valentine, 33 Fed. 1; Hammond *v.* Port Royal Ry. Co., 15 S. C. 19, 32.

[44] "That conditions subsequent are not favored in the law, because their violation works forfeitures, and forfeitures are not favored, no one disputes; but, if any has gone to the extent of deciding that the courts will disregard a condition, provided for in express terms as a condition, simply because under 'surrounding circumstances' a condition was not the wisest thing for the parties to agree upon, the opinion certainly fails to cite it. Such an opinion would be subversive of the fundamental rule, that the courts cannot make contracts for the parties which they have not seen fit to make for themselves, nor can the courts relieve them from their folly, however great, in entering into improvident contracts." *Per* Rombauer, P. J., in a dissenting opinion in Stilwell *v.* St. L. & H. Ry. Co., 39 Mo. App. 221.

[45] Papst *v.* Hamilton, 133 Calif. 631.

[46] May *v.* Boston, 158 Mass. 21. The case of Greene *v.* O'Connor, 18 R. I. 56, is not in any way *contra* to this last, for there by the operation of a special statute the opening of the strip of land conveyed for a public highway was complete, and there could be no proof of any breach. But see Druecker *v.* McLaughlin, 235 Ill. 367.

§ 225. **Post v. Weil:**[47] This was an action by the seller against the buyer for specific performance. The defense was that the plaintiff's title was defective, because subject to a condition subsequent upon which a forfeiture might be declared. The conditional clause of the deed was as follows: "Provided, always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind." At the time of the conveyance the grantor owned other property in the vicinity of that conveyed. A judgment below, decreeing specific performance, was affirmed on the ground that that language did not make a conditional estate. The court admitted that according to the normal meaning of the words they created an estate upon condition. The absence of the re-entry clause merely permitted the court to go into the surrounding circumstances in aid of construction. The result reached was rested wholly upon the bearing of the circumstances surrounding the making of the deed upon the intention of the parties. The extrinsic circumstances were as follows:[48] (1) The grantee paid the full consideration for the fee. (2) He received, with the very slight qualification of the deed, the full and complete enjoyment of the property. (3) It was the sole and necessary consequence of complying with the condition that the neighboring lands of the grantor would be benefited.[49] (4) By taking the words as making a covenant, the

[47] 115 N. Y. 361. See also Ayling *v.* Kramer, 133 Mass. 12.

[48] These circumstances, or at least the first three, were present in Avery *v.* N. Y. Cen. R. R. Co., 106 N. Y. 142; Stilwell *v.* St. L. & H. Ry., 39 Mo. App. 221, and Ayling *v.* Kramer, 133 Mass. 12.

[49] If the act to be performed in fulfilling the condition may indirectly benefit some neighboring land of the grantor; yet, if that is not the sole, necessary and inevitable result —if, in addition, there is the element of a conveyance for a particular use in a particular way—the words have been taken as conditional. Thus, in Blanchard *v.* The Detroit, Lansing & Lake Michigan R. R. Co., 31 Mich. 43, where a conveyance to a railroad was made upon the "express condition" that the said railroad company should build and maintain a station upon the land suitable for the public and that certain trains should stop, the clause was held to be a condition and not a covenant. See also Taylor *v.* Cedar Rapids & St. Paul R. R. Co., 25 Ia. 371, and Brown *v.* Chicago & N. W. Ry. Co., 82 N. W. 1003 (Ia.), to the same effect.

benefit to the neighboring land as such would be fully assured to the owner by a suit in equity for specific performance; while as a condition the neighboring owner, who was an assignee of the grantor, would have no benefit at all.[50]

§ 226. Druecker v. McLaughlin:[51] This case follows *Post v. Weil*[52] to the extent of holding that the words "on condition," without a re-entry clause, have no legal primary meaning, but are inherently ambiguous, so that resort may be had to extrinsic circumstances in aid of interpretation. The words of condition involved were: "This conveyance is made, however, upon the express condition that said grantee and his assigns shall keep the said premises open as a private way," etc. The surrounding circumstances relied upon to show that these were words of condition were—the fact that all use of the strip in question was denied the grantee except its use in common with others for right of way purposes; the fact that by reason of a small piece of land being retained by the grantor, the land in question was not available as a way appurtenant to any lots in the subdivision except those immediately adjoining, and that the clause could not be enforced as an easement because the grantee did not sign the deed. The last point the court put aside by holding that an easement could be created by reservation without the grantee signing, even though there had been no *de facto* existence of the easement before the deed. The other points were overcome by looking into the surrounding circumstances and by finding an intent of the inducement of the parties that the grantee, who bought several lots adjoining the strip in question should receive the condemnation money when the strip was taken as a street. This agreement could not certainly be carried out if the strip were subject to forfeiture. The court insisted also that the words of condition were for the benefit of all lots in the subdivision. On the whole, this case indicates that the Supreme Court was prepared to go further than *Post v. Weil* in relying upon extrinsic circumstances to turn words of condition into words of covenant.[53]

[50] In Hammond v. Port Royal & Augusta Ry. Co., 15 S. C. 10, the court held that the words of condition, if taken as words of covenant, could not create any rights, because the grantee did not sign and seal the instrument, and so a condition was created.

[51] 235 Ill. 367.

[52] *Ante*, § 225.

[53] Koch v. Streuter, 232 Ill. 594; Nowak v. Dombrowski, 267 Ill. 103,

§ 227. Breach of condition created by act of the parties: The question of whether a condition has been broken has arisen regarding conditions of forfeiture on alienation.[54] Thus, in *Voris v. Renshaw*[55] 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*[56] 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 has been held that a voluntary assignment for the benefit of creditors is the breach of such a condition.[57] 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.[58]

In *Hawes v. Favor*[59] 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*[60] there was held to be no default in the payment of rent under the provisions of a coal lease. In *Dockrill v. Schenk*[61] it was held that there was no breach of the condition that the tenant

semble, where the condition was that the grantee pay money, the court construed the clause as a covenant merely.

In Elyton Land Company *v.* South and North Alabama R. R. Co., 100 Ala. 396, the court went outside the record and assumed that the grantor had land in the vicinity of the railroad which it desired to benefit. It then held a clause in a deed of the right of way which read: "Provided, however, that any other railroad running into or through the City of Birmingham shall have the right to run a parallel track along the same right of way," did not create a condition.

[54] As to the validity of such conditions see *post*, § 711 *et seq.*

[55] 49 Ill. 425.

[56] 71 Ill. 546, 547.

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

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

[59] 161 Ill. 440.

[60] 32 Ill. App. 558.

[61] 37 Ill. App. 44.

pay all special assessments, since the landlord had given him no notice to pay them.[62]

TOPIC 2.

CONDITIONS CREATED BY OPERATION OF LAW.

§ 228. (1) 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 will be fully dealt with hereafter.[63]

§ 229. 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.[64] This seems to be the law quite regardless of any special statute of limitations governing mortgages such as sec. 11 of the act of 1872,[65] for the rule obtains 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,[66] or where the mortgage, though controlled by the act, is given to secure a debt not evidenced by a writing [67] so that it is barred

[62] 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; O'Neil *v.* Caples, 257 Ill. 528; Springfield, etc. Trac. Co. *v.* Warrick, 249 Ill. 470.

[63] *Post*, §§ 283-299.

[64] Pollock *v.* Maison, 41 Ill. 516; Gibson *v.* Rees, 50 Ill. 383, 405 (*semble*); Emory *v.* Keighan, 88 Ill. 482; Schumann *v.* Sprague, 189 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 65).

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

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

[67] 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

in five years.[68]

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 defenses.

§ 230. 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 existence is measured by that of the mortgage debt."[69] 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 existence of such an interest by act of the parties may well be doubted.[70] But even if the mortgagor has a possibility of reverter arising by operation of law,[71] such an interest would not, in general, be transferable by deed[72] 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.[73] 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.

§ 231. 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

would be barred only by the ten-year statute. See Field *v.* Brokaw, 148 Ill. 654.

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

[69] Mr. Justice Mulkey in Barrett *v.* Hinckley, 124 Ill. 32, 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.

[70] *Post*, § 302.

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

[72] *Post*, § 302.

[73] 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.

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.[74] This, as under the view of § 230, is a constant difficulty with working out the peculiarities of the estate of the mortgagee upon principles governing legal future interests generally.[75] 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 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.[76] 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.

[74] *Post*, §§ 240, 300, 302.

[75] 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."

[76] *Id.*

§ 232. 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.[77]

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,[78] and the subsequent act of the legislature[79] 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, 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*[80] indicates that we may still hope to overthrow the rule of the earlier cases[81] to the effect that the mortgagee cannot maintain ejectment after his debt is barred. Nor need we despair 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

[77] 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.

[78] *Ante*, § 229.

[79] R. S. 1874, ch. 83, § 11.

[80] 200 Ill. 170.

[81] *Ante*, § 229.

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 mortgagee 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 action 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 [82] 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 mort-

[82] *Id.*

gagee 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.

§ 233. 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.[83] It seems also that the giving up of possession by a tenant to a stranger who takes an assignment or sublease 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.[84] 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.[85] The attempt by a tenant to transfer more than he has operates merely as an assignment of his interest.[86] It does not seem that such a conveyance should by itself furnish a ground of forfeiture.[87]

[83] Ballance *v.* Fortier, 3 Gilm. (Ill.) 291; Fortier *v.* Ballance, 5 Gilm. (Ill.) 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*).

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

[85] 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.

[86] Turner *v.* Hause, 199 Ill. 464. See also *post*, § 384.

[87] It has been said that any con-

§ 234. **By acts of 1865**[88] **and 1873**[89]**—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.

§ 235. **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.[90] From a consideration, however, 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,[91] in the conception that "the relation between the landlord and the tenant is simply a personal

veyance 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.

[88] Laws 1865, p. 107, § 2. In force Feb. 16, 1865. Re-enacted in 1873; Laws 1873, p. 119, § 9; see R. S. 1874, ch. 80, § 9.

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

[90] But prior to the time of Hen. 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, 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, 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, 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?

[91] Land Laws, 137.

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."[92] 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."[93] 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,[94] "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 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.[95] 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.

§ 236. Not altered by any statute down to 1865: This it is believed must have been the law of Illinois down to 1865.[96] The act of 1827[97] which now appears as sec. 4 of the Landlord and Tenant Act[98] merely gave the landlord the right to com-

[92] Pollock on Land Laws, 138, *ante*, §§ 21, 31, 32.

[93] Pollock on Land Laws, 138.

[94] Land Laws, 137-138.

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

[96] Chadwick *v.* Parker, 44 Ill. 326, 335-336, *infra*, note 4 (*semble*).

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

[98] R. S. 1874, ch. 80, § 4.

mence 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.

§ 237. Sec. 2 of the act of 1865 [99] afterwards appearing as sec. 9 of the act of 1873: [1] 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 [2] is: "When default is made in any of the terms of a lease,[3] 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 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* [4]

[99] Laws, 1865, p. 107; *ante*, § 234, note 88.

[1] Laws, 1873, p. 118, 119; R. S. 1874, chap. 80, sec. 9, p. 658, *ante*, § 234, note 89.

[2] Chap. 80, sec. 9.

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

[4] 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

and at least one clear decision of our Supreme Court [5] in favor of this view.

§ 238. Sec. 8 of the act of 1873: [6] The innovation carried out in the act of 1865 was again applied in Sec. 8 of the act of 1873. That provides: "The landlord [7] 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

failure of the tenant to pay such arrears he may, after the expiration 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.*"

[5] 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 Dickenson *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 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.

[6] 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.

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

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.[8]

§ 239. **Whether these acts have any retroactive effect:**[9] 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,[10] 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.

TITLE III.

WHO MAY TAKE ADVANTAGE OF A BREACH OF A CONDITION SUBSEQUENT AND WHO TAKE SUBJECT TO THE CONDITION.

§ 240. **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.[11] So our Supreme Court has said,[12] and in *Presbyterian Church v. Venable*[13] it was 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 held (though noth-

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

[9] See further on this matter, *post*, § 253.

[10] *Ante*, §§ 237, 238.

[11] Gray's Rule against Perpetuities, § 12; Underhill *v.* Saratoga, etc., Ry. Co., 20 Barb. (N. Y.) 455; Sherman *v.* Town of Jefferson, 274 Ill. 294; Green *v.* Old People's Home, 269 Ill. 134 (heirs of devisor). 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; Golconda Ry. *v.* Gulf Lines R. R., 265 Ill. 194; O'Donnell *v.* Robson, 239 Ill. 634. Observe, however, that the assignee of the dominant estate may forfeit an easement which is subject to a condition subsequent: Reichenbach *v.* Washington Ry., 10 Wash. 357.

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

[13] 159 Ill. 215; Voris *v.* Renshaw, 49 Ill. 425, 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.

ing was made of the point in either case) that the right of entry was assignable by a general conveyance [14] of the land which was subject to the condition, and that a devisee [15] 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 [16] is broad enough to include the right of entry for condition broken.

§ 241. **To an estate for life or years**: Prior to the statute of Hen. VIII.[17] 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.[18] By the statute of Hen. VIII., however, this was altered and the assignee of the reversioner was entitled to enforce a forfeiture.[19] This statute may fairly be regarded as part of the common law of this state.[20] In addition we have a further act of 1873 [21] which is sufficient to accomplish the same result.[22]

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 under seal it operates as an assignment of part of the reversion during the

[14] Helm *v.* Webster, 85 Ill. 116, *post*, § 290.

[15] 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.*"

[16] *Post*, § 325.

[17] 32 Hen. VIII, c. 34; Co. Lit. 215a; 5 Gray's Cases on Property, 2nd ed. 4; 2 Starr & Curtis, Ill. Stats. (1896), p. 2515.

[18] *Ante*, § 240.

[19] *Infra*, note 20.

[20] 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*, § 379.

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

[22] 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*).

continuance of such previous lease."[23] 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.[24] In *Drew v. Mosbarger*[25] 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.

§ 242. **Who take subject to the condition:** In the picturesque language of Shepard's Touchstone.[26] "The condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still; and albeit some of them be persons privileged in divers cases, as the king, infants, and women covert, yet they are also bound by the condition.[27] And a man that comes to the thing by wrong, as a disseisor of land, whereof there is an estate upon condition in being, shall hold the same subject to the condition also."

TITLE IV.

EFFECT OF THE BREACH OF A CONDITION SUBSEQUENT AND MODE OF PERFECTING A FORFEITURE.

§ 243. **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.[28] In short, no mat-

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

[24] *Id.*

[25] 104 Ill. App. 635.

[26] Shep. Touch. 120; 5 Gray's Cases on Prop., 2nd ed. 6.

[27] *Accord:* Latham *v.* I. C. R. R. Co., 253 Ill. 93.

[28] 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., 53 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.*

ter 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.[29]

§ 244. Mode of perfecting a forfeiture—Of freehold estates: It has always been said that to perfect a forfeiture in case of freehold estates an entry was necessary.[30] 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.*[31] In *Lyman v. Suburban R. R. Co.*[32] 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.[33] But where a partition suit was filed before any re-entry or other act of forfeiture occurred the bill was properly dismissed.[34]

§ 245. Of estates less than freehold—The common law method 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,

Trustees, etc., 63 Ill. 204; Chadwick *v.* Parker, 44 Ill. 326, 334.

[29] *Post*, § 278.

[30] Gray's Rule against Perpetuities, § 12; Board of Education *v.* Trustees, etc., 63 Ill. 204, 205; Mott *v.* Danville Seminary, 129 Ill. 403, 415, 416; Hammond *v.* Port Royal, etc., Ry. Co., 15 S. C. 10.

[31] 189 Ill. 400. See also, Hart *v.* Lake, 273 Ill. 60; Golconda Ry. *v.* Gulf Lines R. R., 265 Ill. 194.

[32] 190 Ill. 320, 329.

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

[34] Hart *v.* Lake, 273 Ill. 60. A provision of forfeiture may require notice to be given: Newcomb *v.* Masters, 287 Ill. 26.

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,[35] should be pleaded and proved, to be availing. The tenant, however, had the entire day within which to make payment."[36] A demand for rent the day after it was due would not enable the landlord to forfeit the lease for the non-payment of rent.

Where the forfeiture was not for default in the payment of rent, the mere breach of the condition would, under Coke's statement,[37] *ipso facto* end the lessee's estate. The common law, however, in making the term voidable only at the option of the landlord,[38] 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.[39] 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.[40] There may, however, be a question as to how far a re-entry, or some act

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

[36] 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.

[37] Co. Lit. 214b; 5 Gray's Cases on Prop., 2nd ed. 3; Pennant's Case, 3 Co. 64a; 5 Gray's Cases on Prop., 2nd ed. 13.

[38] *Ante*, § 243.

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

[40] Ballance *v.* Fortier, 3 Gilm. (Ill.) 291; Fortier *v.* Ballance, 5 Gilm. (Ill.) 41; Wall *v.* Goodenough, 16 Ill. 415; Fusselman *v.* Worthington, 14 Ill. 135; McCartney *v.* Hunt, 16 Ill. 76 (*semble*). See *post*, § 251.

In all of the above cases the ground of forfeiture was the disclaimer of the tenant (*ante*, § 233). 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.)

equivalent thereto [41] is necessary where the lease expressly provides for forfeiture by re-entry.

§ 246. Effect of Illinois statutes upon the common law method 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 [42] was very crude. It was hard on both landlord and tenant. It gave the tenant no time if the 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.[43] It has remained among our statutes until the present time, appearing in the revisions of 1845 [44] and 1874 [45] as sec. 4 of the Landlord and Tenant act. It was copied from an act of Geo. II.[46] 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

[41] See *ante*, § 244.

[42] *Ante*, § 245.

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

[44] R. S. 1845, p. 334, § 4.

[45] R. S. 1874, p. 658, § 4.

[46] 2 Geo. II, ch. 19. See Chadwick *v.* Parker, 44 Ill. 326, 332.

the proceedings on such ejectment shall thereupon be discontinued."

§ 247. Sec. 2 of the Act of 1865,[47] appearing also as sec. 9 of the Act of 1873:[48] Sec. 2 of the Act of 1865 contained a 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.[49]

§ 248. Sec. 4 of the Act of 1865.[50] 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.[51] 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[52] of it that its purpose was to simplify the common

[47] Laws 1865, p. 107; *ante*, §§ 234, 237.

[48] Laws 1873, p. 118, 119; R. S. 1874, ch. 80, sec. 9; *ante*, §§ 234, 237.

[49] 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*, § 248.

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

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

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

law mode of declaring a forfeiture which required a demand for rent on the day it is due.[53] 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 day before suit brought, sufficient for the purpose of declaring a forfeiture. It would seem to follow, therefore, so far as this section is concerned[54] 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[55] 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."[56]

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 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

[53] *Ante*, § 245.

[54] 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*, § 250.

[55] *Ante*, §§ 234, 237, 247.

[56] 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*, § 247), there is in fact a very substantial demand for rent though it is not according to the common law requirements.

far as the ten day notice to quit was a demand. Yet our Supreme Court as often said that no such demand was necessary and held that mere notice to quit under the statute was sufficient.

Thus, in *Chadwick v. Parker*[57] 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."[58]

The subsequent case of *Cone v. Woodward*[59] 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 diffieulty 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*.[60] 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.

[57] 44 Ill. 326.

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

[59] 65 Ill. 477. See also Woodward *v.* Cone, 73 Ill. 241, 243.

[60] 70 Ill. 254 (decided one year after Woodward *v.* Cone).

In the comparatively recent case of *Woods v. Soucy*,[61] by way of *dictum* merely, the majority of the court intimated 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.

§ 249. Sec. 8 of the Act of 1873: The text of this section has been given above.[62] 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.[63] 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[64] 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.[65]

§ 250. How far has a forfeiture by a common law demand for rent been abolished by the Acts of 1827, 1865, and 1873:

[61] 166 Ill. 407.

[62] *Ante*, § 238.

[63] 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.

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

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

If the act of 1827[66] deprived the landlord of power to effect a forfeiture by a common law demand for rent on the day it was due, it did so only in the narrow line of cases where the act of 1827 applied.[67] On the other hand if sec. 2 of the act of 1865,[68] 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.[69] 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.

§ 251. For cause other than default in the payment of rent—Sec. 2 of the Act of 1865,[70] appearing afterwards as sec. 9 of the Act of 1873:[71] This section only, of all the three above

[66] *Ante*, § 246.

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

[68] *Ante*, §§ 237, 251.

[69] *Ante*, § 248.

[70] Laws 1865, p. 107; *ante*, §§ 234, 237, 247.

[71] Laws 1873, p. 118, 119; R. S. 1874, ch. 80, sec. 9; *ante*, §§ 234, 237, 247.

mentioned acts of 1827,[72] 1865,[73] and 1873,[74] applied to forfeitures for causes other than the nonpayment of rent. Must one, then, upon the breach of a condition other than default 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.[75] 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.[76] 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.[77] In one of these[78] the Supreme Court said no notice to quit was necessary.[79] In *Medinah Temple Co. v. Currey*[80] 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[81] 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.

[72] *Ante*, § 246.

[73] *Ante*, § 237.

[74] *Ante*, § 238.

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

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

[77] 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*, § 245, note 40.

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

[79] 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?

[80] 162 Ill. 441.

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

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.

§ 252. How demand may be made or notice served: This was provided for in section 3 of the act of 1865[82] and the method there indicated applied of course, only to forfeitures declared under sec. 2 of that act.[83] The landlord and tenant act of 1873[84] 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 forfeiture 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,[85] or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises;[86] and in case no one is in the actual possession of said premises then by posting[87] the same on the premises."[88]

§ 253. Retroactive effect of the Acts of 1827,[89] 1865,[90] and 1873:[91] In *Chapman v. Kirby*[92] 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*[93] 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

[82] Laws of 1865, p. 107, § 3.

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

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

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

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

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

[88] 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."

[89] *Ante*, § 246.

[90] *Ante*, § 237.

[91] *Ante*, § 238.

[92] 49 Ill. 211, 216.

[93] 166 Ill. 407, 416-417.

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 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.[94] 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,[95] 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.[96]

§ 254. Method of perfecting a forfeiture as altered by the agreement of the parties—Provisions for the benefit of the landlord: (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.[97] The first of these difficulties has been overcome by a provision for entry by the landlord without forfeiture.[98] The second might con-

[94] *Ante*, § 239.

[95] 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.

[96] *Ante*, §§ 237, 238.

[97] 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.

[98] 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.

ceivably be obviated by a clause that any surrender shall be in writing signed by the party to be charged.[99]

(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.[1]

§ 255. **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.[2]

TITLE V.

REMEDY IN CASE OF FORFEITURE DULY PERFECTED.

§ 256. **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, forcible entry and detainer may not be available, 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."[3]

§ 257. **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 grantor or landlord physically enter and take possession? To

[99] 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.

[1] Espen *v.* Hinchliffe, 131 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.

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

[3] R. S. 1874, ch. 57, sec. 1, § 4.

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?

§ 258. 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.[4] 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.[5] 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.[6] Perhaps such a result was impossible under the English statutes on forcible entry and de-

[4] 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.

[5] "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.

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

tainer, 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.[7] 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.,"[8] 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."[9] 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.[10]

§ 259. Since 1872: In 1872 our forcible entry and detainer statute was fundamentally changed,[11] being altered to conform pretty closely to the provision of the Massachusetts act of 1836,[12] then in force in that state as chap. 137 of the Gen. Stats. of 1860.[13] Sec. 1 of the Illinois act follows word for word sec. 1

[7] Turner *v.* Meymott, 1 Bing. 158 (*semble*); Taunton *v.* Costar, 7 T. R. 431 (*semble*); Taylor *v.* Cole, 3 T. R. 292 (*semble*).

[8] "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, 508, sec. 47 (chap. 28 of Forcible Entries and Detainers).

[9] 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, 495, sec. 3.

[10] 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.

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

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

[13] See also Pub. Stats. Mass.

of the Massachusetts act.[14] 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.[15] 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[16] the Illinois statute provides in sec. 5 that the complaint shall be made by the party "entitled to possession." Like the Massachusetts acts[17] 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*[18] 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, (the latter having 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 subject him to punishment, and that in addition, in most cases, the person forcibly put out of possession might be put back by legal proceedings

(1882), Ch. 175; Rev. Laws Mass. (1902), Ch. 181.

[14] 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.

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

[16] 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.

[17] 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), Ch. 181, sec. 3.

[18] 170 Mass. 29.

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.[19] 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.[20]

[19] The writer asked the late Harvey B. Hurd, the 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."

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

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.[21] As to this result no distinction was to be drawn between the acts of 1827 and 1872.[22] 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.[23] In one case[24] 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 decision of the court rendered under the statute of 1845 [same as act of 1827] is applicable under the present statute."[25]

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.

[21] *Post*, § 266.

[22] *Id.*

[23] Allen *v.* Tobias, 77 Ill. 169; Doty *v.* Burdick, 83 Ill. 473; Hubner *v.* Feige, 90 Ill. 208; 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.

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

[25] Then the court goes on to cite

§ 260. 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.[26] He had done nothing prohibited by the 1st section of the act of 1872.[27] 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*[28] 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*[29] 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.[30]

the cases decided under the Act of 1827, holding the immediate right to possession no defense in forcible entry and detainer by one forcibly put out. (*Ante*, § 258.)

[26] *Ante*, § 258.

[27] *Ante*, § 259.

[28] 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*, § 261), the whole question really turned upon whether the entry was in fact peaceable or forcible.

[29] 32 Ill. App. 400.

[30] 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 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 en-

§ 261. 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.*[31] 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,*[32] 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,*[33] 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.[34] 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 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 occu-

tirely 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,* §§ 258, 259.) 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 defense and in showing the right to possession the title may become involved. (City of Bloomington *v.* Brophy, 32 Ill. App. 400.)

[31] 115 Ill. 177; *post,* § 269.

[32] 41 Ill. 279; *post,* § 267.

[33] 147 Ill. 335.

[34] *Ante,* §§ 258, 259.

pant was forcible. The judgment for the plaintiff was, however, sustained and the court certainly appears 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*[35] and *Croff v. Ballinger*,[36] where the person in peaceable possession had been dispossessed by one having no right to possession.[37] 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*[38] where the entry was clearly with actual force. Finally, they refer to that *dictum* of *Reeder v. Purdy*,[39] 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*.[40] *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.

§ 262. 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 put him and his goods out, using no more force than was necessary.[41] 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,[42] it being left to the plaintiff to set up in his repli-

[35] 1 Scam. (Ill.) 407.

[36] 18 Ill. 200.

[37] Doty *v.* Burdick, 83 Ill. 473, 478; Hammond *v.* Doty, 184 Ill. 246, to same effect.

[38] 45 Ill. 250.

[39] *Post*, § 268.

[40] *Post*, § 269.

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

[42] 2 Chitty on Pleading (1st ed. 1809), 551-554.

cation any further facts which show a right to possession in him consistent with the defendant's having the freehold.[43] The basis, then, of the plea of *liberum tenementum* is the immediate right to possession of the defendant.[44]

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 is 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.[45]

(2) On the other hand some cases go to an opposite extreme, holding the defences bad in all cases where the entry is made with actual force.[46] 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

[43] "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), 648.

[44] "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, 187.

[45] Low *v.* Elwell, 121 Mass. 309; 1 Ames Cases on Torts, 2nd ed. 146,—and see cases there cited on page 149, note 9. In Low *v.* Elwell, the action was trespass for assault and the defense was valid. *A fortiori,* it would have been valid in trespass *quare clausum fregit.*

[46] Duston *v.* Cowdry, 23 Vt. 631; see cases cited 1 Ames' Cases on Torts (2nd ed.), p. 152, note 2. In Duston *v.* Cowdry, *supra,* the defense 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.

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,[47] and such has always continued to be the law in England.[48] 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.*[49] Such has not only remained the law in England, but in the more recent case of *Beddall v. Maitland*,[50] the defence to a count of trespass *d. b. a.* was denied.

§ 263. 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.[51]

§ 264. Reeder v. Purdy[52]**—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

[47] 4 Am. Law Rev. 431-437.

[48] 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.

[49] 1 M. and G. 644; 1 Ames' Cases on Torts (2nd ed.), 136.

[50] 17 Ch. Div. 174; 1 Ames' Cases on Torts, 143.

[51] 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*, §§ 264, 265 *et seq.*

At the time of these two cases the Forcible Entry and Detainer statute of 1827 (*ante*, § 258) was in force.

[52] 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.

claimed to be the owner with an immediate right to possession. The court instructed[53] 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.[54] Indeed the supreme 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

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

[54] 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 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."

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.[55]

§ 265. Subsequent cases—Fort Dearborn Lodge v. Klein:[56] 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[57] 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,[58] or in trespass *quare clausum fregit* alone.[59] 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.[60]

Fort Dearborn Lodge v. Klein and the cases following it[61] have only made this more clear. In none of them is it suggested 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*[62] have justified so far as the action of trespass *quare clausum fregit* is

[55] 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 defense: Chapman *v.* Cawrey, 50 Ill. 512; Illinois & St. L. R. R. Co. *v.* Cobb, 82 Ill. 183, 94 Ill. 55.

[56] 115 Ill. 177.

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

[58] 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.*).

[59] 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.

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

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

[62] 164 Ill. 259.

concerned,[63] 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.[64] 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."[65]

§ 266. The ground of the rule laid down in Reeder v. Purdy: "The statute of forcible entry and detainer [of 1827]"[66] 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.[67] 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 forcible entry and detainer statute of 1872,[68] 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 offense.[69] This was sustained on the ground that the creation by statute

[63] 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*, § 270).

[64] 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.

[65] 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.

[66] *Ante*, § 258.

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

[68] *Ante*, § 259.

[69] *Ante*, § 262.

of a public offense 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.[70] The inconsisteney of the English cases is that they did not do this, but, in *Newton v. Harland*[71] held that, in trespass for assault and battery the defence of right to possession was not good. Our Supreme Court, with more consisteney, it is believed, has continued down to the present 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.*

§ 267. 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.[72] This is certainly the view taken by our Supreme Court

[70] This is the position which the Massachusetts Court has taken. *Ante*, § 262.

[71] 1 M. & G., 644, 1 Scott N. R. 474; 1 Ames Case on Torts, 136.

[72] *Post*, § 453, note 5.

in *Fort Dearborn Lodge v. Klein*.[73] "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 effected 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."[74]

§ 268. The vice of Reeder v. Purdy:[75] The vice, if any, of *Reeder v. Purdy* was the impression which it left that a forcible 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."

[73] 115 Ill. 177, 185-187; *ante*, § 261.

[74] 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.

[75] 41 Ill. 279; *ante*, § 264.

Observe that since the entry in *Reeder v. Purdy* was indisputably with actual force and the instructions were sustained upon that assumption,[76] 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*[77] 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[78] itself appears to have approached very close to such a rule.

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[79] 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 stat-

[76] *Ante*, § 264.

[77] 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).

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

[79] Atkinson *v.* Lester, 1 Scam. (Ill.) 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.

ute. 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,[80] 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 dispossessed to bring his action. In *Atkinson v. Lester* [81] this was stated pretty directly. In *Croff v. Ballinger* [82] 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. 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.

§ 269. 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: [83] "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.

[80] 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.

[81] 1 Scam. (Ill.) 407.

[82] 18 Ill. 200.

[83] 115 Ill. 177, 191.

The word 'force' as here used, means actual force, as contra-distinguished 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."

§ 270. 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*[84] Mr. Chief Justice Walker said: 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[85] that "if an entry be made peaceably, 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."

§ 271. View of the appellate court in the first district—Before the Klein case:[86] The first case[87] 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

[84] 40 Ill. 506, 510.

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

[86] 115 Ill. 177; *ante*, §§ 265, 269.

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

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.[88]

§ 272. Since the Klein case[89]—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,[90]—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.[91]

In five[92] of the nine cases[93] containing actual decisions or *dicta* to this effect the opinion of the court was given by Judge 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[94] 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.[95] 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.[96] In all of these cases

[88] *Ante,* §§ 264-266.

[89] 115 Ill. 177; *ante,* §§ 265, 269.

[90] *Ante,* § 262.

[91] 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.

[92] 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.

[93] The cases, *supra,* note 92, 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.).

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

[95] In Brooke *v.* O'Boyle, *supra,* 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.

[96] 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*

such an instruction was held improper. In *White v. Naerup* [97] 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 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* [98] Judge Gary says: "The heresy introduced into the law of this state in 1886 [99] 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* [1] 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

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."

[97] 57 Ill. App. 114.

[98] 27 Ill. App. 384, 386.

[99] 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.

[1] 43 Ill. App. 442.

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 * * *."[2] In *Frazier v. Caruthers,*[3] Judge Gary says: "Whenever there is an abuse of the right of entry by excessive force (and for that purpose all force is excessive) [4] 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,[5] where it is said 'no case has been referred to, and it is believed none exists which holds 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* [6] 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."

§ 273. **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.[7] In *Chicago & W. I. R. R. Co. v. Slee,*[8] 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

[2] 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,* § 262.

[3] 44 Ill. App. 61, 67.

[4] This may well be doubted, see *ante,* §§ 267-269.

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

[6] 57 Ill. App. 114, 118.

[7] *Ante,* § 272.

[8] 33 Ill. App. 416.

peaceable. In *Eichengreen v. Appel*,[9] 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."[10] In *Mueller v. Kuhn*[11] 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."

§ 274. 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 distinguished from an entry with actual force and violence,[12] 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[13] 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.

§ 275. 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* is not clear. 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*[14] the learned judge says: "No trespass is committed in taking posses-

[9] 44 Ill. App. 19, 20.

[10] See also the remarks of the same learned judge in Mead *v.* Pollock, 99 Ill. 151, 154.

[11] 46 Ill. App. 496.

[12] *Ante*, §§ 261, 267-269.

[13] *Ante*, § 265.

[14] 44 Ill. App. 469, 470.

sion 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*[15] 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.

§ 276. **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,[16] it remains to be inquired how far a plea of leave and license may be a good defence to an entry with actual force.[17]

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

[15] 46 Ill. App. 496.

[16] *Ante*, §§ 264-266.

[17] 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*, § 270), 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.

can a plea of leave and license to a forcible entry be supported?[18] It was very pertinently suggested by Judge Gary in *Frazier v. Caruthers*,[19] that if the forcible entry and detainer statute prohibits 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[20] than that such a defence is valid, and that, too, quite regardless of whether the plaintiff counts in trespass for assault and battery,[21] *de bonis asportatis*[22] or *quare clausum fregit*.[23]

The logical difficulty with this result is recognized in a curious way in *French v. Willer*.[24] 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 of-

[18] 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*, § 262) a plea of leave and license is unnecessary. *A fortiori*, it is sufficient.

[19] 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*, §§ 264-266) doctrine such a plea was no defense to the entry by the defendant and could only go in mitigation of damages.

[20] 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.

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

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

[23] Page *v.* De Puy, 40 Ill. 506; Fabri *v.* Bryan, 80 Ill. 182; Mueller *v.* Kuhn, 46 Ill. App. 496.

[24] 126 Ill. 611.

fense 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*[25] 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.[26] So long, however, as 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?

§ 277. **How far equity will enforce a forfeiture**: Where no forfeiture has been perfected by entry or ejectment, a proceeding in equity cannot itself be used as an act of forfeiture.[27]

[25] 1 M. & G. 644; 1 Scott, N. R. 474; *ante*, § 262.

[26] *Cf.* Kavanagh *v.* Gudge, 7 M. & G. 316. There is, however, a *dictum* in Edwick *v.* Hawkes, 18 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.

[27] Hart *v.* Lake, 273 Ill. 60; Golconda Ry. *v.* Gulf Lines R. R., 265 Ill. 194 (*semble*); Mott *v.* Danville Seminary, 129 Ill. 403, 416 (*semble*); Warner *v.* Bennett, 31 Conn. 468, 478; Donnelly *v.* Eastes, 94 Wis. 390.

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.[28] 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.[29] 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,[30] 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 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*[31] 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.

TITLE VI.

RELIEF AGAINST FORFEITURE.

§ 278. At law—Several methods 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[32]—by requiring some further act on the part of the grantor or lessor to complete the forfeiture, as an entry in the

[28] 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.

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

[30] *Post*, § 282.

[31] 99 Ill. App. 22.

[32] *Ante*, § 243.

case of the forfeiture of a freehold estate,[33] or an election in the case of the forfeiture of a term for years[34]—and, in the case of a forfeiture for the nonpayment of rent, a very particular sort of a demand for rent.[35]

§ 279. **License:**[36] 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,"[37] or to a single specified person.[38] From the language of our supreme court in *Kew v. Trainor*[39] there must be a doubt whether it would recognize *Dumpor's* case at all as law.[40] 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 consent 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.[41] 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?

§ 280. **Waiver:**[42] Of course there is no question about the validity of any express release of the right to declare or complete a forfeiture.[43] The common law, however, in its endeavor

[33] *Ante*, § 244.

[34] *Ante*, § 245.

[35] *Ante*, § 245. Observe also that the tendency was to construe provisions as covenants rather than conditions: Gallaher *v.* Herbert, 117 Ill. 160.

[36] *Post*, § 280, note 43.

[37] Dumpor's Case (1603), 4 Co. 119b; 5 Gray's Cases on Prop., 2nd ed. 16.

[38] Brummell *v.* Macpherson (1807), 14 Ves. 173; 5 Gray's Cases on Prop., 2nd ed. 20.

[39] 150 Ill. 150, 157.

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

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

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

[43] The common case of this is where the landlord gives a license

to soften the hardships of forfeiture went farther than this. Both at law and in equity our Supreme Court has assumed that the holder of a right of entry upon a fee for breach of condition may, by his acts, waive the breach of the condition.[44] It has been said 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."[45] 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. 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.[46] In the same way other acts, which recognize the

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).

[44] Sherman *v.* Town of Jefferson, 274 Ill. 294; Sanitary Dist. *v.* Chicago Title & Trust Co., 278 Ill. 529.

[45] 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.

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

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

existence of a tenancy, amount to a waiver. 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.[47] So, it was recently intimated,[48] 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*[49] 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 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.[50]

wrong. The case may have been decided correctly upon another cause of forfeiture which was not waived.

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

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

[49] 150 Ill. 150; *ante*, § 279.

[50] Davenport *v.* The Queen, 3 App. Cas. 115; 5 Gray's Cases on Prop., 2nd ed. 36; Croft *v.* Lumley, 6 H. L. C. 672.

§ 281. **Estoppel**: *Hawes v. Favor*,[51] 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 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.[52]

§ 282. **In equity**: The principle applied by courts of equity is that where the only damage suffered by the party declaring the forfeiture could be fully compensated for in money, equity would relieve against the forfeiture as a matter of course. Thus the

[51] 161 Ill. 440.

[52] Impossibility in the performance of the condition arising after the condition was created is no excuse: Sherman *v.* Town of Jefferson, 274 Ill. 294; *post*, §§ 749-750.

jurisdiction of equity has been asserted to relieve against forfeiture for nonpayment of rent,[54] for nonpayment of taxes and assessments,[55] and for the breach of a condition in not laying out a specific sum in repairs.[56] Beyond this it is doubtful how far equity will go. It has been held that equity will not relieve against a forfeiture founded on the breach of a covenant not to assign or sublet,[57] or to insure.[58]

There seems, however, not to have been much resort in this state to equity by tenants to obtain relief against forfeitures already declared,[59] even for nonpayment of rent.[60] In *Palmer v. Ford*[61] 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 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 de-

[54] Abrams *v.* Watson, 59 Ala. 524; Little Rock Granite Co. *v.* Shall, 59 Ark. 405; Wilson *v.* Jones & Tapp, 64 Ky. (1 Bush) 173; Lilley *v.* Fifty Associates, 101 Mass. 432; Sunday Lake Mining Co. *v.* Wakefield, 72 Wis. 204; Merrill *v.* Trimmer, 2 Pa. Co. Ct. Rep. 49.

[55] Giles *v.* Austin, 62 N. Y. 486.

[56] Sanders *v.* Pope, 12 Ves. 282. But this was doubted by Lord Eldon in Hill *v.* Barclay, 16 Ves. 401, and 18 Ves. 56, where it was held that equity would not relieve against a forfeiture occurring because of the breach of a condition to keep premises in repair.

[57] Wafer *v.* Mocato, 9 Modern, 112; Davies *v.* Moreton, 2 Ch. Cas. 127; Lovat *v.* Lord Ranelagh, 3 Ves. & B. 24, 31.

[58] Rolfe *v.* Harris, 2 Price, 206; Reynolds *v.* Pitt, 19 Ves. 134; White *v.* Warner, 2 Meriv. 459; Green *v.* Bridges, 4 Sim. 96. Where, however, the failure to insure was due to accident or mistake, and no actual damage had occurred to the lessor, relief was given in equity: Mactier *v.* Osborne, 146 Mass. 399.

[59] 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.

[60] 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.

[61] 70 Ill. 369.

clared 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.

In *Sanitary District v. Chicago Title & Trust Co.*,[62] our Supreme Court said: "Equity will sometimes relieve against the consequences of a breach of condition and save from forfeiture an estate which has vested and is in danger of being defeated by a failure to perform a condition subsequent, when the breach was not willful, the injury can be adequately compensated by damages and there is a certain rule by which to measure the damages."

In *Springfield and Northwestern Traction Co. v. Warrick*,[63] the court held that equity would relieve from forfeiture a railway which did not comply with a condition that it finish its line in two years, when it in fact finished the line four months after that time. The complainants, however, were required to offer and to do equity by the payment of damages which the breach caused, and the defendant was entitled to such damages without the necessity of filing a cross bill.

TITLE VII.

RIGHT OF ENTRY FOR CONDITION BROKEN DISTINGUISHED FROM A POSSIBILITY OF REVERTER—RIGHTS OF THE DEDICATOR AND ABUTTING OWNER ON A STATUTORY DEDICATION.

§ 283. Distinction between a right of entry for condition broken and a possibility of reverter: "The distinction," according to Professor Gray in his Rule against Perpetuities,[64] is this: "after the statute [of *quia emptores*], a feoffer, 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 essen-

[62] 278 Ill. 529, 543.
[63] 249 Ill. 470.
[64] § 245.

tially a reversionary interest,[65]—a returning of the land to the lord of whom it was held, because the tenant's estate had determined."

§ 284. 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.[66] 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.[67] 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[68] 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. Whichever way you take it a court would seem to be pretty free to choose what sort of interest the dedicator shall be

[65] The question, therefore, of the validity of such interests in Illinois is considered in connection with reversions, *post*, §§ 300-302.

[66] 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.

[67] 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*).

[68] 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.

held to possess. Possibilities of reverter, however, as will hereafter be indicated,[69] 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.[70] 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.

§ 285. 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,[71] 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.[72] 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.[73] If, on the other hand, the right of the dedicator was to enter for condition broken, neither he nor his heirs could convey until the forfeiture had been perfected by entry or some equivalent act.[74]

It is worth observing somewhat in detail that the point was raised in just this way in *Ruch v. Rock Island*.[75] There it

[69] *Post*, §§ 300-302.

[70] *Ante*, § 216.

[71] 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.

[72] *Ante*, § 244.

[73] *Post*, §§ 300-302.

[74] *Ante*, § 244.

[75] 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,[76] 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."

§ 286. How does it arise? 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*,[77] and, if it can, it should be objectionable on the ground of remoteness.[78] If it is a right of entry for condition broken, it may be valid apart from the question of remoteness,[79] especially if created by the statute. In either case, where is the expressed intent of the dedicator

[76] 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.

[77] *Post*, §§ 300-302.

[78] Gray's Rule against Perpetuities, § 312; but see *post*, § 662.

[79] But see *post*, § 662.

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 indicate that the interest of the dedicator arises by force of the dedication statute alone.

§ 287. **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 center of the way is held, by the proper construction of the deed to be transferred.[80] 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*[81] 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.[82] Perhaps this difficulty was really in the mind of the court in *Gebhardt v. Reeves.*[83] There it was clearly intimated that where upon a

[80] *Post*, § 292; Hamilton *v.* Chicago, B. & Q. R. R. Co., 124 Ill. 235; Henderson *v.* Hatterman, 146 Ill. 555, 564.

[81] 72 Ill. 334, 336.

[82] *Ante*, § 240; *post*, § 300.

[83] 75 Ill. 301, 306-307: "Until the municipality shall elect to abandon the use of the streets and alleys, 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

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*[84] 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 plaintiff to the abutting owners who purchased lots from him?

§ 288. The acts of 1851,[85] 1865,[86] and 1874:[87] 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 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,

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."

[84] 85 Ill. 116.

[85] 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.

[86] 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.

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

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.*"

§ 289. 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.[88] In their narrower meaning the acts of 1865 and 1874

[88] Presumably the statute authorizes the city to convey to the

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.

§ 290. 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.*[89] There the dedication[90] 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 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

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.

[89] 75 Ill. 301.

[90] 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.

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."[91]

Helm v. Webster[92] seems to have applied the same doctrine to the act of 1874.[93] 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 that effect, would be in violation of the constitution, as well as unjust."

§ 291. 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

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

[92] 85 Ill. 116.

[93] 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.

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.[94] 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.

§ 292. 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 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

[94] 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 Harv. Law Rev. 125.

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 a 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 center is in the transferor, will pass the fee to the center 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 center of strips of land indicated as intended streets.[95] 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 carried to the center of it, unless such words are used and such meets and bounds are set forth as show a contrary intention."[96] In support of this position the two Pennsylvania cases of *Paul v. Carver*,[97] and *Cox v. Freedley*,[98] 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

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

[96] Henderson *v.* Hatterman, 146 Ill. 555, 564. See also Gould *v.* Howe, 131 Ill. 490, where upon 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."

[97] 26 Pa. 223.

[98] 33 Pa. 124.

center 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*,[99] "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." [1]

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 [2] 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 [3] there was no way in which the remnant of title left in the dedicator could pass upon the conveyance of lots abutting on the street. The general assembly, therefore, stepped in to correct this by such legislation as has been above set out.[4] 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,[5] must fail as statutory dedications, has sub-

[99] 75 Ill. 301.

[1] See also Paul *v.* Carver, 26 Pa. 223.

[2] *Ante*, §§ 284-286.

[3] *Ante*, §§ 240, 300.

[4] *Ante*, § 288.

[5] 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

stantially conceded that the result of *Gebhardt v. Reeves*[6] 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.[7] 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,[8] and (2) that the absence of a corner stone did not 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,[9] 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.[10] Then *Gebhardt v. Reeves* was in terms overruled so far as it held that the plat need not be

such dedications were by special act of the legislature. (See *post* § 298, 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.

[6] 75 Ill. 301.

[7] *Supra*, notes 95-98.

[8] 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.

[9] 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.

[10] 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.

made and certified by the county surveyor.[11] 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[12] because the statute required acknowledgement before a justice of the supreme court, a justice of the circuit court or a justice of the peace.[13] It has also been declared to be the law that there can be no statutory dedication without the acceptance of the municipality.[14] 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.[15]

All this may not be sufficient to charge the court with having consciously adopted a technical and literal construction of the

[11] 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.

[12] 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.

[13] 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).

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

[15] 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.

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.

§ 293. **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 [16] and 1874 [17] or indirectly by conveyance by the municipality as under the act of 1851,[18] 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* [19] 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* [20] where the dedication had been made prior to 1851, but in *Gebhardt v. Reeves,* where the court recognize that the dedication was made

[16] *Ante,* § 288.

[17] *Ante,* § 288.

[18] *Ante,* § 288.

[19] 75 Ill. 301, 308: "The proposition relied on," the Court says, "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."

[20] 72 Ill. 334.

after the law of 1851 went into force,[21] such language is unintelligible.[22] 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 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,[23] 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 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.[24]

[21] *Ante*, § 290, note 90.

[22] 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.

[23] *Post*, §§ 402 *et seq.*

[24] Our Supreme Court has held also (*ante*, § 237) 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.

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.[25] 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 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,[26] 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.[27]

§ 294. 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

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 these 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.

[25] *Ante*, § 286.

[26] *Ante*, § 240; *post*, §§ 300, 302.

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

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?

§ 295. **Upon their wider meaning:** In their broader meaning it is clear that none of these acts in favor of the abutting owner [28] 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.*[29] The subsequent positive citation [30] of this case for the point that, where the dedication was made by a private individual *after* the act of 1851 went into effect, that act, if effective to aid the abutting owner, would be unconstitutional, is clearly erroneous.

It would seem, also, that a vacation by private act could not, under the law of 1865, have any 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 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.*[31] 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

[28] *Ante*, § 288.

[29] 72 Ill. 334.

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

[31] 94 Ill. 26, 34.

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*,[32] 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[33] 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 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[34] 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.

§ 296. 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[35] 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

[32] 85 Ill. 116.

[33] The Court speaks only of the Act of 1865, but, as has been explained *ante*, § 290, note 93, there are excellent grounds for believing that the reference was actually to the Act of 1874, which was modelled after the Act of 1865.

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

[35] *Ante*, § 288.

ease 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.[36]

§ 297. Power of canal commissioners and canal trustees to dedicate streets: By an act of Congress of March 2, 1827[37] 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,[38] passed to facilitate the construction of the canal, canal commissioners were appointed. From that time on until the canal trustees were appointed under an act of 1843[39] 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[40] 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[41] 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.[42] 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[43] and executed a release deed. From that time the canal and its property has been administered by canal commissioners under

[36] See People *v.* C. & N. W. Ry., 239 Ill. 42.

[37] 4 Stats. at Large, 234; Hurd's R. S. (1903) p. 90.

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

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

[40] 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).

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

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

[43] Laws 1871, p. 215.

an act of March 7, 1872[44] 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[45] gave the commissioners power to lay off town lots. An amendatory act of 1831[46] gave them power to subdivide tracts into lots. Under these two acts the original towns of Chicago[47] and Ottawa were laid out.[48] Sec. 34 of an act of 1835[49] and Sec. 32 of an act of 1836[50] 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[51] 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[52] 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.

[44] Laws 1871, p. 213.

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

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

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

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

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

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

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

[52] 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.

8 of the act of 1843,[53] 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.[54]

That these powers to subdivide and lay out towns and town lots necessarily included the power to dedicate streets, is hardly open to question.[55]

§ 298. 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.[56]

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.[57] 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.

§ 299. Upon the vacation of a canal subdivision the fee in the street should go to the abutting owners: If, while the act

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

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

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

[56] 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; R. I. & P. Ry. Co. *v.* Johnson, 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.)

[57] *Ante*, § 297.

of 1857 [58] 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.*[59] If it was made after 1851 they take it under the rule of *Gebhardt v. Reeves.*[60] Suppose under these circumstances that the trusts of the canal trustees terminated without the trustees having disposed of the fee for the benefit of the bondholders, could the abutting owners claim under the act of 1851? Could the abutting owners after the act of 1874,[61] 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.[62] 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 [63] the same considerations will control the result.

If the vacation be made since the act of 1874 [64] 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 commsisioners 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* [65] it is hinted that such a result is not impossible.

[58] *Ante*, § 288.
[59] 72 Ill. 334; *ante*, § 295.
[60] 75 Ill. 301; *ante*, § 290.
[61] *Ante*, § 288.
[62] *Ante*, § 297.
[63] *Ante*, § 288.
[64] *Ante*, § 288.
[65] 117 Ill. 411, 418.

CHAPTER XIV.

POSSIBILITIES OF REVERTER.

§ 300. 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.[1] 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."[2]

§ 301. 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.[3] It seems clear, however, that the determinable fee here

[1] § 299.

[2] The inalienability of a possibility of a 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. See also City of Berwyn *v.* Berglund, 255 Ill. 498, 503.

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.

[3] 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; Williams *v.* Elliott, 246 Ill. 548, 552; Morton *v.* Babb, 251 Ill. 488; Askins *v.* Merritt, 254 Ill. 92, 95; Defrees *v.* Brydon, 275 Ill. 530, 546; Aloe *v.* Lowe, 278 Ill. 233, 238. See also "Determinable Fees," by John

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,[4] "is one subject to a special limitation; 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.[5] 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 of *Quia Emptores*.[6] Conditional limitations were not good at common law; they were first introduced by the Statutes of Uses and Wills."[7]

§ 302. 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.[8] 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*,[9] 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 the fee simple. The court called the interest of the donor a possibility of reverter, and, after remarking that, upon the breach of

Maxey Zane, 17 Harv. Law Rev. 297.

[4] Rule against Perpetuities, § 32.

[5] See Wiggins Ferry Co. *v.* O. & M. Ry. Co., 94 Ill. 83, 93, 94.

[6] See *post*, § 302.

[7] *Post*, §§ 452, 467.

[8] Life Assn. *v.* Fassett, 102 Ill. 315, 323, *semble;* Mott *v.* Danville Seminary, 129 Ill. 403; Presbyterian Church *v.* Venable, 159 Ill. 215. See also Miller *v.* Riddle, 227 Ill. 53 (personalty involved); North *v.* Graham, 235 Ill. 178 (express reverter clause and ejectment brought); Dees *v.* Cheuvronts, 240 Ill. 486 (land for school site and when it ceases to be so used, to grantor). But there is no reverter where the lands are purchased with the funds of the corporation as distinguished from a gift by the owner of the land to the corporation: People *v.* Braucher, 258 Ill. 604. Property conveyed to a church does not revert when the land ceased to be used as a church: King *v.* Lee, 282 Ill. 530.

[9] 129 Ill. 403.

a condition subsequent, an entry was necessary to re-vest title in the original grantor,[10] 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.*"[11]

For authority in support of this view our Supreme Court relies upon the *dictum* of an earlier case[12] and a number of text writers[13] whose statements are all founded on the language of Coke,[14] 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,[15] 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,[16] 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,[17] is entirely agreed with Professor Gray that, upon the dissolution of a corporation, its land escheats, and that Coke's view was erroneous.

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

[10] *Ante*, § 244.

[11] 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*, §§ 284, 285.

As to the nature of the interest of the mortgagor where the mortgage debt is barred by the statute of limitations, see *ante*, §§ 229-232.

[12] Life Association *v.* Fassett, 102 Ill. 315, 323.

[13] 1 Bl. Com. 484; 2 Kent Com. 307; Angel & Ames on Corps., sec. 195 (10th ed.); 2 Morawetz on Corps., sec. 1031.

[14] Co. Lit. 13b; 4 Gray's Cases on Prop., 2nd ed. 2.

[15] §§ 260-267.

[16] Vol. 2, p. 394.

[17] This question gave rise to a further discussion upon this point by Professor Gray and Mr. Challis: 3 Law Quart. Rev. 399, 403.

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. 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 XV.

REVERSIONS AND REMAINDERS.

TITLE I.

REVERSIONS.

§ 303. Examples of reversions: The simplest instance of a reversion occurs where a life estate and nothing more is conveyed.[1] This is an indefeasible reversion.[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] Here the reversion is defeasible.[4]

§ 304. Reversions are not destructible by any rule of law defeating intent and are alienable: Reversions, whether defeasible or indefeasible, are vested. They stand ready throughout their continuance to take effect in possession whenever and however the freehold in possession determines. They are, therefore, indestructible by any termination of the preceding estate. They are alienable by quit claim deed,[5] or by will,[6] or by execu-

[1] Allen *v.* McFarland, 150 Ill. 455; Sutton *v.* Read, 176 Ill. 69; Rose *v.* Hale, 185 Ill. 378; Lewis *v.* Harrower, 197 Ill. 315; Brown *v.* Brown, 247 Ill. 528; Brown *v.* Kamerer, 276 Ill. 69. In Brown *v.* Brown, *supra*, the reversion arose in a peculiar way. There was a conveyance to A in fee with the further creation of life estates to arise when B reached eighteen. When the life estate arose A had a reversion. See 6 Ill. Law. Rev. 269.

[2] *Ante*, § 90.

[3] Bates *v.* Gillett, 132 Ill. 287, 295; Lewis *v.* Pleasants, 143 Ill. 271; 274; Dinwiddie *v.* Self, 145 Ill. 290, 300 (*semble*); Madison *v.* Larmon, 170 Ill. 65, 80; Harrison *v.* Weatherby, 180 Ill. 418; Peterson *v.* Jackson, 196 Ill. 40; Collins *v.* Sanitary Dist., 270 Ill. 108; Kamerer *v.* Kamerer, 281 Ill. 587. 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] *Ante*, § 91. Observe that in Frazer *v.* Board of Supervisors, 74 Ill. 282, 290, the court speaks of the reversion in that case as a "contingent reversion."

[5] Peterson *v.* Jackson, 196 Ill. 40 (reversion defeasible by the vesting of a contingent remainder).

[6] Biggerstaff *v.* Van Pelt, 207 Ill. 611.

tion sale.[7] Their alienability for the purpose of effecting a merger of a life estate has frequently been upheld.[8] Attornment by the tenant is no longer necessary in Illinois.[9]

§ 305. 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?[10] The first view seems to be the one adopted in *Hobbie v. Ogden*[11] and *Akers v. Clark*.[12]

§ 306. Whether after the creation by devise of a freehold followed by contingent interests a residuary gift results in the creation of a reversion or a remainder: *Egerton v. Massey*[13] held that the residuary devise resulted in the creation of a reversion. The contingent interests after the freehold were, therefore, contingent remainders which were destroyed by the premature termination of the life estate by merger in the reversion. The same view has been adopted by our Supreme Court in two recent cases.[14] The difficulties in sustaining such a position have already been pointed out.[15] They were not considered by the court.

TITLE II.

THE CREATION OF REMAINDERS.

§ 307. Several points which have been passed upon:[16] The first inquiry concerning the creation of remainders may well be: By what form of conveyance may they be created today in Illinois? Since the law of remainders goes back to the feudal period

[7] Hempstead *v.* Dickson, 20 Ill. 193; Kamerer *v.* Kamerer, 281 Ill. 587 (reversions defeasible by the vesting of contingent remainder); Dinsmoor *v.* Rowse, 200 Ill. 555.

[8] *Post*, § 311.

[9] *Post*, § 379.

[10] *Ante*, § 170 *et seq.*

[11] 178 Ill. 357; *ante*, § 176.

[12] 184 Ill. 136; *ante*, § 176.

For another problem of the same sort see Pinkney *v.* Weaver, 216 Ill. 185.

[13] C. B. N. S. 338 (1857); Kales' Cases on Future Interests, 111.

[14] Benson *v.* Tanner, 276 Ill. 594; Kamerer *v.* Kamerer, 281 Ill. 587.

[15] *Ante*, § 95.

[16] In Riekner *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.

of English history, remainders must originally have been created by feoffment or some other purely common law mode of conveyance. Today, however, our conveyances in this state operate under the Statutes of Uses [17] and Wills, and under such modern conveyancing acts as those of 1827 [18] and 1872.[19] These modern forms are as effective as feoffment to create future interests by way of remainder.[20]

The rule that a fee cannot be limited upon a fee by way of remainder [21] is correct as far as it goes. A *remainder* was the future interest after a particular estate of freehold created by acts of the parties which the feudal land law allowed. It was permitted by that law only if it stood ready throughout its continuance to take effect in possession whenever and however the preceding estate determined, or became so prior to the termination of the preceding estate of freehold.[22] A shifting future interest cutting short a prior interest was not permitted by the feudal land law.[23] To say, then, that there cannot be a fee mounted on a fee by way of *remainder*, is to say that the second fee cannot be a remainder because it does not fall within the feudal definition of a remainder and because the feudal land law did not permit shifting future interests at all. To say, therefore, that a fee cannot be limited after a fee by way of remainder does not at all mean that you cannot have a fee mounted upon a fee by way of executory devise or shifting use.[24]

[17] *Post*, § 456.

[18] *Post*, §§ 457, 458.

[19] *Id.*

[20] In the following cases the remainder was created by a conveyance to uses raised on transmutation of possession: O'Melia *v.* Mullarky, 124 Ill. 506; Roth *v.* Michalis, 125 Ill. 325; Barclay *v.* Platt, 170 Ill. 384.

In Freeman *v.* Freeman, 274 Ill. 228, the mere recital in an antenuptial contract of what was to be done for the wife's children was not sufficient to create a remainder.

[21] 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." Seigwald *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.

[22] *Ante*, §§ 28, 77, 85, 97.

[23] *Ante*, § 26.

[24] *Ante*, §§ 72, 85; *post*, §§ 443 *et seq.*, 467.

It has often been correctly said that two contingent remainders in fee, one to take effect if the other does not, can be properly limited.[25]

It does not seem probable that our Supreme Court, in *Kingman v. Harmon*,[26] meant so far to overturn the common law definition of remainders,[27] 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.[28]

The general rule of the common law that the feoffor could limit no estate to himself[29] 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,[30] that one may now convey a fee simple reserving to himself a life estate.[31] Why, then, may he not limit a life estate by deed to third party with a remainder in fee to himself?

TITLE III.

REMAINDERS WHICH AS CREATED ARE CERTAIN TO TAKE EFFECT BECAUSE THEY ARE NOT LIMITED IN DURATION OR DEFEASIBLE ON ANY EVENT EXPRESSED, AND WHICH STAND READY TO TAKE EFFECT IN POSSESSION WHENEVER AND HOWEVER THE PRECEDING PARTICULAR ESTATE OF FREEHOLD DETERMINES[32] — COMMONLY CALLED VESTED REMAINDERS.[33]

§ 308. Examples of such remainders—They are valid, indestructible and alienable: In Illinois as elsewhere the plainest

[25] City of Peoria *v.* Darst, 101 Ill. 609; McCampbell *v.* Mason, 151 Ill. 500; Furnish *v.* Rogers, 154 Ill. 569. *Cf.* Boatman *v.* Boatman, 198 Ill. 414 and Chapin *v.* Nott, 203 Ill. 341; *post*, §§ 365, 366. Also Ruddell *v.* Wren, 208 Ill. 508; *post*, § 367. Also Butterfield *v.* Sawyer, 187 Ill. 598.

[26] 131 Ill. 171.

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

[28] *Post*, §§ 467 *et seq.*

[29] *Post*, § 463; Callard *v.* Callard, Moore, 687; 1 Gray's Cases on Prop., 2nd ed. 386.

[30] *Post*, § 456.

[31] *Post*, §§ 463-466.

[32] *Ante*, §§ 25, 29.

[33] In Brown *v.* Brown, 247 Ill. 528, 532, Mr. Justice Cartwright adopts this definition of a vested remainder. In Carter v. Carter, 234 Ill. 507, 511, Mr. Justice Dunn puts very clearly the common law distinction between vested and contingent remainders. See also Lachenmyer *v.* Gehlbach, 266 Ill. 11, 19; Smith *v.* Chester,

case of such a remainder is where the limitations are to *A* for life, remainder to *B* and his heirs with no gift over.[34] In the case of a remainder to a class—as to *A* for life, remainder to the children of *A*—the remainder vests as soon as any child is born.[35] True, the remainder is said to be vested subject to open and let in other members of the class so that the share of each remainderman may be divested in part. To this extent the remainder is not indefeasible, yet the remainder to the class as a whole is not subject to be divested by any express gift over. For that reason the remainder to a class without any further gift over has been classified here with remainders which are vested and indefeasible. The validity and indestructibility of vested and indefeasible remainders are unquestioned.[36] These attributes have come down to our law from the feudal land law.[37] Such remainders are transferable by any mode of conveyance by operation of law or by act of the parties appropriate for the passing of title to real estate.[38] Attornment by the tenant in possession is no longer necessary to the validity of the conveyance.[39]

272 Ill. 428, 437; Northern Trust Co. *v.* Wheaton, 249 Ill. 606, 612.

[34] Brown *v.* Brown, 247 Ill. 528; Drake *v.* Steele, 242 Ill. 301; Deadman *v.* Yantis, 230 Ill. 243; Marvin *v.* Ledwith, 111 Ill. 144; Knight *v.* Pottgeiser, 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; O'Melia *v.* Mullarky, 124 Ill. 506, 509; Barclay *v.* Platt, 170 Ill. 384.

[35] Carter *v.* Carter, 234 Ill. 507; Thomas *v.* Thomas, 247 Ill. 543. Observe, however, Meldahl *v.* Wallace, 270 Ill. 220; also *post*, § 353.

[36] Hull *v.* Hull, 286 Ill. 75.

[37] *Ante*, § 25.

[38] They are 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*.

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

They pass by guardian's deed. If the remainder is to a class subject to open and let in others, the guardian's deed will pass the interest of those *in esse* when the sale occurs: Moore *v.* Reddel, 259 Ill. 36; Hill *v.* Hill, 264 Ill. 219 (first opinion of the court holding the remainder vested, not published). But it does not pass the interests of afterborn members of the class: Hill *v.* Hill, *supra* (unpublished opinion).

[39] *Post*, § 379.

TITLE IV.

REMAINDERS LIMITED TO TAKE EFFECT UPON AN EVENT EXPRESSED AS A CONDITION PRECEDENT IN FORM, WHICH MAY HAPPEN BEFORE OR AFTER OR AT THE TIME OF OR AFTER THE TERMINATION (WHENEVER OR IN WHATEVER MANNER) OF THE PRECEDING PARTICULAR ESTATE OF FREEHOLD—COMMONLY CALLED CONTINGENT REMAINDERS.

§ 309. Examples of contingent remainders: A remainder to an unborn person is necessarily limited on an event which may happen before or after, or at or after, the termination of the particular estate. It is a contingent remainder,[40] destructible and in the nature of things inalienable. The remainder to the "heirs" of a living person is a contingent remainder and inalienable *inter vivos* and destroyed by the termination of the life estate before the death of the ancestor whose heirs are to take in remainder.[41] This was in fact the case, decided about 1430, where the contingent remainder was for the first time recognized and given a sort of conditional validity.[42] A remainder to the "heirs of the body" of the life tenant (the rule in *Shelley's* case not applying) is a contingent remainder, destructible [43] and inalienable, especially by execution sale,[44] and

[40] McCampbell *v.* Mason, 151 Ill. 500; Pinkney *v.* Weaver, 216 Ill. 185; Lewin *v.* Bell, 285 Ill. 227; *post*, § 404.

[41] Williams, Real Prop., 17th ed. 411, notes (d) and (e); Digby, Hist. of the Law of Real Prop., 4th ed. 264-269 (translating case from Year Books antedating 1568); Fearne, Contingent Remainders, 9; Challis, Real Prop., 2nd ed. 120; Boraston's Case, 3 Co. 19a, 20b; Irving *v.* Newlin, 63 Miss. 192. See also Bayley *v.* Morris, 4 Ves. 788; Frogmorton *v.* Wharrey, 2 Wm. Black. Rep. 728; Mudge *v.* Hammill, 21 R. I. 283; Hanna *v.* Hawes, 45 Ia. 437, 440; Thurston *v.* Thurston, 6 R. I. 296, 300; Jarvis *v.* Wyatt, 4 Hawks. (N. C.) 227; Lemacks *v.* Glover, 1 Rich. Eq. (S. C.) 141; Tucker *v.* Adams, 14 Ga. 548; Sharman *v.* Jackson, 30 Ga. 224; Johnson *v.* Jacobs, 74 Ky. (11 Bush.) 646; Hall *v.* LaFrance Fire Engine Co., 158 N. Y. 570; McCampbell *v.* Mason, 151 Ill. 500; Aetna Life Ins. Co. *v.* Hoppin, 249 Ill. 406; *id.*, 214 Fed. 928.

[42] *Ante*, § 28.

[43] Archer's Case, 1 Co. 66b; Kales' Cases on Future Interests, 98; Bennett *v.* Morris, 5 Rawle (Pa.) 9; Benson *v.* Tanner, 276 Ill. 594. In Moore *v.* Reddel, 259 Ill. 36, the court assumed that the rule in Shelley's Case applied. It followed that the life tenant took an estate tail which the Statute on Entails turned into a life estate in the first taker and a remainder to his "children" indefeasibly vested in each child upon birth. *Post*, §§ 405, 406.

[44] Aetna Life Ins. Co. *v.* Hoppin, 249 Ill. 406; *id.*, 214 Fed. 928.

the contingent remainderman may be bound by a decree in chancery by representation.[45] The heirs of the body of a life tenant cannot be ascertained till the life tenant's death because till then he cannot have any heirs. This event may not occur until after the termination of the life estate by forfeiture or merger. A remainder limited to the person or persons who would have answered the description of the testator's heirs if the testator had died at the time of the death of the life tenant is the same as a remainder to the heirs at law of a living person. It is a contingent remainder and destructible.[46] A remainder limited to an ascertained person upon a collateral contingency such as that the life tenant die without leaving children or issue is a contingent remainder[47] and inalienable[48] and destructible.[49] The life tenant cannot die without issue him surviving until his actual death occurs. This may occur after the termination of the life estate. If a remainder be limited to the children of the life tenant who reach the age of twenty-one, the remainder is contingent[50] and destructible.[51] Again, the event of the children reaching twenty-one might occur after the termination of the life estate by the death of the life tenant. Perhaps the commonest example of a contingent remainder is where after a life estate an interest is limited to individuals, or to a class, provided they survive the life tenant.[52] The survivorship some-

[45] McCampbell *v.* Mason, 151 Ill. 500.

[46] Bond *v.* Moore, 236 Ill. 576, *semble* (remainder here was also subject to a collateral contingency that the life tenant should die without leaving children).

[47] Walton *v.* Follansbee, 131 Ill. 147; Kamerer *v.* Kamerer, 281 Ill. 587.

[48] Golladay *v.* Knock, 235 Ill. 412; Watson *v.* Dodd, 68 N. C. 528; *id.*, 72 N. C. 240. Boatman *v.* Boatman, 198 Ill. 414 and Chapin *v.* Nott, 203 Ill. 341, are in terms overruled by Golladay *v.* Knock, *supra*, so far as they hold the contrary. *Post*, § 358.

[49] Bond *v.* Moore, 236 Ill. 576; Plunket *v.* Holmes, 1 Lev. 11; Loddington *v.* Kime, 1 Salk. 224; Purefoy *v.* Rogers, 2 Saund. 380; Egerton *v.* Massey, 3 C. B. N. S. 338.

[50] Quinlan *v.* Wickman, 233 Ill. 39.

[51] Festing *v.* Allen, 12 Mees. & W. 279; Rhodes *v.* Whitehead, 2 Dr. & Sm. 532; White *v.* Summers [1908] 2 Ch. 256; Pitzel *v.* Schneider, 216 Ill. 87.

[52] Doe *v.* Seudamore, 2 B. & P. 289; Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296; Belding *v.* Parsons, 258 Ill. 422; Barr *v.* Gardner, 259 Ill. 256; Messer *v.* Baldwin, 262 Ill. 48; Smith *v.* Chester, 272 Ill. 428; Blakeley *v.* Mansfield, 274 Ill. 133; Kamerer *v.* Kamerer, 281 Ill. 587; Mittel *v.* Karl, 133 Ill. 65; Temple *v.* Scott, 143 Ill. 290; Phayer *v.* Kennedy, 169 Ill. 360; Madison *v.*

times is of one other than the life tenant.[53] Such remainders are inalienable on sale by execution.[54] They are also destructible.[55] Where two remainders were limited to the children of the life tenant, one on the contingency that the life tenant survive the husband, and the other on the contingency that she did not survive her husband, both remainders were contingent and neither was alienable by a quit claim deed, even though it contained covenants of warranty.[56]

TOPIC 1.

RULE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS.

§ 310. This rule in force in Illinois: Since *Bond v. Moore*,[57] there have been a number of cases in which the common law rule of destructibility of contingent remainders has been applied.[58]

§ 311. Method of operation of the rule by the premature destruction of the life estate by merger: Where the life estate and the reversion were originally in different persons but both came into the hands of the same party by conveyance, a merger occurred and the life estate was prematurely terminated.[59] Where, however, the life tenant took a life estate under a will and at once upon the death of the testator became invested with the reversion in fee by descent or by virtue of the residuary clause of the will pending the taking effect of the contingent

Larmon, 170 Ill. 65; Spengler *v.* Kuhn, 212 Ill. 186; Robertson *v.* Guenther, 241 Ill. 511; Collins *v.* Sanitary Dist., 270 Ill. 108.

[53] Price *v.* Hall, L. R. 5 Eq. 399; Cunliffe *v.* Brancker, 3 Ch. Div. 393.

[54] Taylor *v.* Taylor, 118 Ia. 407; Young *v.* Young, 89 Va. 675; Nichols *v.* Guthrie, 109 Tenn. 535; Henderson *v.* Hill, 77 Tenn. 26; Roundtree *v.* Roundtree, 26 S. C. 450, 471.

[55] Friedman *v.* Friedman, 283 Ill. 383; McCarty *v.* McCarty, 284 Ill. 196; Spatz *v.* Paulus, 285 Ill. 82.

[56] Blanchard *v.* Brooks, 12 Pick. (Mass.) 47.

[57] 236 Ill. 576.

[58] Belding *v.* Parsons, 258 Ill. 422; Barr *v.* Gardner, 259 Ill. 256; Messer *v.* Baldwin, 262 Ill. 48; Smith *v.* Chester, 272 Ill. 428; Blakeley *v.* Mansfield, 274 Ill. 133; Benson *v.* Tanner, 276 Ill. 594; Kamerer *v.* Kamerer, 281 Ill. 587; Friedman *v.* Friedman, 283 Ill. 383; McCarty *v.* McCarty, 284 Ill. 196; Spatz *v.* Paulus, 285 Ill. 82; Lewin *v.* Bell, 285 Ill. 227. See also Kleinhans *v.* Kleinhans, 253 Ill. 620 and comments, *post*, § 347.

[59] See Illinois cases cited *supra*, note 58; also Craig *v.* Warner, 5 Mackey (D. C.) 460; Archer *v.* Jacobs, 125 Ia. 467.

remainder, there was no merger of the life estate in the reversion.[60] In such cases the merger occurred when the one who was both life tenant and reversioner conveyed to a third party both the life estate and the reversion.[61] There can be no merger of the life estate in any contingent remainder. Hence, a tranfser by a remote contingent remainderman to the life tenant does not destroy the life estate.[62] So the transfer of a life estate to a contingent remainderman does not destroy the life estate.[63]

§ 312. By forfeiture of the life estate: There have been a considerable number of cases in the United States where the life estate was terminated prematurely by forfeiture by the tortious feoffment or common recovery of the life tenant.[64] No reason is perceived why in Illinois a tortious feoffment may not be made by a life tenant. There is no impediment to making livery of seisin if the life tenant wants to do so. It has been said that livery of seisin has been abolished,[65] but the fact is it has only been made *unnecessary* by Section 1 of the Act on Conveyancing,[66] which is quite different from its being abolished.

§ 313. By the expiration of the life estate in due course before the happening of the event upon which the contingent remainder is to vest: Thus, where the limitations are legal estates to *A* for life with remainder to *B* if he survive *C*, or are contingent upon his attaining the age of twenty-one, if *A* dies before *C* or before *B* has attained twenty-one, as the case

[60] Plunket *v.* Holmes, 1 Lev. 11, *semble;* Egerton *v.* Massey, 3 C. B. N. S. 338; Challis on Real Property, 2nd ed. 126; Fearne on Contingent Remainders, 341 *et seq.;* 3 Preston on Conveyancing, 3rd ed. 51, 388, 491; Bennett *v.* Morris, 5 Rawle (Pa.) 9; Bond *v.* Moore, 236 Ill. 576; Benson *v.* Tanner, 276 Ill. 594. See also Kellett *v.* Shepard, 139 Ill. 433.

[61] Egerton *v.* Massey, *supra;* Bennett *v.* Morris, *supra;* Bond *v.* Moore, *supra;* Belding *v.* Parsons, *supra;* Benson *v.* Tanner, *supra;* 3 Preston on Conveyancing, 3rd ed. 489. But see Dennett *v.* Dennett, 40 N. H. 498 and McCreary *v.* Coggeshall, 74 S. C. 42.

[62] Stewart *v.* Neely, 139 Pa. St. 309.

[63] Cummings *v.* Hamilton, 220 Ill. 480.

[64] Faber *v.* Police, 10 S. C. (10 Rich.) 376; McElwee *v.* Wheeler, 10 S. C. (10 Rich.) 392; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Stump *v.* Findlay, 2 Rawle (Pa.) 168; Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322; Redfern *v.* Middleton, Rice, L. (S. C.) 459; Abbott *v.* Jenkins, 10 Serg. & R. 296.

[65] *Post,* § 453.

[66] R. S. 1874, Ch. 30, § 1.

may be, the contingent remainder would be destroyed.[67] Such a case has not yet arisen in this state but it is to be expected at any time.

§ 314. The partial destruction of a contingent remainder occurs where the life estate terminates before the contingency happens as to an undivided interest only: Suppose the life estate and an undivided half of the reversion unite in one person. A merger thereupon occurs as to an undivided one-half, and the life estate is destroyed in that half.[68] The contingent remainder is thereupon destroyed in an undivided half of the property.[69]

§ 315. Where the remainder is to a class and has vested in one or more members of the class before the termination of the life estate, the rule of destructibility does not apply to the interests of the other members of the class: Thus, if the limitations be to *A* for life, remainder to such children of *A* as reach twenty-one, and at *A's* death one child has reached twenty-one and there are others who have not, the latter, it is submitted, may share on reaching twenty-one.[70] This point has not been passed upon in this state as yet, but the case is likely to arise at any time. The argument in support of the interests of those who were not twenty-one when the life tenant died has been set forth, *ante*, §§ 100-103. It should be observed, however, that the remainder cannot be saved consistently with the rule of destructibility where none of the children have reached twenty-one before the termination of *A's* life estate.[71]

§ 316. The rule of destructibility does not apply where the interests are equitable: This is the explanation of *Pinkney v. Weaver*.[72] There the deed as construed by the court limited a life estate to *A* with a contingent remainder to her children if they reached twenty-one. There was a reversion in the grantor which descended to his heirs, who conveyed to *A*. This would have terminated the life estate by merger and destroyed the

[67] *Ante*, § 98.

[68] 3 Preston on Conveyancing, 3rd ed. 89; Wiscot's Case, 2 Co. Rep. 60; Lewin *v.* Bell, 285 Ill. 227.

[69] Crump *v.* Norwood, 7 Taunt. 362; Craig *v.* Warner, 5 Mack. (D. C.) 460; Fearne, C. R. 310.

[70] *Ante*, §§ 100-103; Simonds *v.* Simonds, 199 Mass. 552.

[71] *Ante*, § 99.

[72] 216 Ill. 185.

contingent remainder had the estates been legal. The fee, however, was at all times subject to a mortgage. Hence, the interests were equitable and no rule of destructibility applied.[73]

§ 317. The rule of destructibility appears not to be called into operation when the widow having a life estate by will renounces: This appears to be the ruling in *Wakefield v. Wakefield*.[74] There the widow, as life tenant, renounced and thereupon a bill was filed to appoint a trustee to take charge of her life estate till her death and this was done. The life estate was, therefore, continued in a trustee to preserve contingent remainders. In a subsequent partition suit such a decree was held not to be open to collateral attack. The court in its opinion, however, seems to go farther and to hold that is was a proper decree. If the renunciation by the widow means that she never took a life estate, then it is the same as if the widow had died before the testator. In that case, the so-called contingent remainder would not be a remainder at all but would take effect from the beginning as a springing executory devise and as such would not be subject to any rule of destructibility.[75]

§ 318. Does the rule of destructibility apply to the statutory remainder created by the Statute on Entails: In *Frazer v. Board of Supervisors*,[76] the limitations involved were created by deed and ran to *A* and the heirs of her body. By the Statute on Entails[77] 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 remainder,[78] 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, pending the vesting of the contingent future interest. Thereupon the life estate certainly determined by merger.[79] 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

[73] Astley *v.* Micklethwait, 15 Ch. Div. 59.

[74] 256 Ill. 296.

[75] *Post*, § 483.

[76] 74 Ill. 282.

[77] R. S. 1874, Ch. 30, § 6; *post*, §§ 402 *et seq.*

[78] *Post*, § 404.

[79] *Ante*, § 311.

be to defeat the intention of the legislature.[80] 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?[81] Recently in *Lewin v. Bell*[82] the contingent remainder in unborn children of the tenant in tail created by the statute was held to be destroyed by the merger of the life estate in the reversion.

§ 319. Methods of securing an adjudication that a contingent remainder has been destroyed: This is important in order that a title may be cleared. In *Bond v. Moore*[83] a Torrens petition was filed in Cook County to determine the ownership in fee after the contingent remainder had been destroyed. A bill for partition would seem to be unassailable, and advisable in order to give the court jurisdiction.[84] A proceeding under the burnt record statute would be efficacious where that is available. A bill for specific performance is always precarious because the issue is whether the title is merchantable and specific performance may be refused where there are difficulties with the title on the ground that the title is not merchantable and the court may not at all pass upon the merits of the difficulties. However, in *Benson v. Tanner*,[85] the court sustained a decree of specific performance, although the difficulties and doubts as to whether the contingent remainder was destroyed were considerable.[86] If there is a real difficulty concerning the con-

[80] In Bond *v.* Moore, 236 Ill. 576, the result reached in Frazer *v.* Board of Supervisors, 74 Ill. 282, was sustained on the ground that the remainder was created by the Statute on Entails.

[81] 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."

[82] 285 Ill. 227.

[83] 236 Ill. 576.

[84] McCarty *v.* McCarty, 284 Ill. 196.

[85] 276 Ill. 594.

[86] As to these difficulties see *ante*, § 306; *post*, § 428.

struction of the will as to whether the remainder is vested or contingent, a bill may be filed to construe the will under the recent statute permitting such a bill even where legal titles are involved.[87] Incidentally, the decree would determine whether if the remainder was contingent it was destroyed. Such bills are in reality bills to construe and quiet title.[88]

Suppose, however, that the will is perfectly clear or suppose the remainder is created by deed so that no case for a bill to construe is made. Can the claimant in fee who insists that the contingent remainders have been destroyed file a bill to remove the contingent remainders as a cloud?

It has long been settled in this state that one who has perfected a title by the Statute of Limitations against the former owner under the record title may, if he is in possession, file a bill setting up the limitation title and asking to have the record title removed as a cloud upon his new limitation title.[89] Why, then, may not the party in possession who is the owner in fee by reason of the fact that a contingent remainder or contingent remainders have been destroyed by the premature termination of a life estate by merger, maintain his bill to remove as a cloud upon his title so much of a written instrument of record as purports to create, and does on the face of the record create, the contingent remainder or remainders? In such a case, as well as where a limitation title is involved, events have occurred, since the deed under which the defendants claim, to extinguish the defendant's title or claim to title. In both cases alike an instrument which once was effective to create a valid title is now ineffective. In both cases alike the deed purporting to create the adverse interest is recorded and its existence is effective to cause actual damage to the indefeasible title in fee which is claimed by the plaintiff. It is hardly necessary that the holder of an adverse interest actually make threats, orally or otherwise. Indeed, in the limitation title cases, the holder of a record title has often disappeared and been defaulted.

[87] Laws 1911, p. 253 (R. S. 1874, Ch. 22, § 50, as amended 1911).

[88] Smith *v.* Chester, 272 Ill. 428; Blakeley *v.* Mansfield, 274 Ill. 133.

[89] Walker *v.* Converse, 148 Ill. 622; Harms *v.* Kransz, 167 Ill. 421; City of Chicago *v.* Middlebrooke, 143 Ill. 265; Gage *v.* Hampton, 127 Ill. 87; McDuffee *v.* Sinnott, 119 Ill. 449; Sharon *v.* Tucker, 144 U. S. 533.

There is still, however, this difference between the case of the limitation title and that where contingent remainders are involved: In the case of the limitation title the record title which is extinguished by the Statute of Limitations must be shown to have been so extinguished by evidence outside the record of the title. On the other hand, the destruction of the contingent remainders will appear in most instances from the record of the title itself. If, therefore, there is no question of construction—if the remainder is clearly contingent—the rule of destructibility is clearly applicable, and if it be invoked by the application of the doctrine of merger, the title is relieved of the contingent remainder as appears from the record itself. The filing of the bill may therefore be regarded as improvident, bothering the courts with a matter which is clear enough so that lawyers and conveyancers may pass, and title companies guarantee, the complainant's title in fee, free of any contingent remainders. This is the substance of the holding of our Supreme Court in the recent case of *McCarty v. McCarty*.[90] The logic of the court is perfect. Conveyancers and title companies have, however, practically only begun to deal with the doctrine of destructibility since the case of *Bond v. Moore*.[91] They are not yet ready to pass or guarantee titles where a contingent remainder is outstanding which it is claimed has been destroyed by the doctrine of merger. They ought to, but they do not. Hence, the practical situation is that the title is damaged by the existence of record of the instrument creating a contingent remainder which may possibly vest, and the holder in fee who has destroyed the contingent remainder is subjected to what is practically a cloud on his title and has no way of getting rid of it unless it so happens that there is some co-owner of an undivided interest against whom he can file a bill for partition, or unless the land be situated in Cook County, where he can file a burnt record proceeding or apply to have his title registered under the Torrens Act.

In *Gavvin v. Carroll*,[92] the complainant filed a bill for a decree "declaring title to the land in fee simple in complainant and the removal of clouds therefrom." He claimed title under

[90] 275 Ill. 573. See also Warren v. Warren, 279 Ill. 217, to the same effect.

[91] 236 Ill. 576.

[92] 276 Ill. 478.

a will which devised the land to him in fee, subject to an executory devise over, "should he die without issue," to the testator's children who survived the complainant. All the complainant's brothers and sisters gave him warranty deeds and it was held that these deeds, with the warranties which they contained, precluded the grantors and their heirs from claiming the land in question; and hence the executory devises had become extinguished, or at least could never take effect to the detriment of the complainant's interest. Under these circumstances the court evidently was satisfied to entertain a bill to remove the executory devise as a cloud, although (assuming the warranty deeds to have been recorded) the exact state of the title appeared from the record just as clearly as in *McCarty v. McCarty*. Why, then, might not the court have regarded the bill as improvident, because any conveyancer knowing the law should have been able to give an opinion on the exact state of the title from what appeared of record. The answer is that the state of our knowledge of the law on the subject is not so exact as to prevent the title from being, as a practical matter, clouded until the decree of a court of competent jurisdiction had been rendered. That is precisely the ground on which the jurisdiction of the court to entertain the bill in *McCarty v. McCarty* might have been rested.

One suggestion of the Supreme Court in *McCarty v. McCarty* is difficult to accept. The court said:[93] "The contingent remainders limited to the children of the testator's children were not estates or interests in the land and would never become estates or interests except upon the happening of future uncertain events, and courts of equity do not generally entertain suits to declare the rights of parties on a state of facts which has not yet arisen and which may never arise." Here we have the suggestion that the mere fact that the contingent remainder is a contingent claim which may never vest will preclude a bill to remove it as a cloud. If the existence of a possible contingent claim which can have no validity or operation under any circumstances damages the actual title in fee, the owner thereof ought to be entitled to relief in equity to rid his title of the cloud. It is not a case where the parties are attempting to secure the opinion of a court of equity as to the

[93] 275 Ill. 573, 578.

effect of an instrument under future possible and hypothetical circumstances which may never present an actual case. The effort of the present owner in fee in possession is to secure a decree declaring that he is the present owner in fee and that there is no possibility of that title being disturbed at a future time by the vesting of a contingent future interest even if the events upon which it is to vest do happen.

Topic 2.

Inalienability of Legal Contingent Remainders.

§ 320. Inalienable by conveyance inter vivos: Legal contingent remainders, as long as they remain contingent, have always been inalienable to a stranger.[94] This is a survival of the feudal land law.[95] It makes no difference that the conveyance is by deed under the Act of 1827[96] or by a statutory quit claim deed under the Act of 1872[97] or by a warranty deed[98] or by a guardian's deed.[99] A contingent remainder cannot be transferred by execution sale.[1]

[94] The contingent remainder is, of course, releasable to the reversioner. Williams, Real Property, 17th ed. 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.

[95] *Ante*, §§ 48, 82. "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.

[96] R. S. 1874, Ch. 30, § 1; Walton *v.* Follansbee, 131 Ill. 147, 159; O'Melia *v.* Mullarky, 124 Ill. 506 (*semble*).

[97] R. S. 1874, Ch. 30, § 10; Williams *v.* Esten, 179 Ill. 267 (here the court while quoting the statute in support of the validity of the conveyance by quit claim deed of a 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 the contingent remainder to a stranger); Boatman *v.* Boatman, 198 Ill. 414 (here the court assumes that if the remainder were contingent it could not possibly pass by quit claim deed).

[98] Golladay *v.* Knock, 235 Ill. 412.

[99] Furnish *v.* Rogers, 154 Ill. 569; Hill *v.* Hill, 264 Ill. 219; Graff *v.* Rankin, 250 Fed. 150.

[1] Haward *v.* Peavey, 128 Ill. 430; Ducker *v.* Burnham, 146 Ill. 9, *semble;* Aetna Life Ins. Co. *v.* Hop-

§ 320a. Extinguishment by release: Contingent remainders and springing and shifting interests by way of use and devise were releasable at law. The release, however, was only available to effect the future interest where it operated, not as a conveyance by way of enlargement of the releasee's interest, but by way of extinguishment of the releasor's interest.[2] From this it follows that the release to have any effect must run to him whose interest would be defeated by the taking effect of the contingent remainder or executory interest which was to be released. To put it another way, the release will be effective only so far as the taking effect of the future interest in possession will cut short or interfere with the interest of the releasee. All the cases proceed upon this principle. Thus, a contingent remainder after a life estate may be released to the reversioner.[3] So, the holder of a shifting executory interest cutting short a preceding fee simple can release to the holder of the preceding fee.[4] The conveyance by the holder of the future interest in the property, which would not, however, be affected by the taking effect of the future interest, could not consistently with the rules of the common law be conveyed under the guise of a release. Thus, if the limitations were to *A* for life, remainder to *B* in fee, with a future interest in *C* if *B* die without issue him surviving, *C's* attempted release to *A* would be ineffective. It could not operate by way of extinguishing the future interest, but only by way of enlarging the life estate by adding to it by means of a conveyance of the future interest.[5]

pin, 249 Ill. 406; 214 Fed. 928; Hull *v.* Ensinger, 257 Ill. 160.

[2] 2 Preston on Conveyancing, 268, 269, 392, 471, 473; Fearne, Contingent Remainders, 423, 421, note (d).

[3] Washburn on Real Property, 6th ed. 528; Williams on Real Property, 17th Int. ed. 422; Carahar *v.* Lloyd, 2 Com. Rep. (Australia) 480.

[4] Williams *v.* Esten, 179 Ill. 267; Smith *v.* Pendell, 19 Conn. 107; Fortescue *v.* Scatterthwaite, 1 Ired. L. (23 N. C.) 566; Lampet's Case, 10 Coke 46b, 48a, 48b; Coates Street, 2 Ashm. (Pa.) 12; Jeffers *v.* Lampson, 10 Oh. St. 101; Miller *v.* Emans, 19 N. Y. 384; DeWolf *v.* Gardiner, 9 R. I. 145. *Compare*, however, Edwards *v.* Varick, 5 Denio (N. Y.) 664; 11 Wend., 110; 13 Wend. 178. The releasor must have at the time of the release some right. The release by the son of the executory devisee in the lifetime of his parent is entirely ineffective even when made to the holder of the next interest preceding the executory devise: Dart *v.* Dart, 7 Conn. 250.

[5] See cases cited in Lampet's Case, 10 Coke 46b, 51. The *dicta* of Williams *v.* Esten, 179, 267 and

§ 321. Operation of the doctrine of estoppel by covenants of warranty—Where the Remainder vests in the warrantor: If the contingent remainderman attempted to alienate by a deed with warranties and the remainder vested in his lifetime, the remainder under certain circumstances would pass by way of estoppel to the alienee. This occurred in England if the transfer were "by fine (or by a common recovery, wherein the person entitled to the contingent estate comes in as a vouchee * * *)."[6] Following the analogy it seems clear that, by a deed with covenants sufficient to pass an after acquired title by estoppel,[7] 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.[8]

§ 322. Where the remainder vests in the warrantor's heir—Case stated and considered on principle: Suppose, however, that after the contingent remainderman has attempted to alienate by warranty deed he dies and his contingent remainder descends to his heir, and subsequently the contingency happens upon which the remainder vests in the heir. Does the title to the remainder inure by way of estoppel to the grantee of the ancestor?

It might be urged that at common law the heir of the warrantor is bound if he be expressly named in the covenant and

Ortmayer *v.* Elcock, 225 Ill. 342, are *contra.*

[6] Fearne, Contingent Remainders, 366; 1 Preston on Conveyancing, 301.

[7] 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. 364 *et seq.*).

[8] 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.

if assets descend to him;[9] that the heir is mentioned by force of the Illinois statute;[10] and that assets,—*viz.*, the very land in question or the possibility of getting it,—have descended to him; that being, therefore, bound by the covenants of his ancestor, there is raised against the heir an original estoppel. But because the heir is bound on his ancestor's covenants by reason of assets descending, hardly justifies, without more, the further holding that the lands so descending are subject to an equity with which they were not charged while in the hands of the ancestor. It is one thing to create a personal liability on the heir to the extent of assets descending, and quite another to add to that the creation of a duty, enforceable specifically by a court of equity, to convey the very lands so descending.[11] In the former case the purchaser from the heir, knowing all the facts, is protected in his title. In the latter case he could be charged to make a conveyance in the same way that the heir could be. If the fact that the descent of assets raises any new and original estoppel by deed against the heir it must be on analogy to the effect of the ancient "lineal warranty." Suppose that a life tenant in possession, with remainder or reversionary interests in others, conveys in fee with full covenants of warranty, in which the heirs are named, and then dies, leaving as his heirs those entitled in remainder or reversion. The heirs do not take the land from their ancestor. Hence they cannot take it subject to any equities against the ancestor. If they are bound by any estoppel it must be because an original estoppel is raised against them by the fact that they are bound by their ancestor's covenants because assets descended to them. By the ancient feudal warranty, which was implied from a conveyance by feoffment, the heir in the case stated was estopped to deny the title of his ancestor's feoffee.[12] This was the application of the doctrine of "lineal warranty." It was not until the time of Queen Anne that "lineal warranties" were substantially abolished in England, and the heir in the case stated, no longer bound by any estoppel.[13] The ancient implied feudal warranty no longer

[9] Rawle, Covenants for Title, 5th ed. 515.

[10] R. S. 1874, Ch. 30, § 9.

[11] Rawle, Covenants for Title, 5th ed. 358.

[12] Rawle, Covenants for Title, 5th ed. 4.

[13] *Id.*, 11, 353.

exists. It disappeared with the passing of conveyances by feoffment. The modern express covenants of warranty which began with the introduction of conveyances under the Statute of Uses have taken its place.[14] It might be argued that the effect to be given to these covenants must follow the analogy to the effect of the ancient feudal warranty; that since the statute of Anne is not in force in this state by re-enactment it is not in force at all, nor is there any other statute which prevents the application of the doctrine of "lineal warranty"; that, therefore that doctrine must govern, and the heir be estopped. Such an argument has in it enough logic to be dangerous,[15] but it neglects the force of the passing of time and the change in social conditions. The Supreme Court may or may not hold the statute of Anne actually in force here.[16] If it does not regard it as in force it may very well hold that the doctrine of "lineal warranty" is peculiarly applicable to the time when "homage and warranty were reciprocal,"[17]—when the vassal gave up his land to the lord in return for the protection which the lord and the lord's heir were bound to make good,—and therefore entirely inapplicable to the conditions of society in England when the colonies were first settled, and much more inapplicable to the conditions existing in the colonies themselves, in fact unknown in the law of Virginia or any other colonies, or of the original states of the Union, and therefore not incorporated into the law of Illinois.[18]

§ 323. The state of the cases in this State makes the law uncertain: In three cases[19] a householder residing upon premises subject to a homestead, conveyed by warranty deed to a third party, not waiving the homestead exemption, and thereafter continued to reside upon the premises up to the time of his death. Upon the death of the householder the court held that

[14] *Id.*, 16.

[15] It prevailed in Carson *v.* New Bellevue Cemetery Co., 104 Pa. St. 575.

[16] Russ *v.* Alpaugh, 118 Mass. 369; Crisfield *v.* Storr, 36 Md. 129. Compare, however, *dictum* in Fisher *v.* Deering, 60 Ill. 114.

[17] Rawle, Covenants for Title, 5th ed. 2.

[18] Pollock *v.* Speidel, 17 Oh. St. 439; Crisfield *v.* Storr, 36 Md. 129; Russ *v.* Alpaugh, 118 Mass. 369; 4 Kent's Com. 469. *Compare*, Perrin *v.* Lepper, 34 Mich. 292.

[19] Anderson *v.* Smith, 159 Ill. 93; Despain *v.* Wagner, 163 Ill. 598; Stiekel *v.* Crane, 189 Ill. 211.

the one thousand dollar homestead interest passed to his heirs and that the heirs were not bound by any estoppel. This was an appropriate place to apply the doctrine of estoppel by deed following the analogy of lineal warranty, so as to bind the heir, if the court had had any inclination to do so.[20]

In *Golladay v. Knock*,[21] the testator devised real estate to his wife for her life, with a remainder to such of her children as survived her, and if none, to "Moses and his heirs." The wife died in 1907, without children surviving her. Moses died in 1855, leaving as his heirs William and Mary. William conveyed by warranty deed to Fuller, and died in 1904. The decree found that Fuller was not entitled to anything under this deed, and this was affirmed. If the heirs of William were claiming under him (as it seems they must have done, because Moses' contingent interest descended to William, and from William passed to his heirs at his death under the rule of *North v. Graham*),[22] and if the warranties of William operated to bind them by way of estoppel because of assets descending (*i. e.*, the very land warranted), the heirs of William must have been bound by the estoppel, and the after-acquired title must have inured to the grantee in the deed by force of the estoppel. Such a view, then, the court may in fact have refused to adopt. It is probable, however, that the court never intended to rule upon the question of estoppel at all.[23]

In *Pitzer v. Morrison*,[24] there was a life estate to Susan with a remainder in fee to James and an executory devise over if James died before the testator's wife and daughter to the wife and daughter, with a further gift over if they died and the daughter left no children, to the heirs of James. Susan, James and his wife, and the testator's wife and daughter conveyed by warranty deed to Morrison, who conveyed an undivided half to the complainant, who filed a bill for partition. It was held that Morrison and the plaintiff held the fee, subject only to the gift over to the wife and daughter; that the gift over to the latter had been eliminated because, though their warranty deed did not pass their executory devise, yet their warranties bound not only the wife and daughter so as to pass any after-acquired title

[20] Kales, Homestead Exemption Laws, §§ 79-108.

[21] 235 Ill. 412.

[22] 235 Ill. 178; *post*, § 381.

[23] *Post*, § 382, note 84.

[24] 272 Ill. 291.

coming to them, but it also bound the heirs (and presumably the devisees also) of the wife and daughter, so that any title to the executory devise passing to the heirs or devisees of the wife and daughter would also inure by way of estoppel to the grantee.

Still more recently we have a third case which seems to adopt an intermediate view between denying any effect of estoppel to the warranties and allowing them full effect. In *Gavvin v. Carroll*,[25] the testator's son John had a fee with an executory devise over if he died without issue to the testator's surviving children. All John's brothers and sisters conveyed to him by warranty deed, and he thereupon claimed an indefeasible title in fee simple, and filed a bill to remove the executory devise as a cloud. A decree that he held an indefeasible title in fee was reversed. It seems to have been conceded, at least for the sake of argument, that the estoppel created by the warranty might prevent the brothers and sisters, and their heirs as well, from claiming under the executory devise; but the court then held that this was the limit of the estoppel; that it would simply operate to prevent anyone claiming to take under the executory devise; that the result of this would be that if John died without leaving issue his fee would be divested, the gift over could not take effect, and there would therefore be an intestacy. This, it is submitted, is the least satisfactory solution of the problem. If the heirs and devisees of the warrantors are bound by the estoppel because of assets descending (*i. e.*, an interest in the land which has been warranted and the title to which ultimately vests in the heirs or devisees of the warrantor), then all the consequences of the estoppel should follow, and an after-acquired title should pass to the grantee by estoppel, even though it passes from the heirs or devisees of the warrantor. If, on the other hand, the heirs or devisees of the warrantor are not to be bound by any estoppel which will pass an after-acquired title, they should not be bound by any estoppel at all, but should be entitled to claim the title which has passed to them. The compromise position, that the heirs of the warrantor are bound by the warranty so that they cannot claim and yet the first taker's interest may be divested so that there will be an intestacy, would seem to be unnecessary and at the same time to do the maximum

[25] 276 Ill. 478.

harm to those who were intended to enjoy the property and to benefit those who were least likely in the long run to be marked out for benefit in the events which have happened. It is incongruous that the warranty deed should bring no benefit to the warrantee; should prevent the heirs of the warrantor from making any claim, and throw the estate on a remote heir at law of the creator of the interests who never supposed that there was a possibility of his securing it.

§ 324. Alienable by descent: [26] 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 [27] 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." By 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.[28] Thus, if the remainder is contingent upon the life tenant

[26] For the tracing of the descent of contingent remainders, see *post*, §§ 380-382.

[27] Fearne, Cont. Rem. 364; see also Gray, Rule against Perpetuities, § 118.

[28] 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 possibilities, 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. 419, 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 obscure and perhaps erroneous. For instance, suppose the limitations

dying without leaving issue surviving, the remainder is transmissible by descent even while it remains contingent.[29]

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 con-

be to A for life, then to the youngest son of B in fee (but without any contingency that the youngest son survive A). B has two sons, C and D. D, the youngest, dies in the life of A. Does his remainder descend? It is possible that under the language used by Washburn and Kent it might not. It is submitted, however, that it should. There is no reason in making a distinction between a remainder in D which is contingent on the life tenant's dying without issue surviving and one which is contingent upon his remaining the youngest son of B. D really has in the latter case a remainder contingent upon B not having another son. Any other result would, it is submitted, be incongruous because if D who died before A turned out to be the youngest son on B's death before A, then the remainder would fail entirely because no one else could take it and yet it could not descend. A condition of survivorship would in fact have been included, though such a contingency has been by hypothesis, expressly excluded.

[29] Golladay *v.* Knock, 235 Ill. 412; Drury *v.* Drury, 271 Ill. 336, 341 ("It is also true that a contingent remainder is descendible where the contingency is not as to the persons who will take the ultimate remainder in case it should ever vest."); Moroney *v.* Haas, 277 Ill. 467, 472; Ortmayer *v.* Elcock, 225 Ill. 342; Dickson *v.* Dickson, 23 S. C. 216; Executors of M'Donald *v.* M'Mullen, 9 S. C. L. R. (2 Mill's Consti. Rep.) 91; Roundtree *v.* Roundtree, 26 S. C. 450, 471; Rembert *v.* Evans, 86 S. C. 445, 450; Clark *v.* Cox, 115 N. C. 94, 99; Crawford *v.* Clark, 110 Ga. 729, 739; Hennessey *v.* Patterson, 85 N. Y. 91, 93; Chess's Appeal, 87 Pa. 362; Minot *v.* Tappan, 122 Mass. 535; Cummings *v.* Stearns, 161 Mass. 506, 507; Winslow *v.* Goodwin, 48 Mass. 363, 375; Loring *v.* Arnold, 15 R. I. 428; Brown *v.* Williams, 5 R. I. 309, 311-316; Hampson *v.* Brandwood, 1 Maddock, 381, 386, 387; *In re* Cresswell, Parkin *v.* Cresswell, 24 Ch. Div. 102; Barnes *v.* Allen, 1 Brown's C. C. 181; Pinbury *v.* Elkin, 2 Vern. 759, 766; Doe d. Calkin *v.* Tomkinson, 2 Maule & Sel. 165; Watkins on Descent, p. 4; Jarman on Wills, 6th ed. by Sweet, 1910, Vol. 1, 80; Vol. 2, 1353; Gray, Rule against Perpetuities, § 118.

As to the descent of executory devises limited upon the death of the first taker without issue surviving, see *post*, § 479.

tingent.[30] In all the remainder was held to be vested, but in several the language of the court is such [31] 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.[32] Of course if it were the latter and the remainder-man did not survive nothing could pass to his heirs.[33]

In *Chapin v. Nott* [34] the remainder was subject to a condition precedent 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 issue. It was held that the heirs of the remainder-man were entitled. This was a correct result on the ground that the contingent remainderman's interest descended to his heirs. The court, however, adopted the New York statutory definition of a vested remainder and called the remainder vested, thereby causing it to be inferred that if the remainder had been contingent it could not have passed by descent.[35] This ground for the decision has

[30] 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.

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

[32] 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 remainderman 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.

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

[34] 203 Ill. 341.

[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

now been overruled.[36]

§ 325. **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 [37] 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

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 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, 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. 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.

[36] *Post*, § 358.

[37] 32 Hen. VIII, ch. 1. (1540); (4 Gray's Cases on Prop., 2nd ed. 30).

permitting the devising of contingent estates—the word "having" being understood as if it were "seized of."[38] "But modern decisions," says Fearne,[39] "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.[40] Can there be any doubt, then, but that under our Illinois statute on wills a contingent remainder is devisable? That statute provides [41] 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.[42]

[38] Fearne, Contingent Remainders, 367.

[39] *Id.* Note also that by the statute of Frauds (29 Car. II. ch. 3; 4 Gray's Cases on Prop., 2nd ed. 32) 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 Viet. ch. 26, 1837, III.; 4 Gray's Cases on Prop., 2nd ed. 35, 37) it was in terms provided that "all contingent, executory or other future interests in any real or personal estate" should be devisable.

[40] Fearne, Contingent Remainders, 366-371; *infra*, note 42; Jarman on Wills, 6th ed. by Sweet, Vol. I., 80; Vol. II., 1353.

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

[42] See Maginn *v.* McDevitt, 269 Ill. 196; Fearne, Cont. Rem., 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 acquisition of the estate depended." As we have seen (*ante*, § 324) 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, Washburn and Kent both say simply: They are devisable when the person to

In *Harvard College v. Balch*,[43] 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.

TOPIC 3.

WHEN THE CONTINGENT REMAINDER VESTS.

§ 326. Remainderman 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,[44] protects the remainder-man in this

"take is ascertained." (2 Washburn, 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.

[43] 171 Ill. 275.

[44] L. 1837 (spec. 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."

case. It is obviously modeled after the statute of William III.[45] In *Kyner v. Boll*[46] it would seem that this act might have 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*.

TITLE V.

REMAINDERS WHICH ARE UNCERTAIN EVER TO TAKE EFFECT IN POSSESSION BECAUSE OF LIMITED DURATION OR SUBJECT TO BE DIVESTED BY SOME EVENT EXPRESSED AS A CONDITION SUBSEQUENT IN FORM, BUT WHICH STAND READY THROUGHOUT THEIR CONTINUANCE TO TAKE EFFECT IN POSSESSION WHENEVER AND HOWEVER THE PRECEDING ESTATE OF FREEHOLD DETERMINES—REMAINDERS VESTED BUT OF LIMITED DURATION OR DEFEASIBLE.

§ 327. Examples of such remainders—Their validity and indestructibility by any rule of law defeating intent—Their alienability: If land be limited to A for life, remainder to B for life, B may die before A's life estate terminates, yet the remainder is vested, for during its continuance, *namely*, the life of B, it is ready to come into possession whenever and however A's estate determines.[47]

The much discussed remainder to trustees to preserve contingent remainders is clearly a vested remainder within the common law definition and not a contingent remainder, though it very seldom took effect in possession at all and was introduced with words which in form at least seem like a condition

[45] 10 & 11 Wm. III, ch. 16 (1699), 5 Gray's Cases on Prop., 2nd ed. 48, note 1. 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., 2nd ed. 47). 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.

[46] 182 Ill. 171.

[47] Gray's Rule against Perpetuities, § 102; Madison *v.* Larmon, 170 Ill. 65.

precedent, *viz.*, "after the determination of the precedent estate by forfeiture or otherwise, in the lifetime of the tenant, to the use of the trustees and their heirs during the life of such tenant, in trust for him and to preserve contingent remainders." Clearly, however, by its very terms, the remainder to trustees stood ready throughout its continuance to take effect in possession whenever and however the preceding estate determined. It was not limited upon an event which could by any possibility happen after the termination of the life estate.[48]

If the limitations are to *A* for life, remainder to *B* and his heirs, but if *B* dies before *A*, then over to *C* and his heirs, *B*, to take indefeasibly, must outlive *A*. But *B's* interest is not contingent upon his surviving *A* in any other sense, for if *A's* estate terminated before his death, *B* would at once be entitled in possession, subject to have his fee in possession divested if he did not survive *A*. *B* would, therefore, stand ready at all times during the continuance of his estate to take possession whenever and however *A's* life estate determined. *B's* remainder is, therefore, vested in the feudal sense, although in order to take indefeasibly, *B* must outlive *A*.[49] *B's* remainder is, therefore, alienable[50] and indestructible.[51] The cases of this sort are numerous. So, where the remainder is to the children of *B*, with a gift over, if any child dies before the life tenant leaving a child or children, to such child or children, they to take the share which their parent would have taken, gives the child or children of *B*, upon birth, a vested and alienable remainder.[52] The same is true where the remainder is to the children of *B*, with a gift over if *B* dies leaving no children.[53]

[48] Challis, Real Property, 2nd ed. 130 *et seq.*

[49] Gray's Rule against Perpetuities, § 108; Strickland *v.* Strickland, 271 Ill. 614.

[50] Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Jeffers *v.* Lampson, 10 Ohio St. 102.

[51] Pingrey *v.* Rulon, 246 Ill. 109; Lachenmyer *v.* Gehlbach, 266 Ill. 11.

[52] Smith *v.* West, 103 Ill. 332; Siddons *v.* Cockrell, 131 Ill. 653; Pingrey *v.* Rulon, 246 Ill. 109; Northern Trust Co. *v.* Wheaton, 249 Ill. 606; Lachenmyer *v.* Gehlbach, 266 Ill. 11; Remmers *v.* Remmers, 280 Ill. 93; Haward *v.* Peavey, 128 Ill. 430, 439, (*semble*); *In re* Rogers' Estate, 97 Md. 674; Moores *v.* Hare, 144 Ind. 573; Callison *v.* Morris, 123 Ia. 297.

[53] Ducker *v.* Burnham, 146 Ill. 9; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Forsythe *v.* Lansing's Exr's, 109 Ky. 518.

§ 328. Propriety of calling remainders of this class "vested": A remainder to B "if he survive" the life tenant is contingent.[54] Many lawyers no doubt have been puzzled as to the basis for calling a remainder "to *B*, but if he does not survive" the life tenant then over to *C*, vested. The uncertainty that the remainder will take effect as an indefeasible interest is just as great in one case as in the other. In both cases alike the remainder-man *B* must survive *A* in order to take an indefeasible interest. True, the condition is precedent in form in the first case and subsequent in form in the second, but why should the mere difference in the form of the words used make a difference as to whether or not the remainder is alienable *inter vivos* by quit claim deed or guardian's deed or execution sale?

From the purely modern and rationalistic point of view these remarks are pertinent. The answer to them, however, lies in the historical basis of the law of real property and the survival in our law today of certain rules of the feudal land law.

It is often overlooked that the absolute inalienability of contingent remainders by any mode of conveyance *inter vivos* is a survival of the feudal system of land laws. It is a survival of the time when contingent remainders were absolutely void or were void until they vested, when there was a public policy against the assignment of contingent interests and when even a right of entry by a disseisee could not be transferred by act of the party. As a modern and rationalistic rule the complete inalienability of contingent remainders is somewhat incongruous. Modern statutes which have made the contingent remainder and other contingent interests alienable indicate that there is today little or no public policy in favor of the absolute inalienability of contingent remainders insisted upon by the feudal land law.[55] The same is even more true of the rule of destructibility of contingent remainders. All recognize this as a survival of the feudal system. For the purpose of administering these two feudal survivals—the rule of absolute inalienability *inter vivos* of contingent remainders and the rule of destructibility—we have had to cling to the *feudal* distinction between vested and

[54] *Ante*, § 309.

[55] 8 and 9 Vict. ch. 106, sec. 6 (1845).

contingent remainders, even though it does not satisfy modern rationalistic conceptions.

The feudal distinction had to do largely with what remainders were destructible by a rule of law defeating intent. That rule clearly applied to a remainder to *B* "if he survive" the life tenant. "Survive" meant literally survive the "death" of the life tenant. The life estate therefore might terminate prematurely by forfeiture or merger, leaving the future interest not yet ready to vest, so that it could no longer take effect as a remainder according to the feudal requirements. It was therefore destroyed or failed. On the other hand, if the remainder were to "*B*, but if he did not survive" the life tenant then over to *C*, the remainder could not be destroyed by any rule of law defeating intent. If the life estate terminated prematurely by forfeiture or merger *B's* remainder was ready to come into possession at once, though it might afterwards be divested if *B* died before the life tenant. The condition subsequent in form, therefore, made an actual and, from the feudal point of view, a substantial difference in the two cases by causing the remainder "throughout its continuance" to stand ready to take effect in possession whenever and however the preceding estate determined. The change in situation thus effected by the fact that the condition was expressed as subsequent in form made the rule of destructibility inapplicable. Under these circumstances the feudal law could hardly escape calling the remainder vested.

Conceivably the feudal law could have held this vested remainder in *B* inalienable *inter vivos* on the ground that it was uncertain ever to take effect indefeasibly till the life tenant's death. But the case where the condition was expressed as subsequent in form by means of a gift over to *C* if *B* did not survive the life tenant, did not arise in the feudal period before the Statute of Uses and Wills because before those statutes the gift over to *C* would have been wholly void. It did not begin to come up until the gift over to *C* had been held valid and indestructible, which was not until after *Pells v. Brown* [56] in 1620. The question, therefore, of the alienability of *B's* remainder where the condition was expressed as subsequent in

[56] Cro. Jac. 590, 2 Roll. Rep. 196; Kales' Cases on Future Interests, 65.

form came up for settlement so long after the purely feudal period of land law that it is not surprising that, what had been called a vested remainder because it was indestructible by any rule of law defeating intent, should have been held to be alienable *inter vivos* according to the letter of the feudal land law applicable to vested remainders.

These then are the reasons for Mr. Gray's very precise statement[57] which has been repeated by our Supreme Court in substance[58] or verbatim[59] many times: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into 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."

TITLE VI.

PROBLEMS OF CONSTRUCTION WHICH ARISE IN DETERMINING WHETHER PARTICULAR REMAINDERS ARE CONTINGENT, AND SO DESTRUCTIBLE AND INALIENABLE, OR VESTED (WHETHER INDEFEASIBLE OR DEFEASIBLE) AND SO INDESTRUCTIBLE BY ANY RULE OF LAW DEFEATING INTENT AND ALIENABLE.[60]

§ 329. **Introductory**: A difficulty of construction frequently arises in determining the proper interpretation of language

[57] Gray's Rule against Perpetuities, § 108.

[58] Ducker *v.* Burnham, 146 Ill. 9, 23; Haward *v.* Peavey, 128 Ill. 430, 439; Northern Trust Co. *v.* Wheaton, 249 Ill. 606, 612.

[59] Brechbeller *v.* Wilson, 228 Ill. 502; Lachenmyer *v.* Gehlbach, 266 Ill. 11, 19; Smith *v.* Chester, 272 Ill. 428, 437.

[60] *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 judg-

used where the ultimate question is whether the future interest falls within the feudal definition of a vested or a contingent remainder. This happens most frequently where there is doubt as to whether a condition precedent in form that the remainderman must survive the death of the life tenant has been expressed; or as to whether a condition has been expressed as precedent in form or subsequent in form. Complicated, however, with the difficulty of construction as such is the rule that the courts will in all cases of doubt lean toward an interpretation which brings the remainder within the definition of a vested remainder.[61] This rule has been one of extraordinary vigor for two reasons at least: *First,* because contingent remainders were destructible by a feudal rule defeating intent which was illogical and incongruous after springing and shifting interests created by way of use or devise became valid and indestructible. *Second,* because contingent remainders were inalienable by a feudal rule which had its origin in the avoidance of champerty and the fact that the contingent remainder was void till it vested.

The following sections are arranged to show the extraordinary lengths to which courts have gone in special cases to reach an interpretation which will bring the remainder within the feudal definition of a vested remainder, and also the limits of such extraordinary processes of interpretation. Then there will be pointed out certain tendencies of our Supreme Court to find, by a species of implication, a condition precedent in form that the remainderman must survive the life tenant so that the remainder is brought within the feudal definition of a contingent remainder and becomes destructible and inalienable.

§ 330. Limitations to A for life, remainder to B "after the death of A": If the language used in limitations of this

ment, 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,* §§ 652 *et seq.;* Howe *v.* Hodge, 152 Ill. 252; Madison *v.* Larmon, 170 Ill. 65; Chapman *v.* Cheney, 191 Ill. 574.

5. 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.

[61] It is a corollary to this rule that remainders will be construed to vest at the earliest moment: Jones *v.* Miller, 283 Ill. 348, 356.

sort be accepted literally B cannot take till A's death, which would be an event possibly not occurring till after the termination of A's life estate by forfeiture or merger. The remainder would, therefore, be contingent and destructible and inalienable. From the beginning courts have always read the words "after the death of A" and similar expressions as if they were "at the termination (whenever and in whatever manner it may occur) of the particular estate of freehold." The remainder is, therefore, vested in the feudal sense.[62] It is precisely like the remainder where the limitations are to A for life, remainder to B for life.[63] So where the limitations were to the wife for life "if she do not marry but if she do marry", to H "presently after her decease", the life estate was construed to be in the widow during widowhood only, with the remainder to H whenever and however the life estate terminated, and the remainder in H was therefore vested.[64]

§ 331. Where the limitations are to A for life and "if B overlive A" then to B for life: Here if the contingency be taken literally B has a contingent remainder because the event of B's overliving A might not occur till after A's estate had come to an end prematurely by forfeiture or merger.[65] The approved construction, however, has always been that the phrase

[62] Doe *v.* Considine, 73 U. S. 458, 475; Minnig *v.* Batdorff, 5 Pa. 503; Doe *v.* Provoost, 4 Johns. (N. Y.) 61; Byrnes *v.* Stilwell, 103 N. Y. 454; Livingston *v.* Greene, 52 N. Y. 118; 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; Brown *v.* Brown, 247 Ill. 528; Lynn *v.* Worthington, 266 Ill. 414, 418; People *v.* Camp, 286 Ill. 511 ("then and in such case"); Henkins *v.* Henkins, 287 Ill. 62. Expressions by our Supreme Court in Bates *v.* Gillett, 132 Ill. 287 and Kleinhans *v.* Kleinhans, 253 Ill. 620, relying upon such contexts as "after the life tenant's death" or "in case of the life tenant's death then" as a basis for finding a condition precedent in form that the remainderman must survive the life tenant violate a long settled practice against attaching any significance to such phrases and greatly unsettle the interpretation to be given to language used in the creation of remainders.

[63] *Ante*, § 327.

[64] Luxford *v.* Cheeke, 3 Lev. 125 (1683); De Vitto *v.* Harvey, 262 Ill. 66.

[65] The New Hampshire court so long as it took the contingency literally was sound in holding the remainder to be contingent: Hall *v.* Nute, 38 N. H. 422; Hayes *v.* Tabor, 41 N. H. 521.

"if B overlive A" means "if B survive the termination, whenever and however that may occur of A's life estate." In this view B's interest is bound to take effect, if at all whenever and however the preceding estate determines. It is, therefore, a vested remainder.[66] Again, by a process of construction, the remainder is the same as where the limitations are to A for life, remainder to B for life.[67] If, however, the remainder is to B in *fee* then the expressed condition precedent that B overlive A must be taken as it stands and B's remainder is contingent.[68]

§ 332. **Remainders in default of appointment:** The English courts adopted an extremely artificial and strained construction to bring a remainder "in default of appointment" within the definition of a vested remainder. The usual formula of words for creating limitations with a remainder in default of appointment is as follows: to A for life, remainder to such children of A as he shall by deed or will appoint, and in default of appointment, to B and his heirs. If this language be taken as it stands the event upon which B's remainder is to take effect is the failure of A to appoint. If A can appoint after he ceases to be a life tenant, but still lives, then the event upon which B's remainder may take effect is one which may occur after the determination of A's life estate. Hence it would be a contingent remainder. The English courts at first so held.[69] But later it was determined and settled that the limitations should be read as if they were to A for life, remainder to B and his heirs, provided, however, that A shall have power to appoint among his children and by such appointment divest the interest of B,—thus making the exercise of the power of appointment a condition subsequent instead of the default of appointment a condition precedent.[70] This rule has been fol-

[66] Webb *v.* Hearing, Cro. Jac. 415 (1617), Kales' Cases on Future Interests, 155. The New Hampshire cases referred to, *supra*, appear to have been overruled: Kennard *v.* Kennard, 63 N. H. 303; Wiggin *v.* Perkins, 64 N. H. 36; Parker *v.* Ross, 69 N. H. 213.

[67] *Ante*, § 327.

[68] *Ante*, § 309.

[69] Lovies's Case, 10 Co. 78a; Walpole and Conway, Barnard. Ch. 153.

[70] Doe d. Willis *v.* Martin, 4 T. R. 39.

lowed in many cases ever since.[71] It is the settled rule in Illinois.[72]

§ 333. Where the limitations are by devise to A for life, remainder to B (an individual as distinguished from a class) "if" or "when" he shall attain a given age, or "at" a given age, with a gift over in the event of his dying under that age: Here the contingency that B reach twenty-one is expressed both as precedent in form and as subsequent in form. If the expression of the condition as precedent in form were eliminated, the remainder would be vested subject to be divested. During its continuance it would stand ready to take effect whenever and however the life estate terminated. It came to be the result of the English cases, under what was known as the rule of *Edwards v. Hammond*,[73] that in just the case put the words embodying the expression of the condition as precedent in form might be disregarded and the remainder was, therefore, held to be vested.[74] This shows the lengths to which the English judges have gone in construing a remainder so that it would fall within the definition of a vested remainder. It illustrates the vitality of the rule that courts lean in favor of a construction which will make the remainder vested.

§ 334. Suppose the life estate be omitted and the limitations are directly to A "if" or "when" he shall attain twenty-one, with a gift over in case he dies under that age: The English cases applied the rule of *Edwards v. Hammond*[75] even here and held that A took a fee at once in possession subject only to be divested by an executory devise over if he died under the specified age.[76] Again the condition precedent was disregarded. This course of decision was carried even a step farther. If real

[71] Gray's Rule against Perpetuities, § 112.

[72] Harvard College *v.* Balch, 171 Ill. 275; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Railsback *v.* Lovejoy, 116 Ill. 442; Sayer *v.* Humphrey, 216 Ill. 426; Bergman *v.* Arnhold, 242 Ill. 218; Powers *v.* Wells, 244 Ill. 558; Meldahl *v.* Wallace, 270 Ill. 220. See also, Lehnard *v.* Specht, 180 Ill. 208.

[73] 3 Lev. 132 (1683).

[74] Edwards *v.* Hammond, 3 Lev. 132 (1683); Bromfield *v.* Crowder, 1 B. & P. N. R. 313 (1805); Roome *v.* Phillips, 24 N. Y. 463; Theobald on Wills, 7th ed. 573; Hawkins on Wills, 2nd ed. by Sanger, 287.

[75] 3 Lev. 132 (1683).

[76] Leake, Digest of Land Law, 367; Theobald on Wills, 7th ed. 573; Hawkins on Wills, 3rd ed. by Sanger, 287.

estate were devised to B for a term of years till A reached twenty-one and then to A when he attained that age, A was held to take the fee absolutely and indefeasibly, subject to the term. If A died before he reached twenty-one his interest went to his heirs subject to the term. The apparent contingency is made to read as if it were "at the end of the term," to A. This is known as the rule in *Boraston's Case*.[77] It was referred to with approval in *Carter v. Carter*.[78] In *Bush v. Hamill*[79] the rule in *Boraston's Case* and the extension of the rule in *Edwards v. Hammond* were approved and applied.[80] An undivided one-fourth was devised to Charles for a term of years till Eldon reached twenty-one. Subject to this term the fee was devised to Eldon in these words: "In case my said grandson lives to attain the age of twenty-one years, it is my will that said undivided one-fourth of my real estate shall become his property in fee simple." Then there was a gift over, "In case my said grandson, Eldon Hamill, should die before attaining the age of twenty-one years." The court discussed these questions: Did this give Eldon a fee subject to a term, which fee was limited upon a condition precedent that Eldon must survive the age of twenty-one years, or was the fee an immediate estate in possession (often called vested) subject to a term, and liable merely to be divested? The latter position was sustained. This would seem to commit our Supreme Court to the rule of *Edwards v. Hammond,* and to the extreme position taken in the English cases that in some instances an excuse must be found for disregarding or getting rid, by interpretation, of a condition precedent in form to the taking effect of a remainder or other interest.

§ 335. **Where the limitations are by devise to A for life, then to the children of A (a class) "at," "when" or "if" they attain twenty-one, with a gift over in default of children who attain twenty-one:** Here the rule is the same as in § 333. The remainder to the children is vested subject only to be divested. It makes no difference that the remainder is to a class.[81] This

[77] 3 Co. 19a, 20b; Hawkins on Wills, 3rd ed. by Sanger, 284; Leake, Digest of Land Law, 266.

[78] 234 Ill. 507, 514. But compare the result reached in Kingman *v.* Harmon, 131 Ill. 171.

[79] 273 Ill. 132.

[80] See also Lunt *v.* Lunt, 108 Ill. 307, 313, 314; Kingman *v.* Harmon, 131 Ill. 171, 175.

[81] Doe *v.* Nowell, 1 M. & S. 327; 5 Dow. 203 (H. of L.); Doe *v.*

again shows how far the English judges would go to construe a remainder so that it would fall within the feudal definition of a vested remainder.

§ 336. Where the remainder is to "the children of A who shall attain twenty-one" or "to such children of A as shall attain twenty-one," with a gift over in default of children attaining that age: Here the attainment of a given age is so explicitly made a part of the description of the devisee that the English courts were unable to say that there was not an expressed condition precedent to the taking effect of the remainder. They were obliged, therefore, to hold the remainder contingent and destructible by a rule of law defeating intent.[82]

§ 337. Limitations to A for life, remainder to B "if he survive A; if he does not" to C: In one English case where such limitations were involved,[83] the court refused to apply the rule of *Edwards v. Hammond*.[84] The condition precedent in form that the remainderman survive the life tenant could not be disregarded. The remainder was, therefore, contingent and destructible by a rule of law defeating intent. The New Hampshire court on the other hand, relying on the rule of *Edwards v. Hammond*, disregarded the condition precedent of survivorship and held the remainder vested and therefore liable to be accelerated by the renunciation of the life tenant.[85] This indicates what

Ward, 9 Ad. & El. 582; Doe d. Evers *v.* Challis, 18 Q. B. 224, 231; 7 H. L. 531.

[82] Festing *v.* Allen, 12 Mees. & W. 279 (1843); Bull *v.* Pritchard, 6 Hare, 567 (1847), 1 Russ 213; Holmes *v.* Prescott, 33 L. J. Ch. N. S. 264 (1864); Rhodes *v.* Whitehead, 2 Dr. & Sm. 532 (1865); Theobald on Wills, 7th ed. 573-574; Hawkins on Wills, 3rd ed. by Sanger, 289. *Contra:* **Browne *v.*** Browne, 3 Sm. & G. 568 (1857). *Cf.* Jull *v.* Jacobs, 3 Ch. D. 703, 713 (1876). See also, Pitzel *v.* Schneider, 216 Ill. 87.

[83] Doe *v.* Scudamore, 2 Bos. & P. 289 (1800). Here the limitations were to A for life, remainder to B and his heirs "in case she shall survive and outlive the said A but not otherwise, and in case she die in the lifetime of the said A, then to A and his heirs."

[84] *Ante*, § 334.

[85] Parker *v.* Ross, 69 N. H. 213. In this case after a life estate in the whole property there was a devise of portions to the children "then living" of three different sisters, then follows the gift over in these words: "If there should not be any of the children of any of my deceased sisters living, their portion shall be divided equally among the other legatees."

courts are likely to do and the length to which they may go in construing a remainder so that it will be vested.

§ 338. Limitations to A for life, remainder to the children of A "who survive," and if any die before A to their children, if any; if not, then over: Here the remainder to the children who survive A is regularly held contingent and destructible [86] and inalienable.[87] Mr. Justice Vickers in *Northern Trust Company v. Wheaton* [88] brings out very clearly the difference between the case where the contingency that the remainderman survive the life tenant is expressed only as subsequent in form and where it is expressed both as precedent and subsequent in form. He says, "An estate may be vested and a clause added introducing a condition upon the happening of which it will be divested. Thus, 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 but subject to be divested upon his death during the life of A. On the other hand, a devise 'that all of the residue, rest and remainder of my estate, real, personal and mixed, then remaining in the hands of said trustees shall be equally divided among such of my four children [naming them] as may survive my said wife or the issue of any of my said children who may have died before my wife, such issue to take the share that would have belonged to the parent,' creates a contingent remainder."

§ 339. Where the limitations are "to A for life, remainder to the children of A who survive A and to the children of any who do not survive A," without any further gift over: Here also the remainder is held to be contingent. The expressed condition precedent in form that the children of A must survive A cannot be disregarded.[89]

[86] Blakeley *v.* Mansfield, 274 Ill. 133; Barr *v.* Gardner, 259 Ill. 256; Brechbeller *v.* Wilson, 228 Ill. 502.

[87] Robeson *v.* Cochran, 255 Ill. 355. See also Wakefield *v.* Wakefield, 256 Ill. 296.

In other jurisdictions a tendency may be observed to disregard the condition precedent of survivorship in the case put and to hold the remainder vested: Farnam *v.* Farnam, 53 Conn. 261; Nodine *v.* Greenfield, 7 Paige Ch. (N. Y.) 544.

[88] 249 Ill. 606, 612.

[89] Haward *v.* Peavey, 128 Ill. 430; Thompson *v.* Adams, 205 Ill. 552.

See also Starr *v.* Willoughby, 218 Ill. 485, where, however, the point was not really involved because the remainderman died, leaving children who were entitled in any event.

Cases may no doubt be found

§ 340. **Where the limitations are to A for life, remainder to B "if he survive A" and if he does not and dies without leaving issue, over to C:** Here if B must survive A in order to take, then, upon B's death before A leaving children, the children will be excluded but the gift over will not take effect, and there may be an intestacy or the residuary clause may apply. Under these circumstances the inclination is very strong to construe the remainder vested by disregarding the express condition precedent of survivorship. Romilly, M. R. in *Finch v. Lane*[90] held the remainder vested and the children of the remainderman who died before the life tenant were entitled. Our Supreme Court had the same situation before it in *City of Peoria v. Darst*[91] and declared the remainder was contingent. This was unnecessary to the decision, however, because the remainderman died before the life tenant without issue and the gift over, therefore, took effect whether the remainder was vested or contingent. It may be that the court felt bound to hold the remainder contingent so that the gift over would take effect as a further contingent remainder and not as a shifting interest or fee on a fee. The court may have thought it necessary to take the latter view because it labored under the misapprehension that the ultimate gift over was a fee on a fee by deed, and therefore, void.[92] Once the fallacy that there cannot be a fee on a fee by deed operating under the Statute of Uses is dissipated, as it now seems to be,[93] there is no reason why the court should not handle the question of construction upon general and well-settled principles and consider the remainder vested, as was done in *Finch v. Lane*. Where, however, the remainder was limited to A and B if they survived the life tenant, with a gift over to the survivors if either died without issue, and if one died leaving issue one-half to such issue and the other half to the survivor, there was not the same argument as in *Finch v. Lane* for vesting the remainder and the remainder

where even such a remainder as is referred to in the text has been held vested, the condition precedent of survivorship being disregarded. See Wood *v.* Robertson, 113 Ind. 323.

[90] L. R. 10 Eq. 501 (1870).
[91] 101 Ill. 609.
[92] *Post*, § 445.
[93] *Post*, § 462.

was, therefore, held to be contingent on the remainderman surviving the life tenant.[94]

§ 341. **Where the limitations are to A for life, remainder to "his children surviving him" with a gift over if A die "without issue surviving him":** Here if A has a child who dies before him leaving issue, the latter cannot take if the remainder to the children is contingent on their surviving the life tenant. The gift over cannot take effect because A does not die without issue surviving. There may be an intestacy. These circumstances, together with the fact that the remainder if contingent is destructible and inalienable and the fact that the courts construe it vested if possible, might warrant the remainder being held vested as in the case of *Finch v. Lane*.[95] If the remainder, instead of being limited to A's children "who survive A," were limited to A's children "or the survivor or survivors of them," there would be a still further argument in favor of vesting the remainder in the feudal sense subject only to be divested, so that the remainder would be indestructible by any rule of law defeating intent. Our Supreme Court in *Smith v. Chester* [96] seems to have inclined to the contrary opinion and the remainder was there held contingent and destructible. In *Robeson v. Cochran*,[97] where the limitations were by deed to A for life and on his death leaving issue, to such issue in fee, but in case of A's death without such issue, to the grantor, the remainder to the children of A was held to be contingent on their surviving the life tenant. It appeared that no child of A, who died in A's lifetime, had left issue.

§ 342. **Where the limitations are to A for life, remainder, "in case A dies leaving any children surviving," to them, the issue of any child taking their deceased parent's share; but should A survive all the children (they having died without issue) then to A:** Here the contingency of one of A's children dying without leaving any issue is not provided for. If that child's interest is vested it will descend upon the child's death before the life tenant. If not, there may be an intestacy. In *Siddons v. Cockrell* [98] our Supreme Court appears to have disregarded the express condition precedent of survivorship and

[94] Chapin *v.* Crow, 147 Ill. 219.
[95] L. R. 10 Eq. 501; *ante*, § 340.
[96] 272 Ill. 428.
[97] 255 Ill. 355.
[98] 131 Ill. 653.

held the remainder vested, with the result that when one child died without issue in the life of the life tenant his interest passed by descent. This case is notable as showing how far the court is prepared to go to make a remainder vested. It is especially important in view of the cases referred to, *post*, §§ 350 *et seq.*, where our Supreme Court seems to have developed an extraordinary astuteness in making the remainder contingent.

§ 343. Remainder to A, B and C, "or the survivor or survivors" of them: Here survivorship must be referred to the death of the life tenant and not to the death of the testator. Hence only those can take who survive the life tenant.[99] This is so whether the remainder is vested subject to be divested or subject to a condition precedent in form that only those are to take who survive the life tenant. Suppose, however, the life estate and what would be the reversion in fee if the remainder were contingent unite so as to terminate prematurely the life estate. In that case the question would arise whether the remainder were to those of A, B and C who survive the life tenant, so as to be a contingent remainder and destructible, or a remainder to A, B and C, vested subject only to be divested if any die before the life tenant in favor of survivors.[1] It is submitted that having due regard for the fact that taken literally

[99] *In re* Gregson's Trust Estate, 2 De G. J. & S. 428; *In re* Belfast Town Council, 13 L. R. (Ir.) 169; City of Peoria *v.* Darst, 101 Ill. 609.

The same rule has long been applied in bequests of personalty. Hawkins on Wills, 3rd ed. by Sanger, 312.

The earlier English cases, in the effort to vest a remainder of real estate and thus avoid the feudal consequences of the remainder being contingent, construed "survivor" as meaning survivor of the testator and not of the life tenant. Doe *v.* Prigg, 8 B. & Cr. 231, and see the opinion of the Lord Justices in *In re* Gregson's Trust Estate, *supra*. These decisions must now be regarded as overruled.

[1] So if A, B and C all died before the tenant, the question would arise whether the remainder to A, B and C was vested subject to be divested in favor of a survivor, or was not to take effect at all except in such as survived the life tenant. It may be worth noting in this connection that according to the English cases "a bequest to several, or to a class, 'or' to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favor of those living at that period, if there be such; and if none are then living, all are held to take." Hawkins on Wills, 2nd ed. by Sanger, 318.

the form of words used makes only a condition subsequent or divesting clause and the rule that the courts will construe a remainder vested, if possible, the remainder might be wholly vested in A, B and C, subject only to be divested and hence not destructible by any rule of law defeating intent. The contrary result seems to have been reached, however, in *Smith v. Chester.*[2] The remainder has also been held to be inalienable *inter vivos* by execution sale during the life of the life tenant.[3]

§ 344. Limitations to A and B for life and in case of the death of either, to the other: This creates a remainder which is subject to a condition precedent in form that the remainderman survive the life tenant. It is, therefore, a contingent remainder.[4]

§ 345. Cases where a remainder has been limited without any explicit condition precedent in form that the remainderman survive the life tenant, but where there has been a gift or gifts over in case the remainderman dies before the life tenant —Bearing of the results noted in the preceding sections upon the problem of construction now presented: An examination of the preceding sections, especially §§ 330-344, will show that the cases considered have been those where there was in the context an express condition precedent in form to the remainder taking effect and where the courts went to an extreme limit in disregarding the language providing for such a condition precedent in order to bring the remainder within the feudal definition of a vested remainder so that it would be indestructible and alienable. In some instances the courts disregarded the express contingency entirely or turned it into a phrase introducing the remainder by such words as "whenever and however the preceding estate determines."[5] In one instance they twisted the condition expressed as precedent in form only into a condition

[2] 272 Ill. 428. See also Thompson *v.* Adams, 205 Ill. 552, and Meldahl *v.* Wallace, 270 Ill. 220. As already explained, *ante,* § 340, the only reason for the courts insisting, in the City of Peoria *v.* Darst, 101 Ill. 609, that the remainder was contingent was to avoid the rule that a fee on a fee by deed was void. The moment this fallacy is exploded there is no longer any reason why the court should adhere to the proposition that the remainder in such a case must be contingent.

[3] Hull *v.* Ensinger, 257 Ill. 160.

[4] Cover *v.* James, 217 Ill. 309.

[5] *Ante,* § 330.

expressed as subsequent in form.[6] In other instances they disregarded the express condition precedent in form and regarded only the condition expressed as subsequent in form.[7] The errors (if they may be so called) of the English judges were in favor of vesting the remainder, not against vesting. American cases have in some instances gone further than the English in making the remainder vested.[8]

In view of these results what is to be expected when the remainder has been limited to individuals or a class *without any explicit condition precedent in form* that the remainderman survive the life tenant but with a gift or gifts over which purport to divest the remainderman's interest if he dies before the life tenant?

First: There is no doubt about the difference (so far as vesting is concerned) between the remainder on the one side limited without any condition precedent in form to its taking effect and with a condition subsequent in form which purports to divest it if the remainderman dies before the life tenant, and on the other, the remainder which is subject to a condition precedent in form that the remainderman survive the life tenant. The former is vested and the latter not. Our Supreme Court has made its perception of this plain beyond question. Mr. Justice Vickers in *Brechbeller v. Wilson*[9] quoted from *Gray's* Rule Against Perpetuities, as follows: "Gray, in his Rule Against Perpetuities (sec. 108), lays down the following clear test for distinguishing between a vested and a contingent remainder: 'Whether a remainder is vested or contingent depends upon the language employed. If 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, 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 a devise to A for life, remainder to such of his children as survive him, the remainder is contingent.' The above statement of the rule is in accordance with the

[6] *Ante*, § 332.
[7] *Ante*, §§ 333, 334, 335, 340.
[8] *Ante*, § 340.
[9] 228 Ill. 502, 506.

previous decisions of this court.'' [10] In *Smith v. Chester* [11] the Court said: ''Where a devise by its terms is to a person for life with the remainder to such of the children of that person as survive at his death the remainder is contingent * * *. On the other hand, where the devise by its terms is to a person for life, remainder *to the children of such person*, with the provision that should any of said children die without issue, the children surviving at the death of the testator shall take the share of such deceased children, the remainder in such case has been held to be a vested remainder, * * *.''

Second: The only way, then, to find a condition precedent in form that the remainderman must survive the life tenant when none is explicitly inserted is to resort to a species of implication or interpretation by which the condition precedent in form is reflected from other parts of the context—in the case under consideration, from the gifts over expressed as subsequent in form. Such a process of implication, that is to say, the finding of express words making a condition precedent in form when no such words are to be found physically in the instrument is a step of doubtful propriety.

Third: The chief objection to such a process of implication or reflection of a condition precedent in form of survivorship is that it violates the fundamental rule that courts will do all they legitimately can—and sometimes a little more—to so interpret the limitations creating the remainder that there will be no condition precedent in form to the taking effect of the remainder. Such a violation of so clearly established and vital a rule is unfortunate enough, but consider the enormity of the error of implying a condition precedent in form that the remainderman must survive the life tenant from the mere fact that there are gifts over if the life tenant does not survive! Of what use is it to announce that a gift over on a condition subsequent in form, divesting the remainder if the remainderman

[10] The same statement of Gray was quoted with approval by the Court in Smith *v.* Chester, 272 Ill. 428, 437. In Lachenmyer *v.* Gehlbach, 266 Ill. 11, 19, and in Strickland *v.* Strickland, 271 Ill. 614, 621. The same doctrine is announced in Ducker *v.* Burnham, 146 Ill. 9, 23; Haward *v.* Peavey, 128 Ill. 430, 439. See also statement of Mr. Justice Vickers in Northern Trust Company *v.* Wheaton, 249 Ill. 606, 612, already quoted, *ante*, § 338.

[11] 272 Ill. 428, 437.

does not survive the life tenant, causes the remainder to be vested and indestructible and alienable, if from the mere fact of the gift or gifts over the court immediately raises by implication a condition precedent in form that the remainderman must survive the life tenant?

It would certainly be a reasonable expectation on the part of conveyancers and counsel that when a remainder has been limited to individuals or to a class *without any explicit condition precedent in form that the remainderman survive the life tenant,* but where there has been a gift or gifts over on a condition subsequent in form which divests the remainder if the remainderman does not survive the life tenant, the remainder would be vested and indestructible and alienable *inter vivos.* More than that, it would be a fair expectation that a condition precedent in form that the remainderman survive the life tenant would never be reflected back or found by implication from a gift or gifts over if the remainderman died before the life tenant. But even more than that, it might fairly have been expected that slight elements of context connected with the gift over would not be permitted to produce a condition precedent in form that the remainderman survive the life tenant.

Such expectations have been fulfilled in some decisions of our Supreme Court. In others they have not. The decisions are in a state of practical confusion. The distinctions drawn are so fine as to escape the perception of any but the most diligent and penetrating constructionist. The writer, while not in sympathy with some of the distinctions taken, has nevertheless endeavored to express them as clearly as possible.

§ 346. Where the remainder is to named individuals with a gift over, if any die before the life tenant, to survivors: Here our Supreme Court has said the remainder was vested in the feudal sense, following literally Gray's statement in § 108 of his Rule Against Perpetuities.[12]

§ 347. Where the remainder is to named individuals or to a class with two gifts over, usually one, "if any die leaving children, to such children"; and the other "if any die without children, to the survivors," or, "if all die without chil-

[12] Strickland *v.* Strickland, 271 Ill. 614 (personal property only was involved, but the court's opinion proceeds as if a remainder of real estate were in question).

dren, to A'': In such cases we should be able to start with a strong *prima facie* assumption that the remainder is vested, that no express condition precedent in form that the remainderman must survive the life tenant is present, and that none may be implied or reflected back from the gifts over. The remainder is, therefore, indestructible by any rule of law defeating intent and alienable *inter vivos*. The following cases definitely support this position:

In *Siddons v. Cockrell* [13] the limitations were to the widow till her remarriage. After that one-third for life. Then the will provided, "should she survive all my children (they having died without issue)," to the wife absolutely "but in case of the death of my wife leaving any of my children surviving" to them absolutely, "the heirs of any of my children taking their deceased parent's share." This the court insisted must be read as follows: "I devise all my remaining real and personal estate to my children, and if any children be dead leaving children surviving them, then to them also,—the children of the deceased child taking the part of their parent; but if all my children shall die without issue before my wife shall die, I devise the same to her." This is a striking example of the courts re-writing the language of a will so as to dissolve away the express condition precedent in form that the children must survive the death of the life tenant, thus leaving only divesting conditions subsequent in form. Taking, however, the limitations as the court read them we have a clear case of a remainder to a class of children without any explicit condition precedent in form that they must survive the life tenant, with a gift over on the two events specified. No condition precedent in form that the children must survive the life tenant was reintroduced by implication or by any reflection back from the gifts over. The limitations, therefore, stand without any such express condition precedent in form. The remainder is, therefore, vested in the feudal sense and alienable and indestructible. The court so held. The result reached was that a child who died before the widow's remarriage had an interest which descended to her heirs.[14]

[13] 131 Ill. 653.

[14] See also McCampbell *v.* Mason, 151 Ill. 500, 510.

In *Pingrey v. Rulon*[15] the limitations were to two daughters for life and the life of the survivor, with a remainder to four named grandchildren with these provisos: "Provided, however, that should any one or more of my above named grandchildren come to his or her decease without issue before taking in fee simple, that then the share or shares of such deceased grandchild or grandchildren shall be apportioned in equal parts among those of my grandchildren surviving: But provided, also, that if at the time of such decease my said grandchildren left issue, that then such grandchild's share shall go to his or her issue, share and share alike, in fee simple." It was further provided that if either of the life tenants should have other children then the additional grandchildren should take in fee simple on the same terms as the other grandchildren, including those born after the four who were named. The holding of the court recognized that the remainder was in fact to all the grandchildren as a class.[16] The remainder was, however, vested, subject merely to be divested by the provisos, and hence was indestructible by conveyances which, if the remainder had been contingent on the remainderman surviving the life tenant, would have terminated the life estate prematurely by merger. We have here, therefore, a perfect example of the remainder which is uncertain to vest indefeasibly until the death of the life tenants—a remainder which, in order to vest indefeasibly, requires that the remainderman actually survive the life tenants—and yet is vested in the feudal sense at the time of its creation because it stands ready, throughout its continuance, to take effect in possession whenever and however, the preceding estates for life determine.

Lachenmyer v. Gehlbach[17] is another leading case of the same kind and to the same effect. There the limitations were to the wife for life; "after the death of my said wife * * * to my children, share and share alike, and should any of my children die, then the children of such deceased child, should any children be surviving such deceased child, to take the share

[15] 246 Ill. 109.

[16] See also Lachenmyer *v.* Gehlbach, 266 Ill. 11, 21, where the court said, speaking of Pingrey *v.* Rulon, 246 Ill. 109, "It was held that the remainder was, in effect and in form, to the whole class of grandchildren."

[17] 266 Ill. 11.

of the parent so deceased; and should any of my children die leaving no issue then the share of such deceased child shall be divided equally among my surviving children." It was held that the remainder was vested in the children and was indestructible by any rule of law defeating intent. This was directly involved because if the remainder in the children had been contingent there were conveyances which would have terminated the life estate prematurely by merger and destroyed all contingent remainders.[18]

Now let us turn to the cases which might be thought to be out of line with those just analyzed.

In *Kleinhans v. Kleinhans*[19] the limitations were to a son and daughter for life "and in case of their death, then to their children, only, and if no children are left by them, then the survivor of my said children shall inherit the other's." The court was chiefly concerned in this case with whether the son and daughter took life estates or a fee.[20] It ventured the statement, however, that the remainder to the children of the son and daughter was contingent on their surviving the life tenants and therefore was a contingent remainder. The court said: "The words 'in case of their death, then to their children, only' mean that the remainder to the grandchildren is contingent upon their surviving their parents." The use of the context mentioned has long been discouraged as a basis for holding the remainder contingent.[21] It is important to observe also that if the remainder to the children had really been held to be contingent in the feudal sense because subject to a condition precedent in form that the children survive the life tenants, conveyances had occurred which would have terminated the life estate prematurely by merger and destroyed the contingent remainders.[22] The decision actually reached required a decree which recognized that the remainder to the children had not been destroyed. The decision, therefore, is

[18] In Smith *v.* West, 103 Ill. 332, the precise language of the limitations involved is not given. The way in which they were summarized and the fact that the remainder to the children was held vested is persuasive that the language, construed by the court in that case was like that presented to the court in Siddons *v.* Cockrell, *supra*, Pingrey *v.* Rulon, *supra*, and Lachenmyer *v.* Gehlbach, *supra*.

[19] 253 Ill. 620.

[20] *Ante*, §§ 166, 167.

[21] *Ante*, § 330.

[22] 9 Ill. Law Rev. 438.

really inconsistent with the holding that the remainder to the children was contingent in the feudal sense. That it was contingent in the sense that the remaindermen did not take indefeasibly till they survived the life tenant is, of course, clear.

In *Meldahl v. Wallace*,[23] the limitations after a life estate were to the grantor's daughters without any explicit condition precedent in form that they survive the life tenant. Then there were the following gifts over: "In case of the decease of any of my daughters herein named, intestate, before my death, then in that case the children of such deceased daughter shall take their parent's share, both as to realty and personalty, and if any such deceased daughter so dying intestate leaves a husband surviving, that the husband have the same right to the use and enjoyment of both the realty and personalty and the benefit of it as given by the statutes of the State of Illinois." One daughter died childless and intestate and her husband claimed all the personal property and half the realty by inheritance from her. This was denied. It is submitted the decision was correct on the simple ground that the divesting event had happened. The daughter had died intestate leaving a husband. The remainder was contingent in the sense of being defeasible in the events which happened and its indefeasibility could not be ascertained until the daughter survived the life tenant. The remainder of the daughter having been defeated, the husband took only what the deed gave him. The objection to this solution might have been made that the husband's interest under the deed would be a fee after a vested remainder in fee and as such a fee on a fee by deed and void. This is an old fallacy which has been prevalent in this state.[24] It is now believed to be completely exploded.[25] Hence there is no longer any need to twist remainders into being contingent in the feudal sense in order to make a gift over after them valid. In the case under consideration the interests, it is believed, were all equitable and therefore no rule that a fee on a fee could not be created by deed could by any possibility be applicable.[26] The expression of the court to the effect that the remainder was contingent upon the daughter surviving the life tenant must be

[23] 270 Ill. 220.
[24] *Post*, § 445.
[25] *Post*, § 462.
[26] *Post*, § 472.

read as meaning that the daughter's vested remainder was subject to be defeated when she died intestate before the life tenant.

In *Betz v. Farling*,[27] the limitations were to the two children for life with gifts over upon the death of either, to his or her children or issue, and if one died leaving no children or issue, to the survivor or her children, with a gift over if both died without issue, to the county of M. One of the life tenants died leaving children and one-half the estate vested in them indefeasibly. The interest in the other half was contingent in the sense that if the life tenant died without leaving children it would go over to the children of the deceased life tenant. The question was whether the children of the deceased life tenant could have partition. It was held that they could. The fact that the children of the living life tenant could not have had it did not prevent the suit. This case did not involve the feudal distinction between vested and contingent remainders. The decree, however, found expressly that the remainder to the children of the living life tenant was to those who "should be living at her death" and this was affirmed. This meant that if one child died leaving children before the life tenant, the life tenant's grandchildren would not share, and yet the gift over would not take effect because some children of the life tenant did survive her. If the decree so provided, its affirmance was unfortunate because the remainder was not subject to any condition precedent in form of survivorship. The remainder was vested in the children of the life tenant as they were born, subject only to be divested if all the children of the life tenant died before the life tenant.

§ 348. Where the remainder is to named individuals (who are adults) or to a class (in esse and adult) with a single gift over if any die without leaving children or issue to the survivors: Here the gift over furnishes an argument in favor of vesting and there is an absence of any condition precedent in form that the remainderman survive the life tenant. If the remainderman die before the life tenant, leaving children, and his remainder were subject to a condition precedent in form that he survive the life tenant, his own children would be entirely cut off. Where the remaindermen are adults, especially if they are married and have young children, this is a real

[27] 274 Ill. 107.

danger. Such a result is clearly incongruous for a testator or settlor who makes a gift over if the remainderman dies without leaving children must mean, especially where there is no condition precedent of survivorship, that the remainderman is to take absolutely and indefeasibly in every other event so that upon his death leaving children they may take by descent or devise from him.[28] Under these circumstances the practitioner would surely be justified in a strong *prima facie* assumption that the court would not find, by any process of implication or reflection back from the gift over, an express condition precedent in form that the remainderman must survive the life tenant. The *prima facie* inference would therefore be that the remainder was vested, alienable and indestructible. Two excellent decisions of our Supreme Court support this position.

In *Ducker v. Burnham*[29] the limitations involved after the creation of a life estate in the testator's wife were as follows: "After the death of my wife I direct that all my property and estate then remaining, both real and personal, be by my surviving executor equally divided between my said five children, share and share alike. In case of the death of any of my said children without issue, either before my death or before receiving either of the portions above given him or her, I direct that the share of such child be equally divided among my surviving children, share and share alike." The remainder in the children was held to be vested in the feudal sense and therefore alienable upon execution sale.

In *Hinrichsen v. Hinrichsen*[30] the will provided for a life estate in the wife "and at her death the same to be divided equally among my children" and "in case either of my said sons shall die without leaving legal heirs of their body or heirs thereof, that the said estate shall be inherited by the remaining son * * *." One son died before the life tenant leaving children. The event did not happen upon which the gift over was to take effect. No condition precedent of survivorship could be implied or reflected back from the gift over so as to deprive the son's children of the possibility of inheriting from him. In short, the court held the remainder vested in the feudal sense and not divested by any of the events which had happened.

[28] See *ante*, § 340.

[29] 146 Ill. 9.

[30] 172 Ill. 462.

In *Spatz v. Paulus*[31] the devise was to the lineal descendants of the life tenant, with a gift over if any life tenant died "without leaving lineal descendants or descendant living at his or her death," to the testator's lineal descendants. The court did not construe lineal descendants as heirs of the body so as to make the remainder contingent. It rested its decision that the remainder was contingent upon the issue surviving the life tenant entirely upon the gift over if any child died without lineal descendants surviving, and perhaps on the ground that in another clause the remainder was in terms to lineal descendants surviving the life tenant. The consequence of the remainder being contingent on the lineal descendants surviving the life tenant was that it was destroyed by the termination of the life estate by merger.

§ 349. Where the remainder is to the unborn children of the life tenant with a single gift over if the life tenant die without leaving children or issue surviving: Here the argument from the gift over in favor of vesting the remainder is the same in principle as in the case put in the preceding section. Practically, however, the danger of a remainderman dying before the life tenant, leaving children, is not acute. If the remaindermen are not born when the interests are created the chances that they will be born, grow up, marry and have children before the death of the life tenant are slight.[32] That this situation should give the court any liberty to imply or reflect back a condition precedent in form that the remainderman must survive the life tenant seems to the writer clearly wrong. That such an implication or reflection back of a condition precedent of survivorship should be effected or not, depending upon whether the remainderman was not *in esse* or was a married adult, places the subleties of construction upon a par with the mysteries of the infinite extent of the unknowable. Yet the decisions of our Supreme Court show that its views have been decidedly in favor of implying by reflection back from the gift over the condition precedent in form that the remainderman survive the life tenant where the remainderman is unborn at the time the remainder is created.

[31] 285 Ill. 82.

[32] They are still slighter if the life tenant is the testator's wife as in Golladay *v.* Knock, 235 Ill. 412.

In *Furnish v. Rogers* [33] the limitations were by will and the language was very informal. The devise was to the testator's grandniece of certain premises described, "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 and nephews." It appears to have been held that the grandniece Jessie took a life estate and that the remainder to her children was contingent on their surviving her. Hence the interest of the one child born to her was a contingent remainder and could not be sold by the guardian. No condition precedent of survivorship could have been found in the limitations except by implication and by reflection back from the gift over. The holding may have been influenced by the fact that the case was decided at a time when our Supreme Court was holding that a fee upon a fee could not be created by will.[34] The court may have thought that if the remainder to the children of Jessie was vested, the gift over, if she would die childless, would be a fee upon a fee, and so void. To get away from this unfortunate result the court may have felt warranted in turning the remainder to the children of Jessie into a contingent remainder, so that it and the gift over if Jessie died childless could both be valid as contingent remainders in double aspect. Since it has become settled that a fee upon a fee by will is good as an executory devise,[35] all necessity for the construction adopted in *Furnish v. Rogers* is removed and the case is left, it is submitted, without any proper foundation for the holding that the remainder to the children of Jessie was contingent on their surviving Jessie.

In *Golladay v. Knock*,[36] the remainder after a life estate in Nancy was "to her children after her death; and if the said Nancy does not have children that will live to inherit said real estate, that the said real estate, at the death of Nancy and her children, fall to Moses and his heirs." Nancy was the testator's wife. She had no children at the testator's death. Subsequently the widow died having had one child who lived to be twenty-three years of age but died childless prior to the

[33] 154 Ill. 569.

[34] Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386.

[35] Glover *v.* Condell, 163 Ill. 566, overruling Ewing *v.* Barnes and Silva *v.* Hopkinson.

[36] 235 Ill. 412.

death of Nancy. The principal question in the case was whether the interest of Moses was alienable by deed during the life of Nancy. It was held that it was not. In the course of the court's opinion it said: "The clearly expressed intention of the testator was to give his wife a life estate in the premises, with a remainder in fee to such of her children as might be living at the time of her death." The question whether the interest of the child of Nancy was a contingent remainder in the feudal sense was not in any way involved. If we assume it to have been vested at the birth of the child, then when that child died her vested remainder descended, but when the life tenant died leaving no child the vested remainder was divested in favor of Moses or his heirs. At all times after the birth of Nancy's child, Moses had a contingent shifting executory interest and the inalienability of that interest by deed *inter vivos* is the same as the inalienability of a contingent remainder.[37] It is submitted that *Golladay v. Knock* cannot be used as an authority in support of the proposition that the remainder to the children in the case under consideration is contingent in a feudal sense and destructible and inalienable.

Hill v. Hill[38] purports to follow *Furnish v. Rogers*[39] and *Golladay v. Knock*[40] and to be distinguished from *Ducker v. Burnham*[41] and *Hinrichsen v. Hinrichsen*.[42] In *Hill v. Hill* the limitations were by deed to the daughter for life and "from and after her decease or determine said estate, to the sole use, benefit and behoof of the child and children of her body, their heirs and assigns forever; and in the event of the death of the said Mary Jane Hill [the life tenant] leaving no child or children her issue her surviving, then and in that case to the heirs at law of" the grantor. When this deed was executed in 1848 the life tenant was a young woman. She had two children prior to 1853 and a number of others afterwards. She lived until 1910. Her children grew up, married and had children and one child died before her, leaving children. Here then, as events turned out, the argument for vesting derived from the gift over became a very practical consideration. If the remainder to the life tenant's children was not vested but was subject to a con-

[37] *Post*, § 480.
[38] 264 Ill. 219.
[39] 154 Ill. 569.
[40] 235 Ill. 412.
[41] 146 Ill. 9; *ante*, § 348.
[42] 172 Ill. 462; *ante*, § 348.

dition precedent in form that the children must survive the life tenant, then the children of the child who died before the life tenant never could take by descent or devise from their parent. This was incongruous in view of the fact that the only gift over was if the life tenant died leaving no children at all. Nevertheless, the Court held the remainder subject to a condition precedent in form that the remainderman must survive the life tenant. Hence, the remainder was contingent in the feudal sense and inalienable *inter vivos* during the life of the life tenant. The point that seems to have weighed most with the court was that when the deed was executed the remainder was to "a class not in existence, which might never come into existence." *Ducker v. Burnham*[43] was distinguished because there the remainder was to "certain named children." What the court was driving at was, it is believed, that if the remainder were to certain adults *in esse* the danger of cutting out the children of the remainderman dying before the life tenant would be so great as to warrant the court in holding the remainder vested; while if the remainder were to a class not *in esse* the chance of this would be so slight that the court need pay no attention to it and would be required, therefore, to imply or reflect back a condition precedent in form of survivorship from the gift over. If this line of distinction is sound it also applies to differentiate *Hill v. Hill* from *Hinrichsen v. Hinrichsen*. The fault of the decision in *Hill v. Hill* is the assumption that where there is no explicit condition precedent in form that the remainderman must survive the life tenant, the court is required by some mysterious force to imply it or reflect it back from the gift over unless there is some positive context or incongruity against implying it by such reflection back. This position is fundamentally erroneous. The rule against implications, and especially implications which make the remainder contingent, together with the rule requiring a construction which will vest the remainder, is sufficient to deny the finding of such a condition precedent in form of survivorship. When we add the fact that such argument as is to be found in the gift over is an argument in favor of vesting, we should be permitted to set *Hill v. Hill* down as wrong—a decision not to be submitted to

[43] 146 Ill. 9.

until the court has unequivocally stood by it in the face of criticism.[44]

§ 350. Where the remainder is to named persons or to a class with a single gift over if any die before the life tenant leaving children then to those children: Here there is little need for the gift over if the remainder is not subject to a condition precedent in form that the remainderman survive the life tenant. That is a slight argument that the remainder is subject to such a condition precedent in form. Clearly, however, it is too slight an argument to have the effect of inserting by implication and reflection back from the gift over such a condition precedent in form when none has been explicitly expressed. The rule against implications as well as the rule in favor of vesting forbids it. The practitioner should, therefore, have felt warranted in this class of cases in starting with a strong *prima facie* assumption that there would be found no condition precedent in form that the remainderman must survive the life tenant and that the remainder was, therefore, vested but subject to be divested. Yet the decisions of our Supreme Court show a strong tendency to find the existence of a condition precedent in form that the remainderman must survive the life tenant, so that the remainder is contingent in the feudal sense. These cases can best be appreciated if taken in their chronological order.

In *Spengler v. Kuhn*[45] the limitations were equitable and to A for life, or until remarriage, then "the title to the real estate [shall] become vested in my children * * * and if, in the meanwhile, any or more of my children shall have died leaving a descendant or descendants, such deceased child's share shall go to his or her issue, descendant or descendants." The question arose whether, while the life tenant lived, the interests of two children passed to their trustee in bankruptcy. It was held that the interests were contingent and did not pass. This meant

[44] It may be worth noting that the first opinion of the court in Hill *v.* Hill, written by Mr. Justice Cartwright, held the remainder vested and gave to the appellee two-sixths of the property which he had acquired by the guardian's sale. The services of the writer, who had been of counsel for the appellee up to that time, were dispensed with; a rehearing was applied for by both sides and obtained. The present opinion of the court was the result.

[45] 212 Ill. 186. See also Security Insurance Co. *v.* Kuhn, 207 Ill. 166.

that the court found an express condition precedent in form that the children to take must survive the life tenant. No such condition precedent was explicitly included. It is submitted that none should have been implied or reflected back from the gift over. Furthermore, the reference in the will to the remainder "vesting" at the termination of the life estate might have been and should have been held to speak only of vesting in possession or vesting indefeasibly.[46] Such a reference to "vesting" is too slight a context upon which to find an express condition precedent in form of survivorship which will cause the remainder to be contingent in the feudal sense and inalienable and destructible.

In *Cummings v. Hamilton* [47] the limitations were in substance to A for life with a direct devise of the fee to B, C and D, with a gift over "in case of the death of either B, C or D (prior to the death of my husband [the life tenant] or prior to my decease) leaving a child or children, then in that case such child or children, or the descendants of such child or children shall inherit the share of the real estate which *would have vested* in their parents." It was held that the remainder to B, C and D was contingent upon their surviving the life tenant so that no merger of the life estate occurred by the conveyance of the life tenant to the remaindermen B, C and D. The question of whether there was a merger raised the question as to whether the remainder was vested according to the purely feudal conception of a vested remainder or a contingent remainder according to the purely feudal conception of such a remainder. In support of the decision holding the remainder contingent in the feudal sense and, therefore, not subject to merger it was urged that "would have vested" indicated that the testator did not regard the interest of the remaindermen B, C and D as vested. But "vest" may equally well refer to "vesting in possession" or "vesting indefeasibly." [48] So used the word "vest" produces no argument in favor of the remainder being subject to a condition precedent in form that the remainderman survive the life tenant. It is submitted that it is not sound or proper that so slight and ambigu-

[46] Chapman *v.* Cheney, 191 Ill. 574; Lunt *v.* Lunt, 108 Ill. 307; Burney *v.* Arnold, 134 Ga. 141; *post*, § 354.

[47] 220 Ill. 480.

[48] Chapman *v.* Cheney, 191 Ill. 574; Lunt *v.* Lunt, 108 Ill. 307; Burney *v.* Arnold, 134 Ga. 141; *post*, § 354.

ous a special context should overcome the general rule against implications of conditions precedent in form of survivorship and be used to support a construction which will vest the remainder.

In *Brownback v. Keister,*[49] after life estates, it was provided that the lands "shall vest in fee simple absolutely in the said now living children of my said son Julius [the life tenant] and his present wife, Matilda, and their descendants, share and share alike, the descendants of any of said above named children taking the share of their parents." As the children of Julius had already been named there was a direct gift to them without any explicit condition precedent in form of survivorship. The whole context indicated that the gift to descendants was substitutionary and in the event that any child of Julius died during the continuance of the life estates leaving descendants. It was held that the remainder to the children of Julius was subject to a condition precedent in form that they survive the death of the life tenants, with the feudal consequence that the interests of the children were not alienable *inter vivos* during the life of the life tenants. It was, of course, true that to take indefeasibly the children of Julius must survive the life tenants, but since this is expressed solely by inserting a condition subsequent in form, the remainder in fact stood ready, so long as it continued undivested, to take effect in possession whenever and however the preceding life estate determined. It was therefore vested in the feudal sense and alienable *inter vivos.* The result reached by the court seems even less justifiable than that which obtained in *Cummings v. Hamilton.*

In *Northern Trust Company v. Wheaton*[50] an equitable remainder was limited to ten named beneficiaries without any explicit condition precedent in form of survivorship. In fact, the limitation of the remainder was directly to the named persons. Then there was the following gift over: "In the event of the death of any of the ten persons above named as beneficiaries before the interest in my estate shall vest in them, leaving a child or children surviving at the time said estate shall vest, then said child or children of such deceased person shall take their parent's share." One of the ten died before the life tenant, leaving no child. It was held that her interest was not subject to any

[49] 220 Ill. 544.

[50] 249 Ill. 606.

condition precedent in form that she must survive the life tenant, and therefore since the divesting event had not occurred her interest was indefeasible and passed to her heirs at law or devisees. This looks at first like a strong case for the general rule that the remainder in question will not be subject to any condition precedent in form that the remainderman survive the life tenant by a process of implying by reflection back from the gift over such a condition, and that therefore such remainders may be taken as *prima facie* vested, subject merely to be divested. But upon a closer examination it appears that the result was reached by referring "death," in the gift over if the remainderman died leaving children, to death in the lifetime of the testator exclusively. The basis for this was the fact that death before vesting was particularly mentioned, so that if "vest" were used in the feudal sense the vesting occurred at the testator's death and "death before vesting" meant "death before the testator." The court, therefore, avoided holding the remainder vested but subject to a gift over upon the remainderman's death after the death of the testator and in the life of the life tenant. The case does not, therefore, rebut the inference from *Spengler v. Kuhn, Cummings v. Hamilton* and *Brownback v. Keister,* that in this class of cases a condition precedent in form that the remainderman must survive the life tenant is being regularly implied or reflected back from the gift over, especially if any reference appears in the context to the remainder "vesting" at the death of the life tenant.

In *Remmers v. Remmers* [51] the devise after a life estate was to the testator's sons, with a single gift over if any died before the life tenant to their children, if any, the children to "take the shares of their deceased parents." The remainder was held to be vested subject to a gift over. The actual decision was that the remaindermen could not have specific performance against the buyer because of the gift over.

§ 351. Suppose the remainder be limited "to the life tenant's children who survive the life tenant and in case any die leaving children to such children," is the ultimate gift over also contingent upon the grandchildren surviving the life tenant? The writer's answer would be no. There is no explicitly expressed condition precedent in form that the grand-

[51] 280 Ill. 93.

children survive the life tenant. The rule against implications of such contingencies forbids it. The rule against construing remainders to be contingent and, therefore, destructible and inalienable forbids it.[52] Such inferences as may be made from the context are against the finding of any condition precedent of survivorship. The gift is an ultimate one. There is no further gift over. If, therefore, the additional contingency of survivorship be added, the danger of an intestacy is greatly increased. There is also the remote possibility that those ultimately to take may die in the lifetime of the life tenant leaving children. These would be cut off if the contingency of survivorship be found to exist. The fact that the ultimate gift over is subject to one contingency, namely, that the life tenant's children die in the life tenant's lifetime leaving children, does not in and of itself produce the slightest argument that another and different contingency is to be added. Nor is there any logic in the assertion that a contingency of survivorship applicable to the children of the life tenant can be reflected forward to the next gift. Whatever logic there may be in reflecting a condition of survivorship back from gifts over, no similar process justifies the reflection of a condition of survivorship forward.[53]

These views, while perhaps not yet permanently discarded by our Supreme Court, have certainly up to the present time not been followed.

In *Brechbeller v. Wilson*[54] the remainder after a life estate in the wife was limited to "such of my four children [naming them] as may survive my said wife, or the issue of any of my said children who may have died before my wife; such issue to take the share which would have belonged to the parent; and in the event of the death of any one or more of my said four children without issue before the death of my said wife then his, her or their share" shall go to the survivors and the children of any who may have died leaving issue. Before the life tenant's death one child of the testator died leaving a child who also died before the life tenant. It was held that no interest passed by descent

[52] The English cases seem to have reached results in accordance with these views. Theobald on Wills, 7th ed. 678.

[53] The fact that the interests of the grandchildren were not remainders but shifting executory devises makes no difference because such interests are valid by will, and also by deed, taking effect under the Statute of Uses. *Post*, §§ 462, 467.

[54] 228 Ill. 502.

from the grandchild because his interest was also contingent on surviving the life tenant.

In *Brewick v. Anderson*[55] the testator limited the remainder, after a life estate in the wife, to his children without any express condition precedent in form that they must survive the life tenant, and "and in case of the death of any of my children before the distribution of my estate, then in case they have left at said time of distribution any *living issue*, then said child or children to take the part of my deceased child or children." When the will was made one child of the testator, Josephine, was dead, leaving a daughter Clara. At the testator's death, therefore, Josephine's interest was eliminated and there was a direct and immediate remainder (subject to the life estate) to Clara, with an express condition precedent that she must be alive at the time of the distribution of the estate, which meant the death of the life tenant. The case, therefore, is a plain one of a remainder limited with an express condition precedent in form that the remainderman survive the life tenant. That sufficiently explains the result reached.

§ 352. Suppose there is first a contingent remainder to the life tenant's surviving children or to her lineal heirs and then a remainder is limited to a class upon the life tenant's dying without leaving children or issue—Is the second remainder to the class also contingent upon the remainderman surviving the life tenant? The reasons for answering this in the negative are the same as those set out in the preceding section. The cases do not differ in any material respect. Yet our Supreme Court has held the ultimate remainder to be subject to a condition precedent in form that the remaindermen survive the life tenant.

In *Drury v. Drury*[56] the limitations were to Myrtle, a granddaughter for life. "At her death the fee simple title to all of said lands shall pass to and become vested in the heirs of her body, and in case of her death without a child or children the title thereto shall become so vested in my great-grandchildren." Myrtle died in 1912 without issue. Gertrude, one of the testator's great-grandchildren *in esse* at the time of his death died prior to the death of the life tenant and her heirs at law claimed. It was held that they were not entitled because Gertrude's re-

[55] 267 Ill. 169. [56] 271 Ill. 336.

mainder as a great-grandchild was subject to a condition precedent in form that she should survive the life tenant. The court placed its decision upon an inference in favor of the contingency drawn from the fact that the gift was to a *class*. It is left to § 353 to deal with the soundness of this position.

In *Blackstone v. Althouse*,[57] the devise was to A in fee with an executory devise over in case "A died without issue," in which event the land was to be sold and the proceeds divided "among my brothers and sisters and John Smith Blackstone and Ellen Hartman." The gift over took effect and the question arose whether the objects of the gift over must have survived the death of the first taker. It was held that they need not do so. No condition precedent of survivorship was to be found. The fact that there was one express condition precedent that the first taker must die without issue did not give rise to a further condition of survivorship. The court held that the gift was not to a class,[58] so that no inference of a condition of survivorship could arise from that fact.

§ 353. Effect on vesting of the fact that the remainder is limited to a class: As already explained, the court in *Hill v. Hill*,[59] where the remainder was held to be contingent upon the remainderman surviving the life tenant, was not so much emphasizing the fact that the remainder was to a class as that it was to persons unborn at the time the interests were created.[60] In *Brewick v. Anderson*,[61] the court had no need to rely upon the fact that the gift was to a class in order to make it contingent upon the members of the class surviving the life tenant.[62] In *Drury v. Drury*,[63] however, the court placed its holding that the remainder was contingent—and apparently this was the only ground for it—upon a rule announced by the court as follows: "* * * the rule is that where the gift is not in terms immediate and so confined and a gift to a class is postponed pending the termination of a life estate, those members of the class, *and those only*, take who are in existence at the death of the life tenant."[64] It is submitted that, whatever the rule

[57] 278 Ill. 481.

[58] As to this point, see *post*, § 556.

[59] 264 Ill. 219.

[60] *Ante*, § 349.

[61] 267 Ill. 169.

[62] *Ante*, § 351.

[63] 271 Ill. 336.

[64] This was repeated elaborately in Blackstone *v.* Althouse, 278 Ill.

may be with regard to bequests of personal property to a class *in futuro*,[65] no such rule as that laid down in *Drury v. Drury* exists where remainders of real estate are concerned. Whether a remainder to a class is contingent upon the members of the class surviving the life tenant depends upon whether such a condition precedent in form is found in the language used. No implication by reflecting back such a contingency should be permitted in the face of the rule that the courts construe the remainder vested if possible. The fact that the gift is to a class as such is not an argument of any particular strength that the gift is subject to a condition precedent that the members of the class must survive the life tenant.

Where the limitations are to A for life, remainder to the children of A with no gift over, our Supreme Court has twice emphatically held that the remainder was not contingent on the members of the class surviving the life tenant.[66] The fact that the gift was to a class was urged as an argument for finding the contingency of survivorship and specifically denied any such effect by the court. This would seem to be a fair indication that in dealing with remainders of real estate the fact that the gift was to a class was not an argument for finding the remainder subject to a condition precedent that the members of the class must survive the life tenant.

If the remainder is to a class "at" twenty-one it is still vested just as if it were to an individual "at" twenty-one.[67] This shows that the mere fact that a gift is to a class in and of itself does not furnish an argument of any weight that the gift to the class is subject to a condition precedent that the members of the class survive the life tenant.

Now, suppose the remainder is to a class with gifts over on one or more contingencies. In a number of cases we find our Supreme Court holding the remainder vested, indestructible and alienable. This means that the court refused to find that because the remainder was to a class the remainder was subject to a condition precedent in form that the remainderman must

481, 487-489, but the gift was held not to be one to a class. Whether that was correct or not, see *post*, § 556.

[65] *Post*, §§ 523, 524.

[66] Carter *v.* Carter, 234 Ill. 507; Thomas *v.* Thomas, 247 Ill. 543. Such a decision as Conner *v.* Johnson, 2 Hill Eq. (S. C.) 41, to the contrary only shows that courts can err.

[67] *Ante*, §§ 333, 335.

survive the life tenant.[68] Where the remainder in such a case is held to be subject to a condition precedent of survivorship it is not because the gift is to a class but because such a contingency is implied by reflection back from gifts over.[69] It is not till we read the *dictum* of *Brewick v. Anderson* and the decision of *Drury v. Drury* that we find our Supreme Court announcing a rule that a gift to a class, as such, has the effect of making the remainder contingent upon the remainderman surviving the life tenant. The propriety of that step is, it is submitted, subject to the gravest doubt.

§ 354. Effect of special directions that the remainder is to "vest" or "become absolute" on the death of the life tenant: Such expressions are almost always ambiguous. They may mean "vest in possession" or "vest indefeasibly" or "vest in interest." The first two meanings are consistent with vesting in the feudal sense, subject to the life estate, in which case the remainder is not subject to any condition precedent in form that the remainderman must survive the life tenant. The fact that the courts lean in favor of construing remainders vested rather than contingent would suggest that such expressions receive meanings which permit the remainder to be vested in the feudal sense.[70] Nevertheless, there are cases where directions as to vesting at the death of the life tenant have been used as the basis for an inference in favor of the remainder being contingent on the remainderman's surviving the life tenant.[71] In *Northern Trust Co. v. Wheaton*,[72] where there was a gift over if the remainderman died before the remainder "vested," the court, by taking the feudal definition of vesting, found that the remainder vested at the death of the life tenant, so that "die" meant "die before the testator."

§ 355. Whether a future interest is a vested remainder subject to a charge or a springing executory interest contingent

[68] Siddons *v.* Cockrell, 131 Ill. 653; Ducker *v.* Burnham, 146 Ill. 9; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Pingrey *v.* Rulon, 246 Ill. 109; Lachenmyer *v.* Gehlbach, 266 Ill. 11. See also Holland *v.* Wood, L. R. 11 Eq. 91.

[69] *Ante*, § 350.

[70] Phillips *v.* Gannon, 246 Ill. 98; White *v.* Willard, 232 Ill. 464; Chapman *v.* Cheney, 191 Ill. 574; Lunt *v.* Lunt, 108 Ill. 307; Burney *v.* Arnold, 134 Ga. 141.

[71] Spengler *v.* Kuhn, 212 Ill. 186; Cummings *v.* Hamilton, 220 Ill. 480, *ante*, § 350; Brownback *v.* Keister, 220 Ill. 544, *ante*, § 350.

[72] 249 Ill. 606.

upon the one to whom it is limited paying a sum after the termination of the life estate: In *Jacobs v. Ditz*,[73] after a life estate there was a devise to A with the direction that "before he shall receive the farm" he shall pay to the testator's daughter a certain sum and upon filing receipts of such payments "he shall have the above described lands under this will." Following the cases where a devise is made without any preceding estate, on a condition in form precedent that money be paid, and where the devise is held to be an immediate one, subject to a charge,[74] there would seem to have been a fair inference that the future interest created was a vested remainder subject to such a charge. The court, however, held that there was a condition precedent to the taking of any interest and since the condition must happen after the termination of the life estate, there was created not a remainder, but a springing future interest,[75] which was indestructible.

§ 356. Cases dealing with whether there is a condition precedent in form that the remainderman survive the life tenant where personal property is involved, are not authoritative where real estate is involved: In England the question whether the legal remainder was subject to a condition precedent that the remainderman survive the life tenant was determined for the most part by the common law courts as distinguished from the court of chancery. The attitude of the common law judges in dealing with the question was greatly influenced by the fact that a contingent remainder was subject to the feudal rule of destructibility which defeated the intent of the testator or settlor and was also inalienable. For these reasons the common law courts refused to find conditions precedent by any doubtful process of interpretation or implication or reflection back from gifts over. They steadily enforced the rule that all doubts were to be resolved in favor of a construction which made the remainder vested.

The same question arising in regard to wills of personalty came up as a matter of course in the court of chancery. There was no rule of destructibility applicable to personal property. The chancellors not only did not follow the attitude of the com-

[73] 260 Ill. 98.

[74] *Ante*, § 222. See also Remmers v. Remmers, 280 Ill. 93.

[75] *Post*, § 442.

mon law courts but they were much under the influence of the civil or Roman law regarding the construction of bequests of personal property. Rules as to when a bequest of personal property payable at a future time was subject to a condition precedent of survivorship were applied, which were utterly foreign to the common law courts when remainders of real estate were under consideration. On the whole, the court of chancery was accustomed to find a condition that the legatee must survive the period of distribution far more easily in regard to bequests of personalty than the common law courts ever did as to remainders of real estate.[76]

There is, therefore, a practical necessity for keeping separate and distinct the cases dealing with remainders of real estate and those dealing with limitations of personal property after life interests where the question whether the future interest is subject to a condition precedent of survivorship is involved. The cases, therefore, which deal with whether such a condition attaches to bequests of personal property payable in the future will be considered exclusively in a subsequent chapter on vesting of legacies. To apply the attitude developed in the chancery court with regard to bequests of personal property to legal remainders is hopelessly to confuse the proper solution of the problems of construction relating to the vesting of remainders. It may be desirable to have uniform rules of construction relating to remainders and future interests analogous to remainders after life estates in both realty and personalty. If so, it is suggested that all limitations of personalty analogous to those of remainders after life estates be treated as remainders of realty have been handled—thus eliminating conditions precedent of survivorship in gifts of personalty unless the same explicitly appear.

TITLE VII.

THE NEW YORK STATUTORY DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS, USED TO DETERMINE THE ALIENABILITY OR INALIENABILITY OF REMAINDERS, IS NOT IN FORCE IN ILLINOIS.

§ 357. The New York statutory distinction between vested and contingent remainders: At an early date the common law

[76] *Post*, Ch. XX on Vesting of Legacies.

distinction between vested and contingent remainders was changed in New York by statute. This act was subsequently copied in Wisconsin. The New York act[77] is as follows: "Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain." Under this act some remainders were, and indeed must have been, held to be vested, which under the common law were contingent. For instance, a remainder to such children of the life tenant as survive the life tenant, was held to be vested as soon as any child was born.[78] In such a case the child *in esse* can say that it "would have an immediate right to the possession of the lands upon the ceasing of the precedent estate"—that is, if the precedent estate should determine at that time. So, a remainder to the "heirs at law" of the life tenant (the rule in *Shelley's* case not applying) would be a vested remainder in those persons who at any particular time would be entitled as heirs if the life tenant should die at that time.[79]

It would, of course, have been an entirely futile and academic determination that a remainder was vested under the New York statutory definition unless such a determination had some consequences which did not obtain at common law. Hence the New York courts held that the statute which caused remainders to be vested which at common law were contingent also required those vested remainders to have some of the attributes at least of common law vested remainders, and one of these was the attribute of alienability by quit claim deed and by execution sale. The New York courts, therefore, held that a remainder to the "heirs" of the life tenant (the rule in *Shelley's* case not applying) was not only vested but had the attribute of alienability and was transferable during the life of the life tenant

[77] N. Y. Rev. Stats., pt. 2, ch. 1, tit. 2, § 13.

[78] Connelly *v.* O'Brien, 166 N. Y. 406; *In re* Moran's Will, 118 Wis. 177.

[79] Mead *v.* Mitchell, 17 N. Y. 210, 213; Sheridan *v.* House, 4 Keyes, (N. Y. Ct. App.) 569; Moore *v.* Littel, 41 N. Y. 66; House *v.* Jackson, 50 N. Y. 161.

by execution sale,[80] and by a deed without covenants of warranty.[81] It also held that, upon the transfer by the remainderman to the life tenant, the latter took by merger a vested fee in which the wife would have dower.[82] The courts have, however, always recognized that these results following from the New York statutory definition of a vested remainder, were different from the results properly reached at common law under the common law distinction between vested and contingent remainders, and that the result in New York rested entirely upon the New York statute. Thus in *Coster v. Lorillard*,[83] the New York court in referring to the distinction between contingent and vested remainders, as defined in the New York statute, said: "These definitions of vested and contingent remainders are very different from the common law definitions of these estates." The Wisconsin court in *In re Moran's Will*,[84] notices at length that the distinction between vested and contingent remainders as set forth in the New York statutes, and copied in the Wisconsin statutes, is very different from the common law distinction. The Alabama court, having been misled into thinking that the New York statutory distinction was the common law distinction, has frankly acknowledged its mistake and emphasized the fact that the New York cases are justifiable only under the New York statutory definition.[85] The extent to which the New York courts will go in applying the novel statutory definition and giving to common law contingent remainders the consequences of common law vested remainders is not very clear. In *Hennessy v. Patterson*,[86] the New York Court of Appeals had under consideration limitations to A for life, then to A's issue, and in default of such issue, to B in fee. It declared that even while A had no issue, B's remainder was a contingent and not a vested remainder, even under the New York statutory definition. So in *Hall v. La France Fire Engine Co.*,[87] it was declared that a conveyance to A for life "and at her death to the heir or heirs of her body her surviving," created a contingent remainder. Whether the New York courts would call a remainder

[80] Sheridan *v.* House, 4 Keyes (N. Y. Ct. App.) 569.
[81] Moore *v.* Littel, 41 N. Y. 66.
[82] House *v.* Jackson, 50 N. Y. 161.
[83] 14 Wend. (N. Y.) 265.
[84] 118 Wis. 177.
[85] Smaw *v.* Young, 109 Ala. 528.
[86] 85 N. Y. 91, 104.
[87] 158 N. Y. 570.

vested and indestructible, which the common law called contingent and destructible, will probably always remain a mystery, since the destructibility of contingent remainders was abolished in New York by special statute at an early date.

§ 358. The Illinois cases regularly and without exception assume the common law or feudal distinction between vested and contingent remainders to be in force in this State and endeavor to apply it, and have explicitly rejected the New York statutory distinction: Under the New York statutory definition a remainder to B and his heirs if B survive A, the life tenant, is vested and alienable by quit claim deed and execution sale.[88] This is because B is, during his life, ready to take at all times if the particular estate terminates by the life tenant's death. On the other hand, by the common law distinction the remainder is contingent, because it may not be ready to take effect in possession whenever and however the life estate terminates—as, for instance, if the life estate terminates prematurely by merger.[89] Hence the frequent holdings of the Illinois Supreme Court that such a remainder is contingent[90] are decisions in favor of the common law distinction between vested and contingent remainders and repudiate the New York statutory definition of a vested remainder.

It is equally clear that under the New York statutory definition a remainder to B and his heirs on the collateral contingency of the life tenant dying without leaving issue or children, is a vested remainder during the time the life tenant is alive but has no issue or children living. This is because under such

[88] Connelly *v.* O'Brien, 116 N. Y. 406; *In re* Moran's Will, 118 Wis. 177.

[89] Doe *v.* Scudamore, 2 B. & P. 289; Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296; Taylor *v.* Taylor, 118 Ia. 407; Young *v.* Young, 89 Va. 675; Nichols *v.* Guthrie, 109 Tenn. 535; Henderson *v.* Hill, 77 Tenn. 26; Roundtree *v.* Roundtree, 26 S. C. 450, 471.

[90] City of Peoria *v.* Darst, 101 Ill. 609; Haward *v.* Peavey, 128 Ill. 430; Walton *v.* Follansbee, 131 Ill. 147; Mittel *v.* Karl, 133 Ill. 65; Temple *v.* Scott, 143 Ill. 290; Chapin *v.* Crow, 147 Ill. 219; Phayer *v.* Kennedy, 169 Ill. 360; Madison *v.* Larmon, 170 Ill. 65; Thompson *v.* Adams, 205 Ill. 552; Spengler *v.* Kuhn, 212 Ill. 186; Starr *v.* Willoughby, 218 Ill. 485; Cummings *v.* Hamilton, 220 Ill. 480; Brechbeller *v.* Wilson, 228 Ill. 502; Robertson *v.* Guenther, 241 Ill. 511; People *v.* Byrd, 253 Ill. 223; Robeson *v.* Cochran, 255 Ill. 355; Wakefield *v.* Wakefield, 256 Ill. 296; *ante*, § 309.

circumstances the remainderman stands ready to take at any particular time in case the life tenant dies at that time. By the common law, however, the remainder is contingent, because by possibility the life estate may terminate (*viz.* by merger or forfeiture) before A's death without leaving children or issue, and hence before the remainder is ready, according to the terms of its creation, to take effect in possession.[91] In *Walton v. Fallansbee*,[92] the remainder was limited to the children of the life tenant in case the life tenant's husband should survive her. Here, then, the remainder was subject to a precedent collateral contingency. It was held contingent in accordance with the common law distinction. In *Boatman v. Boatman*,[93] where the remainder in fee was limited in case the life tenant died without leaving issue, our Supreme Court held it to be vested and alienable by a quit claim deed. This was in fact an application of the New York statutory definition and a repudiation of the common law rule. In *Golladay v. Knock*,[94] however, the court held the remainder contingent and inalienable by deed, thus returning to the common law distinction. *Boatman v. Boatman*,[95] and *Chapin v. Nott*,[96] were in terms overruled so far as they stood for any different result.

It has been regularly held, in accordance with the New York statutory definition, that a remainder to the heir or heirs of the body of the life tenant (the rule in *Shelley's* case not applying) was vested in those who at any time answered the description of heirs or heirs of the body of the life tenant if the life tenant were then to die.[97] Obviously under the common law distinction the remainder is contingent because the life estate may possibly terminate before the life tenant's death and hence before the re-

[91] Plunket *v.* Holmes, 1 Lev. 11; Loddington *v.* Kime, 1 Salk. 224; Purefoy *v.* Rogers, 2 Saund. 380; Egerton *v.* Massey, 3 C. B. N. S. 338; Stump *v.* Findlay, 2 Rawle (Pa.) 168; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Redfern *v.* Middleton, Rice, L. (S. C.) 459; Craig *v.* Warner, 5 Mackey (D. C.) 460; McElwee *v.* Wheeler, 10 S. C. (Rich.) 392; Faber *v.* Police, 10 S. C. (Rich.) 376; Watson *v.* Dodd, 68 N. C. 528; *id.*, 72 N. C. 240.

[92] 131 Ill. 147.

[93] 198 Ill. 414, approved in Chapin *v.* Nott, 203 Ill. 341.

[94] 235 Ill. 412. See also cases cited, *ante*, § 309.

[95] 198 Ill. 414.

[96] 203 Ill. 341.

[97] Mead *v.* Mitchell, 17 N. Y. 210, 213; Sheridan *v.* House, 4 Keyes, 569; Moore *v.* Littel, 41 N. Y. 66; House *v.* Jackson, 50 N. Y. 161.

mainder is ready to take effect in possession.[98] Our Supreme Court has regularly held that the remainder was contingent,[99] thereby applying the common law distinction and repudiating the New York statutory distinction between vested and contingent remainders.

§ 359. Cases which it is claimed show the adoption in Illinois of the New York statutory distinction, in every instance, excepting one, will be found to reach a proper result without applying the New York doctrine, and the one case which did apply the New York statutory distinction, and another purporting to follow it, have been in terms overruled—Cases dealing with the statutory remainder created by the Statute on Entails: The Illinois Statute on Entails provides that where an estate tail would have been created at common law (meaning under the Statute *de Donis*) the tenant in tail shall take a life estate and the remainder in fee 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 course of the common law, by virtue of such devise, gift, grant or conveyance." The remainder created by the statute would be a contingent remainder if it were regarded as equivalent to a remainder to the "heirs of the body" of the tenant in tail, who was made a life tenant by the statute. Furthermore, the remainder under the statute would be to the eldest son of the tenant in tail if there were one, for that would be "the course of the common law." The cases in other states having precisely the same Statute on Entails, have reached these results.[1] In *Butler v. Huestis*,[2] and *Lehndorf v. Cope*,[3] the Supreme Court

[98] *Ante*, § 27.

[99] Aetna Life Ins. Co. *v.* Hoppin, 249 Ill. 406; 214 Fed. 928. See also McCampbell *v.* Mason, 151 Ill. 500; Bond *v.* Moore, 236 Ill. 576; *ante*, § 309.

In Moore *v.* Reddel, 259 Ill. 36, the court assumed, in accordance with the express admission of counsel, that the Rule in Shelley's Case did apply, so that an estate tail was created. It necessarily followed that the Statute on Entails applied and turned the estate tail into a life estate in the tenant in tail and according to the settled construction of the Statute on Entails, limited a remainder to the children of the tenant in tail. See *post*, § 406.

[1] Horseley *v.* Hilburn, 44 Ark. 458, 476; *In re* Estate Kelso, 69 Vt. 272; *In re* Wells' Estate, 69 Vt. 388; Frame *v.* Humphreys, 164 Mo. 336; Burris *v.* Page, 12 Mo. 358. *Post*, § 405.

[2] 68 Ill. 594, 598.

[3] 122 Ill. 317, 331.

issued *dicta* that the statutory remainder was vested in any child as soon as born, but subject to be divested if the child died before the death of the life tenant. The fact that the remainder was subject to be divested shows that the court still regarded the remainder as limited to the "heirs of the body" in the sense that only those took who answered that description at the life tenant's death. Hence the declaration that the remainder was vested when any child was born could only go upon the New York statutory definition of a vested remainder. But the force of these *dicta* the court itself destroyed by subsequently holding that the statutory remainder was not only vested in the children of the statutory life tenant as soon as born, but it was not subject to be divested by their death before the life tenant.[4] This result can rest only on the ground that the statute in terms provided that the remainder in fee was to go to the "children" of the statutory life tenant and not to the "heirs of the body" of the life tenant. *Moore v. Reddel*[5] frankly goes upon this reading of the statute. Whether the court was right or wrong in so dealing with the Statute on Entails, there can be no doubt that the position actually taken eliminates any application of the New York statutory definition of a vested remainder which might have occurred if the *dicta* of *Butler v. Huestis* and *Lehndorf v. Cope* had been consistently applied.

§ 360. **Voris v. Sloan:**[6] Here the limitations were to trustees in trust for "C. M. and the heirs of her body forever." Upon the decease of the trustees the legal title to the property was to go to "C. M. during her natural life, with the remainder to the heirs of her body; and in case she should die without *issue*, then, in that case, the legal title to revert to the said party of the first part or his heirs." It was held that C. M. took a life estate in the proceeds of the sale of property and her children the interest after her death. Two children having already died, their interest passed by descent from them to the mother. This could only be correct if the children took absolute and indefeasible interests when born. No discussion of this point occurred in the opinion of the court. The clearest ground for its support is that the gift over "in case the life tenant should die

[4] Welliver *v.* Jones, 166 Ill. 80; Kyner *v.* Boll, 182 Ill. 171; Moore *v.* Reddel, 259 Ill. 36; *post*, § 406.

[5] 259 Ill. 36.

[6] 68 Ill. 588.

without *issue*," by reference caused "heirs of the body" to mean "issue." The result of this would be that each issue on birth took a vested indefeasible interest, subject only to open and let in other members of the class. The result of *Voris v. Sloan* might also be supported if an estate tail were regarded as created by the limitations to "C. M. and the heirs of her body forever," under the rule laid down in *Welliver v. Jones, Kyner v. Boll* and *Moore v. Reddel*.[7] Under these last mentioned cases the statutory remainder is regarded as limited to the "children." This would be a vested remainder under the common law distinction.[8]

§ 361. **Smith v. West**:[9] Here the limitations are not clearly set out. As recited by the court they were in a deed from Allen to Mrs. West conveying a life estate to the latter "and a remainder to the children of her body, *or such as might be living at her death, or the descendants of any one that might be then deceased.*" The holding was that the children had a vested remainder on birth and that the grantor, Allen, had parted with all of his title and had no reversion in fee and therefore was not incompetent as a witness because interested. This is clearly in accordance with the proper application of the common law distinction, for the remainder to the children of the life tenant is not subject to any condition precedent whatever, either in form or in substance. The children when born obviously during the continuance of their remainder stood ready to take in possession whenever and however the particular estate determined. The phrase "or such as might be living at her death" in reality provides for a gift over if any shall die before the life tenant's death, to the surviving children, and this, read with the preceding direct gift to the children, is a condition subsequent which leaves the direct gift to the children still vested. In the same way the final gift in the words "or descendants of any one that might be then deceased" is another gift over in case any child

[7] *Supra*, note 5.

[8] It is doubtful, however, if the court regarded an estate tail as having been created in Voris *v.* Sloan, 68 Ill. 588, for the next case in the reports is Butler *v.* Huestis, 68 Ill. 594, 598, which stated emphatically that the statutory remainder though vested in a child as soon as born, was subject to be divested. It is hardly possible that our Supreme Court would have issued such a *dictum* at the moment it was holding the statutory remainder vested indefeasibly.

[9] 103 Ill. 332.

dies before the life tenant's death, leaving children. The court was clearly correct, therefore, in holding that the children had a vested remainder upon birth and that the grantor parted with all interest. It is noticeable that the court purports to apply the common law distinction as laid down by Fearne and Kent. The court, however, quoted from *Moore v. Littel*,[10] the leading case decided in New York under the New York statutory distinction. The quotation from that case, apparently adopted in the opinion of the Illinois Supreme Court, is as follows: "Decisions 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. * * * The person must be one to whose competency to take no further or other condition attaches, etc., *i. e.*, in respect to whom it is not necessary that any event shall occur, or condition be satisfied, save only that the precedent estate shall determine." This passage is probably driving at the proper and recognized common law distinction. A careful perusal of it shows an effort on the part of the court to express what has been so well expressed by Gray and Williams when they say in substance that the remainder is vested when it stands ready at all times throughout its continuance to take effect in possession whenever and however the preceding estate determines. There is, therefore, absolutely nothing in *Smith v. West*, either in the result or in the language of the court, to indicate any tendency to adopt the New York statutory distinction between vested and contingent remainders. In fact, it is noticeable that in quoting from *Moore v. Littel* the Illinois court quotes the New York court's statements of the common law distinction which was the one the New York court in the case quoted from did *not* follow.

§ 362. **Siddons v. Cockrell**:[11] Here the context containing the limitations was very peculiar. Our Supreme Court was obliged to straighten out the extremely bungling language of the will before it could make any determination of the character of the remainder. As the court finally viewed the language the limitations were as follows: "after the devise to the widow: I devise all my remaining real and personal estate to my children, and if any children be dead leaving children surviving them,

[10] 41 N. Y. 66, 72.

[11] 131 Ill. 653.

then to them also,—the children of a deceased child taking the part of their parent; but if all my children shall die without issue before my wife shall die, I devise the same to her." Clearly upon such limitations the remainder to the children is vested under the common law distinction, exactly as in *Smith v. West*. There is nothing to indicate that the Court was not following the common law distinction or that it had in the slightest degree elected to adopt the New York statutory distinction.

§ 363. **Kellett v. Shepard**: [12] Here the devise was to the testator's daughter for life with 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. There is much language of the court to the effect that the interest of the heirs at law under the will was vested. It was entirely unnecessary, however, to determine whether the remainder was vested or contingent, 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 have vested in her heirs. The observations that the remainder to the heirs at law of the testator was vested probably meant no more than that there was no contingency that the heirs at law should survive the life tenant, or that heirs at law did not mean those who would have been the heirs at law of the testator had he died at the time of the death of the life tenant. Clearly under the common law distinction the remainder to heirs at law of the testator, meaning those who are his heirs at the time of his death, is vested. But if there be added the contingency that the heirs at law of the testator at the time of his death are not to take unless the life tenant dies, leaving no children, a collateral contingency is added which will make the remainder contingent, precisely as in *Golladay v. Knock* [13] and *Bond v. Moore*.[14] The result in *Kellett v. Shepard* is clearly correct and the references of the court to the remainder being vested are to be put down as a misapplication

[12] 139 Ill. 433.
[13] 235 Ill. 412.
[14] 236 Ill. 576.

of the correct and technical meaning of vested. There is no evidence whatever that the court regarded itself as departing from the common law distinction between vested and contingent remainders and the common law consequences thereof.

§ 364. **Burton v. Gagnon:** [15] Here we have an opinion of the court which was agreed to by three only out of seven members. It is in fact a minority opinion. Three judges dissented wholly and one judge dissented from the reasoning and particularly the construction placed upon the will in question. In no event, therefore, can the opinion in this case be given much weight. 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 to "heirs at law of my deceased father," in case "all of my children die intestate and without lawful children and not survive my wife." A decree for the complainants that the gift over was ineffective as against the first taker was affirmed. One ground was that of repugnancy. The other ground was that the executory devisees were precluded by a former decree in partition to which they were parties. To this latter point the executory devisees answered that their interest was contingent, 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. This apparently proceeded upon the ground that heirs at law of the deceased person were ascertained, and since those to take the ultimate gift over were ascertained, they must take a vested interest, although subject to three collateral contingencies: (a) the death of the children intestate; (b) the death of the children without lawful issue; and (c) failure of the children to survive the wife; and although the future interest was not a remainder at all, but an executory devise. Nothing could be more extraordinary than the calling of such an interest vested. Executory interests can never properly be called vested. The cases relating to the Rule against Perpetuities make that clear, for in the application of the rule no executory devise is ever vested until it takes effect in possession. *Golladay v. Knock* [16] has made it clear that a remainder to an ascertained person, which is, however, subject to only one collateral contingency, such as the life tenant dying without chil-

[15] 180 Ill. 345.

[16] 235 Ill. 412.

dren, still belongs to the class of contingent remainders. It is not possible to make any deductions whatever from this minority opinion in *Burton v. Gaynon* as to the views of the Court regarding the proper line of distinction between vested and contingent remainders obtaining in Illinois.

§ 365. **Boatman v. Boatman:** [17] In this case the limitations were by will, as follows: To E for life; "at his death, if he leaves a child or children surviving him, then said land is to go to said 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 child or children. Clara, E's sister, conveyed prior to E's death and while E was without children, by quit claim deed all her interest in the lands devised. E's brother, Clarence, died prior to E's death. It was held 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. Clearly the case is correct so far as the passing of Clarence's remainder to his heirs at law is concerned, for a contingent remainder was descendible at common law and, if it were limited upon a collateral contingency, such as the death of the life tenant without children, as in the *Boatman* case, which left a chance that it might vest after the death of the remainderman, it regularly descended to his heirs at law. So much in the *Boatman* case is clear, whether the remainder to Clarence was vested or contingent. The holding, however, that Clara's remainder was transferable by quit claim deed before E's death is a definite repudiation of the common law consequence of the inalienability of a contingent remainder. By the common law distinction Clara's remainder was contingent because the event of E's dying without children was one which might not happen until after the termination of E's life estate by merger. It was also a condition precedent in fact and in form to Clara's taking. On the other hand, by the New York statutory distinction, C had a vested remainder. Since E had no children at the time of the conveyance, Clara was ready to take at once if E had died then. In short, E had at that time a present capacity of taking in possession if E's life estate had then determined, although it could not be said of

[17] 198 Ill. 414.

Clara that she was *throughout the continuance of her remainder at all times ready to take whenever and however E's life estate determined*, which was the requirement of the common law for a vested remainder. It is clear, therefore, that *Boatman v. Boatman* is a decision, adopting the New York statutory distinction so far as the consequence of alienability of remainders is concerned. Curiously enough, however, the opinion of the court does not disclose any tendency to take up the New York statutory distinction or to depart from the common law distinction. The case is one where the court while purporting to go upon the common law distinction was not clear as to what that distinction was and thus fell into a palpable error. The subsequent case of *Golladay v. Knock* [18] has in terms overruled the result reached in the *Boatman* case.

§ 366. Chapin v. Nott: [19] In this case the limitations were by deed after a life estate "to Maud Chapin and the heirs of her body, if she has issue; in the event that the said Maud Chapin dies without issue, then the lands therein described are to revert to" J. B., S. M. and E. V. N. E. V. N. died before Maud, and then Maud died without ever having had issue. The heirs of E. V. N. claimed. Clearly, they were entitled, even though her interest was a contingent remainder, because contingent remainders were deseendible and if, as here, they were subject only to a collateral contingency, such as the death of the life tenant without issue, which might happen after the death of the remainderman, the chance of obtaining the vested interest regularly descended to the contingent remainderman's heirs. The holding that the heirs of E. V. N. were entitled to her share is, therefore, entirely consistent with the common law distinction. The court placed its result upon the ground that the remainder was vested, following the result of the *Boatman* case. Again, however, the court does not appear consciously to be departing from the common law distinction, or to be adopting the New York statutory distinction. Again, it is a case of the court misconceiving the proper formula for the common law distinction, and while laboring under this misconception obtaining a correct result on wrong reasoning. Again *Golladay v. Knock* [20]

[18] 235 Ill. 412.
[19] 203 Ill. 341.
[20] 235 Ill. 412.

has straightened the situation out by repudiating the basis which the court selected for its holding in *Chapin v. Nott.*

§ 367. **Ruddell v. Wren:** [21] The result in this case is correct, but the reasoning is subject to the same objection as that upon which the *Boatman* case was founded. The limitations after the life estate to the daughter were to her surviving children with a gift over "in case my said daughter shall die without leaving any child or children," 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." The court held that the brothers and sisters had a contingent remainder and therefore no partition could be had before the remainder vested. If this meant merely that remainders which were not vested indefeasibly were not subject to partition, then no question of the common law distinction between vested and contingent remainders was here involved, but only the rule as to what future interests are subject to partition. The court, however, discusses the character of the remainder to the brothers and sisters in terms of contingent and vested remainders. Clearly the remainder was contingent on the common law distinction since it was subject to the collateral contingency of the life tenant dying without children surviving. This view is consistent with *Golladay v. Knock* [22] and contrary to *Boatman v. Boatman,*[23] and the reasoning of *Chapin v. Nott.*[24] The reasoning of the Illinois Supreme Court, however, in *Ruddell v. Wren* attempts to reconcile its result with the views of the *Boatman* case and *Chapin v. Nott* by insisting that, without the gift over in case the brothers and sisters died before the daughter to their children, the remainder would have been exactly like the remainder in the *Boatman* case and *Chapin v. Nott*, and would have been vested. Then the court goes on to declare that the presence of the gift over if the brothers and sisters died before the daughter,—a gift over which is obviously by way of condition subsequent and expressed as a condition subsequent in form—made the remainder contingent. If the court had said it made the remainder vested but not indefeasibly vested, and, there-

[21] 208 Ill. 508.
[22] 235 Ill. 412.
[23] 198 Ill. 414.
[24] 203 Ill. 341.

fore, not subject to partition, it might have expressed its actual holding with precision. But it insisted upon calling the remainder a contingent remainder because of this gift over and repudiated the idea that it was a condition precedent which introduced it. Such reasoning, however well intended, is impossible from every point of view. If the remainder in the brothers and sisters was vested except for the gift over if they died before the life tenant, then the existence of the gift over expressed as a condition subsequent could not make the remainder a contingent remainder in the technical common law sense under any known view. It could not do it under the common law distinction because the gift over would simply operate as a condition subsequent. It could not do it under the New York statutory distinction in any event. *Ruddell v. Wren*, therefore, is either a practical repudiation of the *Boatman* case and the reasoning of *Chapin v. Nott*, or it means merely that a remainder, whether vested or contingent in the common law sense, while it is a future interest and not certain ever to vest indefeasibly because subject either to a condition precedent to its taking effect or a condition subsequent which might divest it after it has taken effect, is not subject to partition. In either view the case has no effect to establish any departure from the application of the common law distinction between vested and contingent remainders.

§ 368. Orr v. Yates: [25] Here a remainder after a life estate was devised to the testator's daughter "in fee simple * * * that is to say, that if" at the death of the testator's wife the daughter "shall then be living, the fee to said real estate shall vest in her," but if the daughter is not living, the fee shall vest in her children, or if she leaves no children, "then, in such case, said fee, if not disposed of" by the daughter, shall vest in the testator's brothers and sisters. The bill was filed for the construction of the trusts and to determine whether the gift over to brothers and sisters was void for repugnancy and whether the daughter took a remainder in fee. The court held the gift over void and that the daughter took only for life. The decree was reversed on these points. Whether the remainder in fee in the daughter was to be called vested or contingent in the common law sense of these terms was not in the least involved. The court in the fewest possible words and merely by the way, assumed,

[25] 209 Ill. 222.

that "the remainder in fee would seem upon all the authorities to be a vested remainder and not merely contingent," citing *Chapin v. Nott.* This merely passing assumption has no weight whatever. It falls along with the repudiation by the court in *Golladay v. Knock* [26] of the reasoning in *Chapin v. Nott.*

TITLE VIII.

JURISDICTION OF EQUITY TO SET ASIDE AND ENFORCE TRANSFERS OF REVERSIONS AND REMAINDERS.

§ 369. Introductory: Equity was not satisfied with the feudal distinction between reversions and vested remainders on the one hand and contingent remainders on the other as a test of alienability or inalienability. It was unwilling that all transfers of reversions and vested remainders should be given effect. It was equally unwilling that all transfers of contingent remainders should fail. Accordingly it developed its own rules for setting aside transfers of reversions and vested remainders and for giving effect to transfers of contingent remainders.

§ 370. Setting aside transfers of reversions and vested remainders which were indefeasible: The English court of chancery over two hundred years ago commenced to exercise a jurisdiction to set aside transfers of reversions and vested remainders in land, although such reversions or vested remainders were indefeasible. No fraud was required to be proved. It was enough that the price paid was inadequate.[27] The rule was

[26] 235 Ill. 412.

[27] Berny *v.* Pitt, 2 Vern. 14 (1686), (remainder in tail after life estate); Nott *v.* Johnson, 2 Vern. 27 (1687), (remainder in tail after life estate); Twisleton *v.* Griffith, 1 P. Wms. 316 (1716), (remainder in tail after life estate); Barnardiston *v.* Lingood, 2 Atk. 133 (1740), (remainder in tail after life estate); Gwynne *v.* Heaton, 1 Bro. Ch. 1 (1778), (rent charged by remainderman in tail after life estate); Gowland *v.* DeFaria, 17 Ves. Jr. 20 (1810), (reversion in fee subject to life estate); Bowes *v.* Heaps, 3 Ves. & B. 117 (1814), (remainders subject to life estate and remainders in tail); Hinksman *v.* Smith, 3 Russ. 434 (1827), (fee subject to life estate); King *v.* Hamlet, 2 Myl. & K. 456 (1834); Bawtree *v.* Watson, 3 Myl. & K. 339 (1834); Aldborough *v.* Trye, 7 Cl. & Fin. 436 (H. of L.) (1840), (remainder in tail after life estate); Edwards *v.* Burt, 2 DeG. M. & G. 55 (1852), (remainder for life subject to life estate); Salter *v.* Bradshaw, 26 Beav. 161 (1858), (fee or fee tail subject to life estates); St. Albyn *v.* Harding,

carried so far that the burden was put upon the purchaser to show that a proper price had been paid.[28] There were two views as to what price was proper. One required to be paid the present value as calculated by an actuary—that is an exact *quid pro quo*. This was called the arithmetical value.[29] To adhere to it was practically to render the remainder or reversion inalienable. The other view was that only the fair market value need be paid.[30] This gave some opportunity for transfer. These extreme views were modified by an act of Parliament in 1867 [31] which provided that "no purchase made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue." This, however, left courts of equity free to set aside such sales where there was unfair dealing and this might appear from gross inadequacy in the price paid.[32] It may be doubted whether courts of chancery in this country would exercise, in any such extreme manner as the English chancery courts did, a jurisdiction to set

27 Beav. 11 (1859), (remainder in tail after life estate); Jones *v.* Ricketts, 31 Beav. 130 (1862), (reversion in fee subject to life estate).

The same rule applies to future interests in personal property: Potts *v.* Curtis, 1 Younge, 543 (1832); Foster *v.* Roberts, 29 Beav. 467 (1861); Nesbitt *v.* Berridge, 32 Beav. 282 (1863).

A fortiori, the rule applies where the reversion and vested remainder is defeasible. Where the interest is subject to a condition precedent: Boothby *v.* Boothby, 15 Beav. 212 (1852).

See, however, Nichols *v.* Gould, 2 Ves. Sr. 422 (1751), (reversion in fee subject to a life estate).

A sale at public auction was sustained in Shelly *v.* Nash, 3 Madd. 232 (1818).

[28] Gowland *v.* DeFaria, 17 Ves. 20, 24, and other cases cited, *supra*, note 27.

[29] Gowland *v.* DeFaria, 17 Ves. 20 (1810); Hinksman *v.* Smith, 3 Russ. 433 (1827); Bawtree *v.* Watson, 3 Myl. & K. 339 (1834); Boothby *v.* Boothby, 15 Beav. 212 (1852); Salter *v.* Bradshaw, 26 Beav. 161 (1858); Foster *v.* Roberts, 29 Beav. 467 (1860); Jones *v.* Ricketts, 31 Beav. 130 (1862); Nesbitt *v.* Berridge, 32 Beav. 282 (1863).

[30] Headen *v.* Rosher, 1 M'Clel. & Y. 89 (1825); Potts *v.* Curtis, 1 Younge 543 (1832); Wardle *v.* Carter, 7 Sim. 490 (1835); Aldborough *v.* Trye, 7 Cl. & Fin. 436 (1840); Edwards *v.* Burt, 2 De G. M. & G. 55 (1852); Tynte *v.* Hodge, 13 Wkly. Rep. 172 (1864); Willoughby *v.* Brideoke, 13 Wkly. Rep. 515 (1865).

[31] 31 Viet. Ch. 4.

[32] Tyler *v.* Yates, 6 Ch. App. 665 (1871); Aylesford *v.* Morris, 8 Ch. App. 484 (1873); Brenchley *v.* Higgins, 70 L. J. Ch. 788 (1901).

aside transfers of reversions and vested remainders. It may even be doubted whether they would exercise such a jurisdiction at all where the reversion or vested remainder was indefeasible and there was no fraud.[33]

§ 371. Setting aside transfers of reversions and vested remainders which are defeasible: The English cases—whether they be followed in their extreme results or not—at least establish for the chancery courts of this country some equitable jurisdiction to set aside the transfer of a future interest by reason of inadequacy of price and other unconscionable circumstances, even though there is no fraud. Does the transfer of a reversion or a vested remainder which is defeasible present such a case? Such a reversion or remainder is alienable at law while the contingent remainder is not. The vested remainder may, however, be vested subject to be divested if the remainderman does not survive the life tenant. The contingent remainder may be subject to a condition precedent in form that the remainderman survive the life tenant. So far as alienability is concerned, one is from a modern rationalistic point of view, the same as the other. Barring the rule of destructibility, one is as uncertain to take effect as the other. Yet by the feudal land law one is alienable and the other is not. Whatever policy there may be in favor of safeguarding the holders of contingent remainders by continuing the rule of inalienability, applies equally to the defeasible vested remainder. The same reasoning which would cause a court of equity to refuse specific performance of a conveyance of a contingent remainder after the remainder had vested if the price were inadequate or the circumstances unconscionable (though not fraudulent), are applicable to prevent the carrying out of a transfer of a vested though defeasible remainder. In these circumstances it is to be expected that the courts of chancery in this state will use an established jurisdiction to set aside for inadequacy of price or unconscionable circumstances (not, however amounting to actual fraud) trans-

[33] Jenkins *v.* Pye, 12 Pet. (U. S.) 241, 252, 253; Whelen *v.* Phillips, 151 Pa. 312; "Attitude of Public Policy toward the Contracts of Heirs Expectant and Reversioners," 13 Yale Law Journal, 228. But see Nimmo *v.* Davis, 7 Tex. 26, 34; Boynton *v.* Hubbard, 7 Mass. 112, 120; Kenwood Trust & Savings Bank *v.* Palmer, 209 Ill. App. 370; 285 Ill. 552.

fers of reversions and vested remainders which are defeasible. They may not go the length of the English chancery court. They may not require the full price to be paid. They may not put the burden of proof on the purchaser. They are quite likely, however, to set the transfer aside where the transferor proves that the price was grossly inadequate and that the circumstances surrounding the transaction were unconscionable.

§ 372. Suppose the transfer of the reversion or vested remainder were by a guardian's sale: It is assumed that if the reversion or vested remainder were indefeasible its transfer would not be disturbed. It seems hardly possible, however, that a court of equity would disturb it where the reversion or vested remainder were defeasible and the sale had the approval of a court of competent jurisdiction. To act otherwise would be to permit a collateral attack on the decree of a court of competent jurisdiction.[34]

§ 373. Suppose the transfer of the reversion or remainder were by execution sale: If the reversion or vested remainder sold is indefeasible it is doubtful if equity would interfere to set aside the sale for inadequacy of consideration. The case is too much like the sale on execution of a present interest in possession. The actual value is fairly ascertainable and the statutory period of redemption gives the debtor protection against the sale for an inadequate price. If, however, the reversion or vested remainder is *defeasible,* it is the mere technical or feudal difference between such a remainder and contingent remainders that makes the former alienable by execution sale and the latter not. Both alike may (except for the application of the rule of destructibility) be equally uncertain ever to come into possession or vest indefeasibly. There are strong reasons why such interests (whether vested and defeasible or contingent) should not be subject to sale on execution. By reason of the uncertainty that the remainder will ever vest or come into possession indefeasibly the creditor has the debtor at his mercy. He may bid in the interest at a very low price and then keep the balance of his judgment alive indefinitely and possibly collect it out of other property. The period of redemption does the debtor no good because during that time

[34] For this reason no attack could be made directly upon the bankruptcy sale involved in Wallace v. Foxwell, 250 Ill. 616.

the uncertainty of the remainder vesting indefeasibly is as great as ever. The existence of the uncertainty discourages redemption even where the purchase price is very low. Thus the creditor for a small sum obtains the chance of a valuable estate and has his judgment as well. This is unconscionable. It is the real basis for the strict enforcement of the rule that there can be no execution sale of contingent remainders. The courts have no doubt been bothered by observing that the policy against execution sales of reversions and vested remainders which were defeasible was just the same as the policy against permitting execution sales of contingent remainders. The way out is to use the jurisdiction of a court of equity to set aside execution sales of reversions and vested remainders which are defeasible when the price is inadequate and the terms of the sale unconscionable.

§ 374. Specific performance of transfers of contingent remainders as contracts to convey when the remainder vests: The expectancy of one as the heir of a living person may be released to the ancestor and in equity such a release will be enforced for the benefit of the other heirs.[35] The expectancy of such an heir is assignable in equity to a stranger who may upon the death of the ancestor maintain a bill for specific performance to compel a conveyance.[36] Inadequacy of consideration and circumstances of unfairness would be a defense to such a bill. The English court of chancery refused specific performance when the price alone was such as would warrant the setting aside of the transfer of a reversion or vested remainder.[37] It should not be open to doubt that in Illinois the attempt to transfer, upon a proper consideration and where there were no elements of unfairness, a contingent remainder, would operate

[35] 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; Donough *v.* Garland, 269 Ill. 565; Simmons *v.* Ross, 270 Ill. 372; Mires *v.* Laubenheimer, 271 Ill. 296. But see Sayer *v.* Humphrey, 216 Ill. 426.

[36] Parsons *v.* Ely, 45 Ill. 232; Ridgeway *v.* Underwood, 67 Ill. 419, 427 (the interest assigned was a springing executory interest). See *post,* § 181; Hudnall *v.* Ham, 183 Ill. 486, 500, 501; Donough *v.* Garland, 269 Ill. 565.

[37] Peacock *v.* Evans, 16 Ves. Jr. 511 (1809). See cases cited, *ante,* § 370.

as an assignment in equity and that specific performance would be given when the remainder vested.[38] The conveyance must, however, on its face show an intent to transfer the contingent remainder.[39]

§ 375. Specific performance of a guardian's attempted transfer of the ward's contingent remainder: If a guardian has no statutory power to deal with his ward's contingent remainder in any way, his attempted transfer is not only void at law but there can be no contract of which a court of equity could give specific performance. If, however, the guardian has power to deal with the ward's real estate in any way that the ward could if he were of age, then the guardian would have power to contract to convey the ward's contingent remainder and equity could give specific performance of the attempted transfer when the remainder vested. The assumption seems to have been that this could not be done.[40] If it could be, the question would arise whether after an approval of the guardian's contract by a court of competent jurisdiction, a court of chancery would undertake to inquire into the adequacy of the consideration or the fairness of the transaction.

§ 376. Equitable execution upon contingent remainders by creditors' bill: This is flatly denied in a recent case.[41] The unfairness of execution sales of contingent remainders as well as of reversions and vested remainders which are defeasible has already been indicated *ante*, § 373. These considerations justify

[38] 3 Pomeroy, Equity Jurisp. §§ 1287, 1271; Fearne, Cont. Rem. 549-551; Smith's notes to Fearne, C. R., §§ 749-750; Watson *v.* Smith, 110 N. C. 6; Whelen *v.* Phillips, 151 Pa. 312. In Golladay *v.* Knock, 235 Ill. 412, the warranty deed of the heir of a contingent remainderman was not enforced in equity against the heir of the grantor who died before the remainder vested in him. No question, however, of the enforceability of the attempted conveyance was considered by the court.

[39] 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*, § 481.

[40] Hill *v.* Hill, 264 Ill. 219; Graff *v.* Rankin, 250 Fed. 150.

[41] Kenwood Trust & Savings Bank *v.* Palmer, 209 Ill. App. 370; 285 Ill. 552.

the refusal by courts of equity to permit any equitable execution against contingent remainders just as they furnish the basis for setting aside for want of an adequate consideration an execution sale of a reversion or vested remainder which is defeasible.

§ 377. Suppose the interest attempted to be transferred while in form like a contingent remainder, is equitable and not legal: Such interests are not subject to any feudal rule of destructibility.[42] They are not subject to any feudal rule of inalienability. They are recognizable only by courts of equity. Those courts have their own rules regarding the alienability of such interests. They do not have to resort to the subterfuge of giving specific performance of a contract to convey. They may recognize the conveyance as passing the equitable title to the contingent interest. Still the consideration must be adequate and there must be no unconscionable circumstances. In *Spengler v. Kuhn*[43] the equitable contingent remainder (if it may be called so for convenience) seems to have been assumed to be inalienable in equity in the same manner as a legal contingent remainder. The result deduced was that the contingent remainder did not pass to a trustee in bankruptcy. This may perhaps be upheld on the ground that such an assignment meant a forced sale by the bankruptcy court and that rather than permit such a sale the bankruptcy act must, like the statute relating to execution sales, be construed as not passing the equitable interest to the trustee.

§ 378. Conclusion: The purpose in pointing out the jurisdiction of a court of equity over transfers of reversions, vested remainders and contingent remainders is this: Our Supreme Court when it followed the New York statutory definition of vested remainders in *Boatman v. Boatman*[44] showed a strong desire to make remainders, which were contingent according to the feudal definition, alienable. On the other hand, in a number of cases where the remainder was vested according to the feudal definition but defeasible, the court has, by what are believed to be unsound processes of interpretation, implied or reflected back a condition precedent in form of survivorship in order that the remainder may be contingent and inalienable.[45] This indicates

[42] *Ante*, §§ 88, 316.
[43] 212 Ill. 186.
[44] 198 Ill. 414; *ante*, § 365.
[45] Furnish *v.* Rogers, 154 Ill. 569; Hill *v.* Hill, 264 Ill. 219; *ante*, § 349.

a feeling on the part of the judges that the feudal distinction between vested and contingent remainders as a test of alienability does not answer the needs of justice in particular cases. They are right. It does not. The way out is not to confound the law of real property by calling contingent remainders vested or making vested remainders contingent, as the exigencies of sustaining or setting aside a conveyance demand, but to develop the legitimate and settled jurisdiction of courts of equity in setting aside transfers of reversions and remainders which are vested in the feudal sense and giving or refusing specific performance of transfers of contingent remainders which are inalienable at law. But even when this is done the guardian's sale may elude control by a court of equity. If the ward's interest is a reversion or vested remainder, it is alienable and the decree of the court permitting it cannot be attacked collaterally. If the ward's interest is a contingent remainder the statutory power to make even a contract may be lacking. If that be so then one of two courses only is open to the court. Either it must hold that a reversion or remainder vested but defeasible is not subject to a guardian's sale or that the feudal distinction between vested and contingent remainders is the test of the validity and propriety of a guardian's sale. It should not by forced constructions make the remainder contingent or vested according as it believes the conveyance should be set aside or sustained.

TITLE IX.

ATTORNMENT.

§ 379. Attornment no longer necessary for the transfer of reversions and vested remainders: Under the feudal law it was necessary to the validity of the conveyance of a reversion or vested remainder by grant that the tenant in possession attorn. Without attornment the grant was void; no title passed.[46] 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.[47] *A fortiori*, none was necessary

[46] Lit. §§ 551, 567-569, 1 Gray's Cases on Prop., 2nd ed. 353, 354. See also "The Mystery of Seisin," by F. W. Maitland. 2 Law Quart. Rev. 481, 490 *et seq; ante*, § 43.

[47] Lit. §§ 167, 586, 1 Gray's Cases on Prop., 1st ed. 451; *ante*, § 43.

when a reversion was conveyed by will operating under a statute.[48] 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.[49] So zealous, too, were the courts to sustain conveyances, and dispense with the requirement of attornment that 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 pass a legal title without attornment.[50] The common law requirement of attornment, however, still continued to exist. The statute of 32 Hen. VIII,[51] 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 expurgation from the law of England did not occur till the statute of Anne.[52] In this country, many states have re-enacted the statute of Anne.[53] 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 the feudal land law unsuited to, and inconsistent with, our laws, customs and institutions.[54]

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*[55] 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

[48] 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; *ante*, § 43.

[49] Co. Lit. 309a, b, 1 Gray's Cases on Prop., 2nd ed. 354; Edward Fox's Case, 8 Co. 93b; 1 Gray's Cases on Prop., 1st ed. 489; *ante*, § 43.

[50] Edward Fox's Case, 8 Co. 93b; 1 Gray's Cases on Prop., 1st ed. 489; *post*, § 456; *ante*, §§ 62, 75.

[51] 32 Hen. VIII. Ch. 34, sec. 1; 2 Gray's Cases on Prop., 2nd ed. 321, and 2 Starr and Curtis, Ill. Stats. (1896), p. 2515.

[52] 4 Anne, ch. 16, sec. 9; 1 Gray's Cases on Prop., 2nd ed. 355.

[53] 1 Stimson's Amer. Stat. Law, §§ 2008, 2009.

[54] Perrin *v.* Lepper, 34 Mich. 292; 1 Gray's Cases on Prop., 1st ed. 448.

[55] 60 Ill. 114; 1 Gray's Cases on Prop., 1st ed. 446. Also Scheidt *v.* Belz, 4 Ill. App. 431, 435-436; Hayes *v.* Lawver, 83 Ill. 182.

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,[56] 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 Landlord and Tenant Act of 1873 [57] 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.*,[58] 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.[59]

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 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.

TITLE X.

DESCENT OF REVERSIONS, REMAINDERS AND OTHER FUTURE INTERESTS—FROM WHOM TRACED.

§ 380. At common law: The common law rule was that descent was traced from the person last actually seized. To

[56] *Post*, § 456; *ante*, §§ 62, 75.

[57] R. S. 1874 ch. 80 sec. 14.

[58] 169 Ill. 112, followed by Bordereaux *v.* Walker, 85 Ill. App. 86. Same result reached in Howland *v.* White, 48 Ill. App. 236.

[59] 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.

this there was the exception that descent could always be traced from the first purchaser, even though he was not actually seized, as if he had been. The application of this principle and its exception became especially important where the question of the descent of future interests of which there was no actual seisin, —viz: future interests after freeholds as distinguished from future interests after terms for years—was involved. For instance, if, subject to a life estate in A, B had a remainder in fee and died before A, B was not actually seized. Nevertheless, on his death descent was traced from him because he was the first purchaser.[60] If B died before A leaving as his heir C, and C thereupon died before A, on A's death descent was traced from B and not from C. If by deed, or by the marriage of B, a woman, with A, there was created a life estate in A and a reversion in the grantor or the wife B, then on the grantor's or B's death before A leaving as heir C, who died before A, descent would be traced from the grantor or B, who was the first purchaser or person last actually seized of an estate of inheritance.[61] If by will or by assignment of dower A became possessed of a life estate and there was an intestacy as to the reversion, which passed to B, then if B died before A leaving C as his heir, and then C died before A, descent would be traced from B and not from C, for C was never seized and was not a purchaser.[62] So if the future interest were a contingent remainder or a contingent executory interest in B, and the contingent remainderman or executory devisee died before the first taker, leaving his heir C, who also died before the first taker, leaving as his heir D, descent was traced from the first purchaser B and not from C.[63]

[60] Wendell *v.* Crandall, 1 N. Y. 491; 2 Denio 9.

[61] Bates *v.* Schraeder, 13 Johns. 260; Jackson *v.* Hendricks, 3 Johns.' Cas. 214; Lawrence *v.* Pitt, 46 N. C. 344 (prior to 1851).

[62] Dickenson *v.* Holloway, 6 Munf. 422 (1819, Va.); Lawrence *v.* Pitt, 46 N. C. 344; Jackson *v.* Hilton, 16 Johns. 96.

[63] Barnitz *v.* Casey, 7 Cranch (U. S.) 456 (devise to A in fee and if he dies under twenty-one without issue, then to B in fee. B died before A and although A is the heir at law of B, yet on the death of A the executory devise devolves upon the next heir of B); Buck *v.* Lantz, 49 Md. 439 (to M for life; then to her children, but if no child, then to M. H., sister of the grantor. M. H. died leaving M as one of her heirs. M then died without children. Held, descent was traced

§ 381. The rule of the common law tracing descent from the person last seized or from the first purchaser, has been abolished by the Illinois Statute on Descent under which descent is traced from the person last entitled: In some states the Statute on Descent is explicit that descent is to be traced from the person last entitled.[64] Our Statute on Descent[65] begins, "that estates, both real and personal, of resident and non-resident proprietors in this state dying intestate, or whose estates or any part thereof shall be deemed and taken as intestate estate, after all just debts and claims against such estate are fully paid, shall descend," etc. This has been the form of

from M. H. to her heirs living at the death of M, so that M did not take as an heir and thereupon pass to her heirs the share which M had taken by descent from M. H.); Garrison *v.* Hill, 79 Md. 75 (to E for life, then to her children, but if she had none, then to her brother absolutely. The brother died before E and she died without issue, having devised all her property to her mother. E was an heir of her brother, and the mother, claiming by devise from E, contended for the share of the brother's remainder which had descended to E. Held, the mother was not entitled. The heirs of the brother only were entitled who were ascertained as such at the death of E, thus excluding E); Jenkins *v.* Bonsal, 116 Md. 629 (to the daughter for life; if she leaves no children then to the testator's son T. M. J. absolutely. T. M. J. died intestate before the daughter leaving a wife but no descendants. The widow died leaving a will in which L. B. was named as executor. Upon the death of the daughter without descendants it was held that the remainder of T. M. J., though descendible, did not pass to T. M. J.'s widow and therefore did not pass by her will. Descent was to the heirs of T. M. J. at the death of the life tenant, at which time T. M. J.'s widow was dead. Held, also, that the rule applied to personal property as well as to real estate).

[64] Cook *v.* Hammond, 4 Mason (U. S.) 467, (Story, J.) Massachusetts Act: "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein."

Kean's Lessee *v.* Roe, 2 Harr. 103, 113 (Del. 1841). (The statute read: "When any person having title or any manner of right, legal or equitable.")

Hicks *v.* Pegues, 4 Rich. Eq. (S. C.) 413. Act of 1791 read: "Where any person possessed of, interested in, or entitled unto, a real estate."

Lakey *v.* Scott, 15 N. Y. Weekly Digest 148. Evidently a New York statute changing the law from what it had formerly been.

Moore *v.* Rake, 26 N. J. L. 574, 582 (1857). Statute read: "When any person shall die seized of any lands, etc., in his or her own right in simple fee." Held, "die seized" was the same as "entitled."

[65] R. S. 1874, ch. 39, sec. 1.

our Statute on Descent since 1829.[66] It is now settled by *North v. Graham*[67] that "estates" in this Act refers to estates to which the deceased is "entitled," so that descent is traced from the person last entitled. In that case a grantor upon a conveyance to a charitable corporation became, according to the settled view in this State,[68] entitled to a possibility of reverter which gave him the right to obtain back his fee again upon the dissolution of the grantee corporation without debts. During the life of the corporation the grantor died leaving surviving him as his only heirs three daughters. One daughter died unmarried without issue, leaving as her only heirs her two sisters. Of the two remaining sisters one died married, leaving a child. That child died leaving as her only heir, her father. Subsequently the corporation dissolved. According to the common law doctrine of descent the surviving daughter of the grantor would have taken the whole estate, while under the rule as generally adopted by statute in this country, descent would have been traced from the person last entitled in regular succession, and the surviving daughter of the grantor would have taken an undivided one half interest and the grantee of the brother-in-law the other undivided one half. The latter view and the results depending thereon were adopted by the Court.

The soundness of the result reached is clear. The natural meaning of the word "estates," as used in the Statute on Descent, is "estates to which deceased shall be *entitled.*" Such it is believed is the primary meaning of the language used at the time it was used by the legislature. To say that it referred only to estates to which the deceased died actually seized, would be far-fetched and uncalled for. Such a construction upon language substantially similar has been adopted in Georgia,[69] and Pennsylvania.[70] The interpretation of the Illinois Act adopted by our Court is fortified by reason of the fact that in

[66] Laws 1829, p. 191, sec. 43; R. S. 1845, ch. 109, sec. 46; 1 A. & D. R. E. S. 505. Prior to 1829 the statutes seem to have read: "The estates, both of resident and non-resident proprietors * * * shall descend." See 1 A. & D. R. E. S. 439, 450, ordinance of 1787, sec. 2, Laws 1819, p. 223, sec. 21.

[67] 235 Ill. 178.

[68] Life Assn. *v.* Fassett, 102 Ill. 315, 323; Mott *v.* Danville Seminary, 129 Ill. 403; Presbyterian Church *v.* Venable, 159 Ill. 215.

[69] Thompson *v.* Sandford, 13 Ga. 238; Oliver *v.* Powell, 114 Ga. 592, 600.

[70] Cote's Appeal, 79 Pa. St. 235.

the Act real and personal property are treated together so far as the rules for tracing descent are concerned. The common law rule never, of course, had any relation to the distribution of personal property. The fact then that real and personal property follow the same rules of descent and the incongruity of applying the common law rule to personal property, is a strong argument that the rule relating to personal property was intended to be applied in the case of real estate. This argument was potent in *Hillhouse v. Chester*;[71] *Thompson v. Sanford;*[72] and *Cote's Appeal.*[73] Furthermore, the Illinois Act follows the general scheme of the Statute of Distributions of Charles II, relating to personalty. This was held in *Hillhouse v. Chester*[74] to be a sound argument in favor of a construction of the Statute which repudiated the common law rule that descent must be traced from the person last seized. The common law mode of tracing descent is, is it submitted, extremely foreign to the customs and practice in this state and in the country at large, and this was found in *Hillhouse v. Chester*[75] to be a strong argument for a construction of the Statute on Descent which abolished the common law rule.

§ 382. There should be no distinction in the tracing of descent between reversions and vested remainders on the one side and contingent remainders and executory interests on the other: Since the mode of tracing descent from the person last entitled depends upon the Statute on Descent there can be no ground for saying that the descent of reversions and vested remainders is to be traced in one way and the descent of contingent remainders and contingent executory interests in another. If the contingent remainderman dies before the life tenant his right or interest passes by descent to his heir and upon that heir's death before the contingency happens, to his heirs, and so on. There is no difficulty in this because the contingent remainderman has the right to secure an estate. It passes by descent even under the feudal land law.[76] The legislature has full power to say how that descent shall be traced and it has spoken. In Georgia, however, where the descent of reversions and vested remainders is from the person last

[71] 3 Day (Conn.) 166, 210.
[72] 13 Ga. 238.
[73] 79 Pa. St. 235.
[74] 3 Day (Conn.) 166, 210.
[75] *Id.*
[76] *Ante*, § 324.

entitled,[77] the descent of a contingent remainder or contingent executory interest is traced from the first purchaser at the time the contingency happens.[78] It looks as if our Supreme Court had dallied with the same distinction. In *North v. Graham*[79] a possibility of reverter was involved which was inalienable *inter vivos* at common law, like a contingent remainder, and from the feudal point of view after the Statute of Quia Emptores had abolished tenure, was no more than a remote future right. Nevertheless, before the Statute of Quia Emptores it was in effect a reversion. Our Supreme Court emphasized the fact that "the right or interest under the possibility of reverter is very like, though, as we have seen, not strictly identical with, a reversion,"[80] thus indicating that in tracing its descent the rule applicable to a reversion would be followed. On the same day that the opinion of the court in *North v. Graham* was handed down, the opinion of the court in *Golladay v. Knock*[81] was filed. In that case there was a contingent remainder after a life estate in case the life tenant died without leaving children, to "Moses Golladay and his heirs." Moses, the contingent remainderman, died during the life of the life tenant leaving as one of his heirs his son William. William made a warranty deed to Fuller and died before the life tenant leaving the complainants as his heirs. It was held that the complainants were entitled as against Fuller. This goes on the ground that the doctrine of lineal warranty did not apply,[82] or that descent was traced from Moses when the remainder vested, so that there was never any descent to William. It could not have gone on the ground that the limitation to "Moses and his heirs" meant Moses "or his heirs" without running necessarily into the question of lineal warranty. If "and" had been construed "or" the limitations would have been to Moses, or if he were dead, to his heirs. This would have meant his heirs at the time of his death,[83] and so would have included William, and the question of lineal warranty would have arisen. There is no indication that the court was intending to deal in any way with the doc-

[77] Oliver *v.* Powell, 114 Ga. 592, 600; Thompson *v.* Sandford, 13 Ga. 238.

[78] Payne *v.* Rosser, 53 Ga. 662; Collins *v.* Smith, 105 Ga. 525, 532.

[79] 235 Ill. 178.

[80] *Id.*, 184.

[81] 235 Ill. 412.

[82] *Ante*, § 323.

[83] *Post*, § 571.

trine of lineal warranty. The only language used by the court was "No title ever vested in him [William]. His children are not estopped by the covenants in this deed for the reason that they are not asserting a title by descent from their father, but are claiming under the will of George Golladay, as heirs of Moses Golladay." If this be read "the complainants were claiming under the will a contingent remainder as heirs of Moses," it would amount to a statement that descent was being traced from Moses; but it could hardly do that and at the same time ignore *North v. Graham*. It is not unlikely that the court thought by taking "heirs" in the limitation to "Moses and his heirs," as a word of purchase, the persons who would have been Moses' heirs if he died at the time of the vesting of the remainder, were designated.[84] The statement of such a position indicates the difficulty in supporting it.[85] Perhaps the best course is to put the case down as not deciding anything about lineal warranty, the tracing of descent, or the meaning of the phrase to "Moses and his heirs."

TITLE XI.

ADVERSE POSSESSION AGAINST REVERSIONERS AND REMAINDERMEN.

TOPIC 1.

WHERE ONE ENTERS UNDER A CONVEYANCE FROM THE LIFE TENANT.

§ 383. Where one enters under a conveyance purporting to transfer the life estate only: If the conveyance by the life

[84] The writer saw the opinion of Mr. Justice Vickers in Golladay *v.* Knock after it had been filed and while the case was pending on a petition for rehearing. He wrote to the learned justice raising the point that under the decision in North *v.* Graham the contingent remainder descended from Moses to William and from William to the complainants and that the warranty of William did not work any estoppel because the doctrine of lineal warranty was not in force. The writer's letter of July 8, 1908, to Mr. Justice Vickers (in reply to a letter from the justice) shows that the latter regarded the complainants as taking as a class of persons who would in a certain event receive the estate. There would seem, therefore, to have been no intention to make any decision counter to North *v.* Graham, or to hold that the common law method of tracing descent would be used where a contingent remainder passed by descent, while a different method of tracing descent would be used where a reversion or vested remainder descended.

[85] *Ante*, § 158; *post*, § 577.

tenant purports to convey only the life estate, there is of course no adverse possession against any one, much less against the remainderman,[86] prior to the death of the original life tenant.[87] Even upon the death of the life tenant the inference might well be that the holding over was in conscious subordination to the true owner and therefore not adverse until some act or expression of intention indicated the contrary and that possession as of right was claimed.[88]

§ 384. Where one enters under a conveyance by the life tenant purporting to transfer the fee: If the conveyance is tortious—by fine, feoffment or recovery—a ground of forfeiture arises by operation of law; but under *Taylor v. Horde*[89] no forfeiture of the life estate actually occurs until the one entitled to enter elects to declare it in some appropriate manner. Until, therefore, the forfeiture is complete, the possession of the one entering under the tortious conveyance is not adverse to the remainderman.[90] The moment, however, that the original life tenant dies, the possession of the tortious transferee becomes

[86] For the sake of simplicity, whenever vested remainders are referred to, reversions are also included.

[87] See Rohn *v.* Harris, 130 Ill. 525; Chicago, etc., Ry. Co. *v.* Vaughn, 206 Ill. 234; Blair *v.* Johnson, 215 Ill. 552; Meacham *v.* Bunting, 156 Ill. 586, 594 (possession of original life tenant not adverse).

[88] See Bond *v.* O'Gara, 177 Mass. 139, where a licensee in possession after the termination of the license by the conveyance of the land by the licensor continued in possession and it was held that possession was still in conscious subordination to the right of the owner and not adverse.

[89] 1 Burr. 60.

[90] Jackson *v.* Mancius, 2 Wend. (N. Y.) 357 (held that the life tenant had not made a feoffment and therefore no forfeiture of the life estate occurred; but the court went on to say that if such a feoffment were made and a forfeiture occurred "yet the reversioner is not bound to enter until the natural termination of the life estate, as the law does not require him to look after the estate, the presumption being that the tenant in possession holds by such a conveyance as the tenant for life had a right to give"); Wallingford *v.* Hearl, 15 Mass. 471: Parker, C. J., said: "If tenant for life acknowledge a fine for a longer time than for the life of the tenant for life, the fine may be good; but it is a forfeiture of the estate, and he in reversion or remainder may enter. Yet he is not obliged so to do, for he may wait the termination of the estate for life, and has five years after that (Shep., "Touch." 14; Jenk., "Cent." 254)." See also Stevens *v.* Winship, 1 Pick. (Mass.) 317; Miller *v.* Ewing, 6 Cush. (Mass.) 34, 41.

adverse to the remainderman.[91] Possession under a tortious conveyance rebuts any inference that the possessor was holding over in conscious subordination to the remainderman.

Now suppose the life tenant has conveyed in fee by deed, or by bargain and sale, so that the conveyance has no tortious operation. Such a conveyance transfers only what the grantor has—namely, the life estate. It has been intimated that such a conveyance might be a cause of forfeiture.[92] If, however, there is no forfeiture of the life estate, the grantee of the life tenant becomes the holder of a life estate *pur auter vie* and his possession cannot be adverse to the remainderman during the life of the original life tenant.[93] One English case at least has gone so far as to determine that the holding over after the death of the original life tenant by the one entering under a conveyance in fee from the life tenant did not become by that fact alone adverse to the remainderman.[94] This must proceed upon the ground that the transferee of the life tenant was in the same position as if he had obtained a conveyance expressly transferring only a life estate, and therefore must be regarded *prima facie* as holding over in conscious subordination to the remainder-

[91] Doe *v.* Gregory, 2 A. & E. 14 (where the husband entered upon an estate by the marital right in lands of which his wife was the owner for life, and then he and his wife levied a fine in fee to themselves).

[92] Mixter *v.* Woodcock, 154 Mass. 535 ("if the mortgages executed by her [the life tenant] may be regarded as acts of disseisin, so that the reversioner could have entered, he was not obliged to do so, but could wait until his right of entry accrued upon her death"); Rigg *v.* Cook, 4 Gilm. (Ill.) 336 ("And where the possession has been consistent with, or in submission to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer and disavowal of the title of such owner, will render the possession, however long continued, adverse."); Meacham *v.* Bunting, 156 Ill. 586, 594.

[93] Mixter *v.* Woodcock, 154 Mass. 535; Central Land Co. *v.* Laidley, 32 W. Va. 134; Higgins *v.* Crosby, 40 Ill. 260; Orthwein *v.* Thomas, 127 Ill. 554, 564, 568-570; Mettler *v.* Miller, 129 Ill. 630; Peterson *v.* Jackson, 196 Ill. 40; Turner *v.* Hause, 199 Ill. 464; C. P. & St. L. R. Co. *v.* Vaughn, 206 Ill. 234; Bechdoldt *v.* Bechdoldt, 217 Ill. 537; Weigel *v.* Green, 218 Ill. 227; Schroeder *v.* Bozarth, 224 Ill. 310; Willhite *v.* Berry, 232 Ill. 331; McFall *v.* Kirkpatrick, 236 Ill. 281; Bartlow *v.* C. B. & Q. R. Co., 243 Ill. 332; Cassem *v.* Prindle, 258 Ill. 11 (life estate passed by condemnation); Allison *v.* White, 285 Ill. 311.

[94] Doe *v.* Hull, 2 Dowl. & R. 38.

man. It is believed, however, that in American jurisdictions today the holding over would be regarded as *prima facie* adverse from the date of the death of the original life tenant.[95]

TOPIC 2.

WHEN THE LIFE TENANT IS DISSEISED AND THE REMAINDER IS VESTED.

§ 385. Results reached by the cases generally: It is clear that the life tenant, after the statutory period of adverse possession, is barred from again securing possession. The difficult question is: what is the effect of the running of the statute against the life estate upon the reversion or vested remainder?

It would have been a very simple answer to say that the life estate had been extinguished and that the vested remainderman had an immediate right to possession, so that the continued possession of A would be adverse to him. Indeed, it might have been urged that this followed from the fact that the running of the statute operated to extinguish the life estate, and that a vested remainder is by its very definition one which stands ready throughout its continuance to take effect in possession whenever and however the preceding freehold estate determines.[96] Such a view would have the advantage to the adverse claimant of causing the statute to begin to run against the remainderman as soon as it had run against the life tenant. It would have had the disadvantage to him that at once upon the running of the statute against the life tenant the remainderman would be entitled to possession.

The courts seem very clearly to have rejected this view and to have proceeded upon the supposition that when the statute has run against the life tenant, the adverse holder obtains an estate of some sort which is good against the remainderman as long as the life estate, which is extinguished by the adverse possession, would have been good against the remainderman—that is to say, in the usual case, during the life of the original life tenant. Accordingly, it has been regularly held that no right to

[95] In Safford *v.* Stubbs, 117 Ill. 389, such was the holding where the grantee in fee from the life tenant had no actual or constructive notice of any instrument creating a life estate in the grantor.

[96] Gray's Rule against Perpetuities, § 101.

possession arises on the part of the remainderman until the actual death of the original tenant for life, even though the remainder be vested and though the statute has run against the original life tenant. In the cases, therefore, where the reversioner or vested remainderman has sued for possession after the life estate has been barred, but before the death of the original life tenant, the action has failed.[97] So where the reversioner or vested remainderman sues for possession after the death of the original tenant for life, the possession of the disseisor of the life tenant does not become adverse to the reversioner or vested remainderman until the actual death of the original life tenant. Hence, the disseisor may still be ousted by the remainderman, though the statute has first run against the life tenant and then the possession of the disseisor has continued for the statutory period during the life of the original life tenant.[98]

§ 386. What estate does the disseisor of the life tenant have after the statute has run against the life tenant only? If we said that the life estate passed to the disseisor and he became a tenant for the life of the original life tenant, we should be met with the general proposition that the statute of limitations operates to extinguish the title of him who is barred and to raise a new and original title in favor of the disseisor. If we said that the disseisor obtains a new and original title in fee simple, good against all the world during the life of the tenant for life, but subject to a right to enter on the part of the remainderman upon the death of the original life tenant, we should run into the difficulty that the relation between the remainderman and the disseisor had been so changed as to prejudice the rights of the remainderman. For instance, what would have been waste on the part of a life tenant would not be waste when committed by the holder of a fee, the remainderman being as to him merely one entitled to re-enter upon a future contingency, or the holder

[97] Shortall *v.* Hinckley, 31 Ill. 219; Jacobs *v.* Rice, 33 Ill. 370; Gregg *v.* Tesson, 1 Black (66 U. S.) 150; Higgins *v.* Crosby, 40 Ill. 260; Kibbie *v.* Williams, 58 Ill. 30; Moore *v.* Luce, 29 Pa. St. 260; Baker *v.* Oakwood, 123 N. Y. 16; Thompson's Heirs *v.* Green, 4 Ohio St. 216.

[98] Dawson *v.* Edwards, 189 Ill. 60; Wells *v.* Prince, 9 Mass. 508; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390; Tilson *v.* Thompson, 10 Pick (Mass.) 359; Foster *v.* Marshall, 22 N. H. 491.

of what is in appearance at least a possibility of reverter.[99] On the whole, perhaps the least objectionable position is that the disseisor of the life tenant becomes the holder of a new and original estate for the *life of the original tenant for life.*

§ 387. Illinois cases apparently contra—(1) Where the life estate is that of a husband by the marital right in his wife's fee—Before the first Married Woman's separate property act: Before the first Married Woman's Act of 1861, which gave to married women their separate property as if they were femes sole, the husband of every woman with a fee simple had an estate for the joint lives of himself and his wife, known as the estate by the marital right. If the husband conveyed this estate, the grantee had an estate for life *pur auter vie*—namely, for the joint lives of the husband and wife. In that case clearly the wife must have become an actual reversioner. The wife or her heirs could have no right to possession until the death of the husband or wife. No possession could, therefore, become adverse to the wife or her heirs till the death of her husband, or till her death.[1] Suppose, however, that the husband did not convey. Suppose a disseisor entered and held possession for the statutory period and for such additional period after as the statute provided in the case of the disability of coverture—namely, according to the Statute of James I, the period of ten years after the coverture terminated. Did he disseise both the husband and wife so that the interests of both were barred and the fee acquired by the disseisor good against the world? Or did the disseisor bar only the husband's interest by the marital right so that there was no adverse possession against the wife or her heirs until the death of the husband or the wife?

On this question courts and judges have differed.

The Massachusetts Supreme Court at an early date held that it was only by reason of the peculiar legal relation of husband and wife that the actual seisin of the wife's fee was in the husband during the joint lives of husband and wife, thus giving the husband what was technically an estate for the joint lives of husband and wife; that in fact the unity of husband and wife

[99] Ohio Oil Company *v.* Daughetee, 240 Ill. 361; Dees *v.* Cheuvronts, 240 Ill. 486; 4 Ill. Law Rev. 429.

[1] Higgins *v.* Crosby, 40 Ill. 260; Mettler *v.* Miller, 129 Ill. 630.

caused both together, and the husband as the representative of both, to have in their legal unity the entire fee and the seisin in fee; that while the husband had actual seisin by the marital right, there was in fact no separation of estates, but that the fee was in possession of the husband and wife. Hence, when the statute began to run against the husband, it ran against the wife's interest as well, and upon the completion of the twenty years required by the statute and the ten years in addition after the coverture was ended, the wife's interest was barred.[2] This was consistent with the statute and its assumption that during coverture there might be adverse possession against a wife who had a fee and that she was permitted the period of ten years after the coverture ended in which to bring her action.

Other courts, however (including our Supreme Court), have treated the wife as having an actual reversion in fee, subject to the husband's estate for life by the marital right, so that there could be no adverse possession whatever against the wife during coverture, and, therefore, upon the termination of the coverture the statute would first begin to run against the wife or the wife's heirs and they would be entitled to the full period of twenty years, although that might mean that the wife or her heirs were entitled to the running of the full period of the statute after the husband had during his life been disseised for forty years.[3] In Connecticut the opinions of four judges were equally divided as to which view was correct.[4]

§ 388. Effect of the Illinois Married Woman's separate property act of 1861—Castner v. Walrod:[5] The first Illinois Married Woman's Act of 1861 operated to prevent the creation of any estate by the marital right in a husband for the joint lives of the husband and wife in the wife's fee. This act, however, had no general retroactive effect. A husband's vested estate by the marital right which existed at the date when the act took effect continued. If, therefore, the statute of limitations had run

[2] Melvin *v.* Locks & Canals, 16 Pick. (Mass.) 161; Kittridge *v.* Locks & Canals, 17 Pick. (Mass.) 246.

[3] Foster *v.* Marshall, 22 N. H. 491; Shortall *v.* Hinckley, 31 Ill. 219; Jacobs *v.* Rice, 33 Ill. 370; Gregg *v.* Tesson, 1 Black (66 U. S.) 150; Kibbie *v.* Williams, 58 Ill. 30, *semble;* Thompson's Heirs *v.* Green, 4 Ohio St. 216.

[4] Watson *v.* Watson, 10 Conn. 77.

[5] 83 Ill. 171.

against the husband's life estate by the marital right before the act of 1861 and then the possession of the disseisor had continued after the act of 1861 for the statutory period while the husband and wife still lived, it might with great force have been urged that, in accordance with the rulings already made by our Supreme Court,[6] the adverse holder had secured an estate good against all the world during the joint lives of the husband and wife, and that there could, according to the general rule, be no adverse possession against the wife or her heirs until the death of the husband or the wife, and then the full statutory period must run against the reversion. Our Supreme Court, however, did not adopt this view. Instead it gave a mysterious effect to the Married Woman's Act of 1861 to reach the result adopted by the Massachusetts court prior to the time of any married women's legislation, that the disseisin of the husband was the disseisin of the husband and wife, and the statute began to run against both at the same time.

The first step toward this result was taken in *Castner v. Walrod*. In that case Hall agreed to convey to Haskins in 1849. Haskins' son assigned the bond for the deed fraudulently in the name of his father to Walrod. Haskins, the father, died in 1850. Walrod presented the bond to Hall, secured a deed and took possession. In 1869 complainants, who were the children of Haskins, filed a bill to obtain a conveyance pursuant to the bond. They were really attempting to enforce a constructive trust against Walrod who had the legal title. It was held that the complainants were barred by laches. Their claim was purely equitable and the doctrine of laches in equity and not the statute of limitations applied. It was insisted on behalf of three of the complainants that when Walrod took possession of the land they were married women, and still were, and that this fact placed them under a disability which the statute of limitations recognized and which equity would also recognize. That was met by the ruling of the court that since the Married Woman's Act of 1861 there was no longer any disability of coverture under the limitation act[7] and equity would not recognize any such excuse

[6] *Ante*, § 385.

[7] The court said (p. 178): "If, then, under the act of 1861, a feme covert became unmarried, so far as her property was concerned, the conclusion is irresistible that the saving clause in favor of married women, in the limitation law, was abro-

for delay. While not so precisely stated, the court recognized another argument on the part of the complainants who were married when Walrod took possession. It was this: The equitable interests in the fees of the married women were merely reversionary, since their husbands had the present interest in possession by the marital right which accrued before 1861 and was not disturbed by that act. The husbands were still living. Hence, it was contended the wives could not be guilty of laches since they had no power to act. There are a number of sufficient answers to this position which the court did not formulate. For instance, the wife's interest was only an equity to secure a legal title. The husband's estate by the marital right did not attach until the wife got in the legal title and became legally seized in fee. Hence, the husband and wife together had a right to sue for conveyance. The delay, therefore, was the delay of both and dated from the year 1850. Another answer might have been that since the husband and wife did not get in the legal title for the wife before 1861 the right of action to secure it became by the act of 1861 the wife's separate property and she was barred by laches from asserting it by reason of her delay since 1861, especially in view of the fact that she knew of all the circumstances since the year 1850. Another answer to the married women's position was that it was self-destructive. If the husbands had an estate for life by the marital right it still existed. The husbands were barred by laches, but the wives' right to possession had not yet accrued, so that the complainants' case would fail. The court, however, passed by these answers to the position of the married women and adopted another. It assumed for the sake of argument that the husband had a life estate by the marital right and that the wife's interest was reversionary. It then proceeded to hold that since the husband's estate by the marital right was barred before 1861 by the running of the statute, the continued possession of the disseisor after the act of 1861 for the statutory period barred the wife.[8]

gated, as the two acts are so utterly inconsistent that they can not stand together."

Subsequent decisions have referred to Castner *v.* Walrod as holding that after 1861 the disability of coverture was removed, so far as the statute of limitations was concerned: Enos *v.* Buckley, 94 Ill. 458, 462; Miller *v.* Pence, 132 Ill. 149, 158.

[8] The court said (p. 180): "The possession of the defendant commenced as early as 1850, and the statute of limitations then began to

The court thus in effect held that where a husband had a life estate by the marital right in the wife's fee before the Married Woman's Act, and the husband's life estate was terminated by adverse possession before that statute, the Married Woman's Act operated to give the wife an immediate right to possession of her separate estate as if she were a feme sole, and the continued possession of the disseisor became adverse to the wife and after the statutory period had run was barred, though she and her husband were still alive.[9] In short, while the act of 1861 had no retroactive effect to divest what was already vested in the husband, yet when the husband's estate for life by the marital right had already been divested by the statute of limitations before the act of 1861, that act became effective to give the wife a right to possession at once. This means that the act of 1861 was given a retroactive effect so far as the rights of the adverse holder (as one who had acquired an estate good against all the world during the joint lives of the husband and wife) were concerned. The estate for the joint lives of the husband and wife, which the disseisor would, by the operation of the usual rule already noted, secure by the operation of the statute, came to an end by the act of 1861, and the wife had an immediate right to possession. To this extent the act of 1861 operated retroactively. Whether this proposition of *Castner v. Walrod*

run against the life estate in the husbands of the complainants. This life estate was, therefore, barred prior to the passage of the act of 1861, and when barred, it was, for all practical purposes, gone, and the husbands, in effect, no longer had any interest in the premises. * * * When, therefore, the life estate which the husbands had acquired by virtue of the marriage, was terminated by operation of the statute of limitations, and the act of 1861 removed the disability of coverture of the complainants, they were then bound to bring their action within seven years, or their right to title would be barred. This complainants failed to do, but permitted the defendant to remain upon the land, undisturbed, for more than seven years after the passage of the act of 1861."

[9] Such is the statement of the holding in Castner *v.* Walrod, which was made by the court in Mettler *v.* Miller, 129 Ill. 630, 643, 644, where the court said: "In Castner *v.* Walrod it was held, that when the estate which the husband had acquired by virtue of the marriage, was terminated by operation of the statute of limitations, and the act of 1861 removed the disability of coverture, the wife was bound to bring action within seven years, or her right and title would be barred."

is right or wrong is perhaps of little if any importance today so long as its very limited application is observed. It only causes difficulty when counsel attempt to generalize from it that any possession will become adverse to any remainderman or reversioner as soon as any life estate is extinguished by the running of the statute—a proposition which, as already noticed, might have been the result of the authorities, but as a matter of fact has not been adopted by the courts.[10]

§ 389. Enos v. Buckley: [11] The *dictum* of this case goes the full length of holding that after the act of 1861 a disseisor of a husband having an estate by the marital right in the wife's fee is a disseisor of the wife also, and, when the statutory period of adverse possession has run, the interests of both are barred. Thus, in effect, the act of 1861 is given a mysterious operation to bring the court to the rule of the Massachusetts cases which held that, prior to any married women's legislation, a disseisin of the husband who had an estate by the marital right was at the same time a disseisin of the wife.[12]

In *Enos v. Buckley,* the husband and wife who had a record title brought ejectment in 1878. The defense was adverse possession for the statutory period from 1865 to 1872. When the adverse possession began in 1865, the wife who had the fee was married to her present husband, who then had an estate by the marital right in the wife's fee which arose prior to the act of 1861 and was not disturbed by that act. A judgment for the defendant was very properly affirmed. The husband's estate for life was clearly barred while the wife's reversion was not, but the husband and wife being still alive the wife had no right to possession when the ejectment was brought. The court, however, appears to hold that since the act of 1861 the disability of married women under the limitations act had been entirely removed, and that this had the effect of causing the statute to run against a married woman as if she were a feme sole and regardless of whether the property was acquired by the married woman while covert before or since the act of 1861.[13]

[10] *Ante,* § 385.

[11] 94 Ill. 458.

[12] *Ante,* § 387.

[13] The court said (page 462): "We regard, then, under the decision in the case of Castner et al. *v.* Walrod, that since the passage of the Married Woman's Act of 1861, the saving clause in favor of married women in this limitation law has no

So long as *Enos v. Buckley* is recognized as applying only where a husband, who is seized of an estate by the marital right in a wife's fee as at common law, is dispossessed and the adverse holding continues for the statutory period after the act of 1861, it is a matter of small importance whether it is sound or not. The danger of having the case in the supreme court reports is that counsel always, and even the court itself sometimes,[14] deduces from it the general proposition that any adverse possession against any life tenant is at once an adverse possession against any reversioner or vested remainderman—a proposition which it may safely be said no court has recognized and which all decisions, particularly those already noted,[15] holding that no adverse possession begins to run against a reversioner or remainderman until the actual death of the original tenant for life, no matter how long the original life tenant may have been disseised, repudiate. Furthermore, it should not be overlooked that if any such general rule were announced and applied, it would be void under the Fourteenth Amendment of the Federal Constitution as a deprivation of the remainderman's property without due process of law, and the decision of a state Supreme Court should be reversed by the United States Supreme Court on that ground.[16] A remainderman who has no right to sue for

force, and that the statute since that time applies against a married woman equally as against an unmarried woman, without regard to whether the property of the married woman be strictly in legal understanding, before the passage of the act, her separate property or not, and without regard to the time of its acquisition, whether since or before the passage of the act, whether during or before coverture."

[14] Nelson *v.* Davidson, 160 Ill. 254; *post*, § 391; Field *v.* Peeples, 180 Ill. 376; *post*, § 390.

[15] *Ante*, § 385.

[16] Higgins *v.* Crosby, 40 Ill. 260, ("It would be unprecedented to hold that a right of entry was barred where such a right had never accrued. A party cannot be prejudiced by the non-assertion of a right that does not exist."); Mettler *v.* Miller, 129 Ill. 630, 642, 643 ("All statutes of limitation are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice, and would be to *deprive such person of his estate without his day in court.*").

It should be observed also that the Illinois seven-year statute of limitations as to vacant lands was first held unconstitutional as a taking of property without due process of law because there was no sufficient substitute in the act for adverse possession: Harding *v.* Butts, 18 Ill.

possession till the death of the original tenant for life cannot constitutionally be barred by any possession of a disseisor during the life of the original tenant for life. The fact is, however, that in the *dicta* of *Nelson v. Davidson* [17] we find the court using *Enos v. Buckley* for the general proposition that when the statute begins to run against any life tenant it begins to run against the remainderman. In *Field v. Peeples*,[18] our Supreme Court seems to use *Enos v. Buckley* for the proposition that when the statute has run against any life tenant it also runs against any reversioner or remainderman under any disability such as infancy, so that the remainderman must within the additional time allowed by the statute sue for possession although the original life tenant still lives. It is important, therefore, that these two cases be carefully analyzed, and the *dicta* of the court, which are derived from a misconception of *Enos v. Buckley* and which cannot be supported, be separated as far as possible from the actual decision in each case.

§ 390. **(2) Where the disseisor of the life tenant enters under a void guardian's sale of the reversioner's interest—Nelson v. Davidson:** [19] In this case the mother died in 1845, leaving her husband tenant for life by curtesy, and Mary her heir at law, the reversioner. In 1852, the father as guardian for Mary purported to sell at guardian's sale the minor's interest. In 1892 the father died. Mary brought ejectment in 1896. The defense was a regular chain of title from the purchaser at the guardian's sale and possession, payment of taxes under color of title during the ten years immediately preceding 1892. Judgment for the defendant was affirmed. The court first held that the objections to the guardian's sale were trivial and not well founded. That disposed of the case, for the guardian's sale transferred the remainder and the life estate had been barred by the statute of limitations as well as terminated by the death of the life tenant. The court, however, went on to deal with the

503. The act was only held valid as a limitation act by reading into it the requirement that the claimant, after seven years' payment of taxes under color of title, must enter and take possession in order to complete the bar of the statute: Newland *v.* Marsh, 19 Ill. 376; Dunlap *v.* Taylor, 23 Ill. 387; McCagg *v.* Heacock, 34 Ill. 476; 42 Ill. 153.

[17] 160 Ill. 254; *post*, § 390.

[18] 180 Ill. 376; *post*, § 391.

[19] 160 Ill. 254.

case on the supposition that the guardian's sale was void for irregularity and reached the conclusion that even in that event the defendant was entitled to judgment. The problem of the case is: how can this *dictum* be supported?

Can it be sustained on the ground that the void guardian's sale was made valid by the laches, estoppel and affirmance of the minor?[20] The guardian's sale if void was so, not on the ground that the minor's interest was contingent and therefore not transferable, but because of irregularities in the proceedings to sell an interest, which, however, was alienable by guardian's sale. It is true also that the reversioner came of age in 1863, thirty years before bringing suit. It must be very doubtful, however, if the reversioner could have filed any bill to remove the guardian's deed as a cloud, for she was not in possession and the property was not vacant. Nor was there any evidence that the minor ever received any part of the purchase price paid at the guardian's sale after she came of age. The case presented, therefore, is not, it is submitted, sufficient to bar the complainants from attacking the guardian's sale if it were actually void.[21]

What the court appeared to go upon was a generalization from the *dictum* of *Enos v. Buckley*—namely, that an adverse possession against *any life* tenant is at the same time an adverse possession against the *reversioner*. Such a generalization cannot be supported. It cannot properly be extracted from *Enos v. Buckley*, for that case dealt only with the effect since 1861 of an adverse possession against a husband holding an estate by the marital right in the fee of his wife to bar the right of the wife. It was merely a reversion to the Massachusetts common law rule that a disseisin of the husband who had only an estate by the marital right in his wife's fee was at the same time a

[20] See Tracy *v.* Roberts, 88 Me. 310; Price *v.* Winter, 15 Fla. 66, 121; Penn and Wife *v.* Heisey, 19 Ill. 295; Walker *v.* Mulvean, 76 Ill. 18, 20; Byars *v.* Spencer, 101 Ill. 429, 436.

[21] In Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, the reversioner was barred by laches, estoppel and affirmance from attacking an administrator's sale of his interest which was void for irregularity. But in that case the purchase money had been paid to the administrator and used for the payment of debts. The reversioner made no offer to repay it and he could have filed a bill to remove the conveyance as a cloud during the continuance of the life estate. Under these circumstances he allowed twenty years to elapse before taking action.

disseisin of the wife. In *Nelson v. Davidson*, when the adverse possession began, the life tenant was a widower who had an actual estate for life by curtesy. The reversioner was the heir of the wife. Under these circumstances, the *dictum* of *Enos v. Buckley* could have no application. The *dictum* of *Nelson v. Davidson* runs counter to the general rule which must be regarded as established in this state, not only by express decision [22] but also by statute,[23] that an adverse possession against a life tenant not only does not become adverse to the remainderman when the statute has run against the life estate, but does not become adverse to the reversioner until the actual termination of the life or lives which measure the duration of the original estate for life. The *dictum* of *Nelson v. Davidson*, in fact, approves a rule which if actually applied would amount to a taking of the reversioner's property without due process of law.

§ 391. **Field v. Peeples**: [24] The Supreme Court in this case appears to approve the proposition attributed by it to *Enos v. Buckley* and *Nelson v. Davidson*, that when adverse possession commences against any life tenant it immediately begins to run against any remainderman under any disability such as infancy, so that when the statute has run against the life tenant before the disability is removed, the remainderman must sue within the additional time allowed by the statute after the disability is removed or be entirely barred. By a will which took effect in 1871, Ellen became life tenant with a vested remainder in her children who were then born. In 1894, while the life tenant was still alive, but after she had conveyed in 1893 all her interest to her children, the children brought ejectment against the defendant in possession. A judgment was entered for the plaintiffs, the two children, Clarence and Cornelia. In the Supreme Court

[22] *Ante*, § 385.

[23] Section 3, subsection third of the Limitation Act of 1872 (R. S. 1874, chapter 83, section 3, subsection third): "When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time."

This section has been referred to and declared to govern the other sections of the Limitation Act. See Turner *v.* Hause, 199 Ill. 464; Weigel *v.* Green, 218 Ill. 227.

[24] 180 Ill. 376.

the defendants successfully contended that all the interest of Clarence had passed to them by a guardian's sale of 1873. Hence, the judgment was reversed. That really disposed of the case. But the court, in order apparently to settle further questions, intimated that the other child, Cornelia, not having had her interest sold by the guardian would be entitled to judgment for her share. It was this suggestion of the court that the defendants sought to combat. They relied upon the fact that they had had adverse possession against the life tenant so that the life estate was barred. As a result of this they claimed a right to possession good as against all the world during the life of the original life tenant who was still living. There was evidence of possession and payment of taxes from 1883 to 1894 and the court seems to have assumed that there was also color of title. Nevertheless, the defendants failed in this defense because no issue was presented by the pleadings which would entitle them to claim an estate for the life of the original life tenant by the statute of limitations.[25] The defendant no doubt claimed the fee under the

[25] The court said (p. 383): "The fact that the statute of limitations might have been successfully interposed as a defense had the action been brought by Ellen Pool Peeples, has no special bearing on this case. Here, appellees are claiming to recover as owners of the fee, and it is not claimed, as we understand the argument, that they are barred by the statute of limitations." On the rehearing, the court said (p. 389): "The right of possession under color of title to the life estate is not involved in the case. Plaintiffs below, by their declaration, claimed the premises in fee, and the defendant, both by virtue of the guardian's sale and deed and possession under that deed as claim and color of title and payment of taxes for more than seven years, also claimed the title in fee simple. He does not claim color of title to the life estate, and counsel are therefore mistaken in the assertion that the opinion heretofore filed overrules cases cited, to the effect that when the bar of the statute is complete the holder of the title by limitation may assert it against all others; that his right of possession is as perfect as though he were invested with a paramount title, and that his title is as available for attack as defense. The petition and argument in support of it, assume a state of case not shown by this record. If appellant had set up and shown color of title to the life estate, and relied upon that title under the statute of limitations, then the position here contended for would have been tenable. In that case the remaindermen would undoubtedly have been postponed in their right of action until after the death of the life tenant, but under the issues in this case they were bound to bring their action within the time limited by the statute after they became of age, and if they had delayed their action until the death of their mother, and

statute of limitations. This would be an affirmative defense. If the defendant were successful in maintaining it, the plaintiff would have been adjudicated out of the fee. Hence, the issue raised was not whether the defendant had an estate for the life of the original life tenant by the statute, but whether the fee of the remainderman had been barred by the statute, so that the defendant would have the fee as against the remainderman. Whether the court was right or wrong in so analysing the precise issue is not material to the present discussion. That is the position which it took and that disposed of the case.

As a parting shot, however, to the defendants on the rehearing, the court called attention to the decisions in *Enos v. Buckley* and *Nelson v. Davidson*, and said that the court in those cases held, "that possession for the statutory period, under claim of title, to an estate in fee, sufficient to constitute color of title, with payment of taxes for the same period, would bar the estate in remainder, notwithstanding the existence of the outstanding life estate, where the remainderman claiming title was under no disability." The court then concludes that in view of such holdings the plaintiffs were bound to bring their action within two years after they came of age, and therefore could not wait until the death of the original life tenant.[26] This is a plain intimation that when a remainderman is under any disability, whether of coverture or infancy, the statute of limitations begins to run against him as soon as it commences to run against the life tenant, but that the remainderman under a disability of infancy has the additional time after that disability is removed within which to sue, and must sue within that time or be forever barred. This *dictum* of the court again overlooks the fact that when a remainderman is under no disability, the statute does not begin to run against him until the original life tenant actually dies, and the fact that the reversioner is under a disability does not put him in any worse position, or any better for that matter. The *dictum* of the court in *Field v. Peeples*, like the *dictum* of

that event had occurred more than two years after they became of age, they would have been barred."

[26] The court said (p. 390): "* * * it cannot be held that plaintiffs below were bound to bring their action within two years after they became of age, and, at the same time, that they had no right to do so until after death of the life tenant."

the court in *Nelson v. Davidson*, fails to observe that the *dictum* of *Enos v. Buckley* applied only where a husband holding by the martial right in his wife's fee was disseised after the act of 1861. The *dictum* of *Field v. Peeples*, like that of *Nelson v. Davidson*, runs counter to the many cases already noted,[27] which support the general rule that reversioners and remaindermen have no right to possession until the actual death of a life tenant who has been disseised, and whose estate for life has been barred by the statute.

§ 392. Miscellaneous problems—(1) Suppose the life estate is released to the vested remainderman, or both the life tenant and the vested remainderman convey to a third person: Suppose the vested remainderman is using the release or conveyance as the basis of a merger to enable him to secure possession from the adverse holder before the actual death of the life tenant. He will, of course, succeed if the adverse possession has not yet barred the life tenant. If, however, the statute has run against the life tenant when the conveyance relied on to effect the merger occurs, there cannot be a merger which will prejudice the adverse holder whose possession is protected until the actual death of the life tenant.[28] If, however, when the conveyance which is relied upon to affect a merger is executed, the statute has not run against the life tenant but subsequently it does so before the remainderman sues for possession, will the adverse holder's possession be protected for the life of the original life tenant? This has been answered in the affirmative[29] on the ground that the merger will not be permitted to prejudice the situation of the adverse holder after the possessory title has become good against the life tenant. Perhaps this might be expressed by saying that

[27] *Ante*, § 385.

[28] Moore *v.* Luce, 29 Pa. St. 260; Baker *v.* Oakwood, 123 N. Y. 16; Jacobs *v.* Rice, 33 Ill. 370; Gregg *v.* Tesson, 1 Black (U. S.) 150.

The remarks of the court in Field *v.* Peeples, 180 Ill. 376, are not *contra*, because the court there held that whether the life tenant was barred by the statute so as to give the adverse holder an estate good against the world during the life of the original life tenant was not involved. The moment it is assumed, under the issue made, that the life estate might have continued, the court could with propriety say that the conveyance by the life tenant to the remainderman would give the remainderman an immediate right to possession by the doctrine of merger.

[29] Shortall *v.* Hinckley, 31 Ill. 219; Kibbie *v.* Williams, 58 Ill. 30, *semble*.

when the adverse possession becomes complete to bar the life tenant, the adverse holder's title relates back to the beginning of the adverse possession and, therefore, as to him no merger has ever occurred.

Suppose now the disseisor is using the attempted merger to contend that adverse possession began against the remainderman upon the termination of the life estate by merger and therefore the remainder is barred by the statute, although the statutory period has not run since the death of the original life tenant. Clearly after the statute has run against the life estate the original life tenant's interest is gone and there can be no merger by his release or conveyance at that time.[30] If the release or conveyance by the life tenant occurred before any adverse possession began, clearly a merger occurs and when the adverse possession does commence there is no reversioner or remainderman, and the statute runs against the entire fee at once.[31] The difficult case is where the release or conveyance, which is the basis for the merger, occurs after the statute has begun to run against the life tenant, but before the life estate is barred, and then the statute does run completely against the life tenant and would have run against the remainderman if it had started to run against the remainder at the time of the alleged merger. It is submitted that a merger which could not be used against the adverse holder where the remainderman was seeking possession could not be used for him. If the disseisor's possession bars the life estate by relation back so as to prevent any merger, that will equally prevent any adverse possession against the remainderman from the time of the alleged merger. The result is that when an alleged merger occurs after a disseisin of the life tenant, the reversioner or remainderman can sue at once for possession, and hence the possession becomes adverse to the remainderman, but when the life estate is barred, then the adverse possession against the remainderman ceases and does not begin again until the death of the life tenant, and then must run for the entire statutory period. However incongruous this may seem, it would appear to be the logical and necessary result of the taking effect

[30] Talcott *v.* Draper, 61 Ill. 56; Peadro *v.* Carriker, 168 Ill. 570, 580 (*semble*).

[31] Whitaker *v.* Whitaker, 157 Mo. 342; Boykin *v.* Anerum, 28 S. C. 486.

of a limitation title by relation back to the time when the adverse possession commenced.

§ 393. (2) It becomes important in applying the statute of limitations to determine whether a life estate is subject merely to a forfeiture for a breach of condition, or whether it comes to an end by express limitation before the life tenant's death: If a life estate is subject to forfeiture for breach of an express condition subsequent, no forfeiture will occur until the one entitled to enter for the breach elects to declare the forfeiture, and in an appropriate way completes the forfeiture.[32] No possession can, therefore, become adverse against the remainderman or reversioner until the forfeiture has been perfected. If, on the other hand, a life estate is expressly made terminable upon an event other than the death of the life tenant—as, for instance, alienation by the life tenant—and the event happens, the remainderman is at once entitled to possession and the possession of a disseisor of the life tenant at once becomes adverse to the remainderman.[33]

§ 394. (3) Suppose the remainderman is also interested in the life estate: Suppose, for instance, a trustee acquires an estate for the life of a wife in trust for the wife and her children during the life of the wife, with a legal remainder to the children of the marriage. Suppose the trustee is disseised and the legal estate for life barred by the running of the statute. Is the usual rule that the statute does not run against the remainderman until the death of the original tenant for life altered by the fact that the remaindermen are themselves interested in the life estate? Clearly not.[34] The interests of the children are different and separate. In barring their several interests, the statute must be applied to each.[35] If, however, the trustee holds the *fee* and conveys that in breach of trust, there is no question of the statute of limitations in a suit to enforce the trust against the transferee of the land conveyed. The legal title has passed. The only question is whether the equitable remaindermen are barred by laches from recovering the trust *res* from one who

[32] *Ante*, § 384.

[33] Barnes *v.* Gunter, 111 Minn. 383.

[34] Franke *v.* Berkner, 67 Ga. 264; East Rome Town Co. *v.* Cothran, 81 Ga. 359; Graff *v.* Rankin, 250 Fed. 150.

[35] See also Mara *v.* Browne, [1895] 2 Ch. 69.

takes with notice of the trust. It might well be urged that the vested equitable remainderman or reversioner had a right to sue at once to have the trust estate restored to the trustee to hold upon the trusts designated, and that laches on the part of the remainderman would commence at once upon notice of the breach of trust and the removal of any disability, such as infancy. The same might be true even if the equitable remainder were contingent on the remainderman surviving the equitable life tenant. If, however, we add the fact that the equitable remaindermen, whether having a vested or contingent interest, also have a present equitable interest in the equitable life estate, there can be no doubt of their right to sue to have the trust estate which has been transferred in breach of trust turned back to the trustee for the purposes of the trust—and not only for the purposes of the present equitable interests but to serve the future equitable interests as well. In such a case then, the period of laches would commence to run from the knowledge of the breach and the removal of any disability.[36]

Topic 3.

Where the Remainder Is Contingent.

§ 395. The statute cannot begin to run against the remainderman till the event happens upon which the remainder is to vest: Where the remainder is subject to a condition precedent to its vesting which does not happen till the life tenant's death, there can be no right to possession by the remainderman till the event has happened, and no possession can be adverse to the remainderman till then. This is clearly so where one in possession during the life of the original life tenant takes by deed from the life tenant.[37] It is equally so where the

[36] This is the explanation of McCoy *v.* Poor, 56 Md. 197, where forty-nine years elapsed after the breach of trust and the coming of age of some of the equitable remaindermen, and thirty-six years elapsed after the youngest remainderman came of age before suit was brought, and seven years had elapsed after the equitable life tenant's death before suit was brought. This case is sometimes erroneously cited for the proposition that if the remainderman is also interested in the life estate and has permitted his interests therein to be barred, the statute bars the remainderman. See Graff *v.* Rankin, 250 Fed. 150.

[37] McFall *v.* Kirkpatrick, 236 Ill. 281; Hill *v.* Hill, 264 Ill. 219.

life tenant is disseised.[38] Even where a husband who owns in fee has been disseised and the fee is barred, the statute will not run against the wife's contingent dower interest until the husband's death.[39] Even though the *dictum* of *Nelson v. Davidson* were accepted, that adverse possession against any life tenant becomes at once adverse to any remainderman so that both are barred when the statutory period has once run, it has very properly been held that such a rule could have no application to a remainder which was contingent upon an event which was to happen or not only on the death of the life tenant. In such a case there can be no right to possession until the event happens and only then can the possession of the disseisor of the life tenant become adverse to the remainderman.[40]

§ 396. Where the life tenant is barred by the statute will a legal contingent remainder be destroyed? If the effect of the running of the statute against a life estate were to transfer the life estate originally created to the adverse holder, then, of course, there could be no destruction of any legal contingent remainder by the running of the statute against the life estate. We may, however, assume that when the statute runs against the life tenant, the original life estate is destroyed, or brought to an end. The life tenant no longer has any right of entry or right of action. That such a state of affairs operated to destroy the contingent remainder seems to have been the view of both Fearne and Butler.[41] This conclusion must have rested upon the further fact, not stated, that the reversioner (pending the vesting of the contingent remainder) had an immediate right to

[38] Graff *v.* Rankin, 240 Fed. 150.

[39] Steele *v.* Gellatly, 41 Ill. 39; Whiting *v.* Nicholl, 46 Ill. 230; Brian *v.* Melton, 125 Ill. 647; Miller *v.* Pence, 132 Ill. 149.

[40] Graff *v.* Rankin, 250 Fed. 150.

[41] Fearne, Cont. Rem. 287: "Thus, if A be tenant for life with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of tenant for life will support the contingent remainders; but in this case, if the contingent remainder does not vest before such a descent be cast as will take away the entry of tenant for life within the statute of H. 8 c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action."

Butler in his note says: "that, when, by the death of the disseisor, or by *any other means*, the right of entry under a previous estate is lost, there is no longer a rightful estate, capable of supporting the contingent remainder."

possession as soon as the life estate was extinguished. Under such circumstances, the contingent remainder, if it took effect at all upon the happening of the contingency, would be bound to do so as a springing executory interest cutting short a previously vested reversion in fee. Rather than permit a contingent remainder to take effect in this way it was held void and destroyed. The American authorities, however, clearly deny to the reversioner any right of entry during the life of the original life tenant and protect the disseisor in his possession during the life of the original life tenant.[42] Hence, if Fearne's opinion rests upon the fact that the reversioner has a right of entry as soon as the life estate terminates by the running of the statute, his opinion cannot be used in this country as the basis for the destruction of a legal contingent remainder by the running of the statute against a preceding life estate.

If the disseisor were regarded as obtaining a fee simple which was good during the life of the original tenant for life against the reversioner, and the contingent remainder took effect like a shifting executory interest after a prior fee, it is hardly probable that it would be held void and destructible.[43]

Suppose, however, that the disseisor of the life tenant were held to acquire a new title to an estate for the life of the original life tenant—a view heretofore put forward as the least objectionable consistent with the authorities.[44] Why under such circumstances should the contingent remainder be destroyed? There is a freehold to support it. Indeed, the series of estates would be almost precisely the same as where A was given a life estate with an estate to B and his heirs for the life of A to preserve contingent remainders, with a contingent remainder to the eldest son of A. In such a case if A's life estate terminated before A's death and before A's first son was born, B would step into a freehold for the life of A to preserve the contingent remainder. So in the case put, the disseisor obtains a new freehold for the life of the original tenant for life and no reason is perceived why this should not operate to preserve the contingent remainder.

[42] *Ante*, § 385.

[43] This is not, however, entirely certain. See Kales, "Cases on Future Interests," page 120, Moot case.

[44] *Ante*, § 386.

TOPIC 4.

WHERE THE ADVERSE CLAIMANT HAS NO NOTICE, ACTUAL OR CONSTRUCTIVE, OF THE INSTRUMENT CREATING THE LIFE ESTATE.

§ 397. Results of the cases stated: Where the instrument which creates the life estate and remainder or reversion is not recorded and the adverse holder or holders have no actual notice of it,[45] adverse possession for a single statutory period is sufficient to give the disseisor a title in fee valid against both the life tenant and the remainderman or reversioner.[46] In the application of this rule it makes no difference whether the adverse holder takes by deed from the life tenant[47] or disseises the life tenant, or whether the remainder is vested or contingent.

The rule evidently proceeds upon the theory that the adverse holder takes from the one who appears of record to have the fee, and such transferee takes free from all unrecorded instruments and interests thereunder. The premise here is hardly correct. The adverse holder does not take title from any one. He holds in opposition to that title. He extinguishes a former title and obtains under the statute a new and original one. In this position he certainly does not fall within any protection given by the recording acts. On the other side, the remainderman is equally barred from suing whether the instrument which creates the remainder is recorded or not. Where the title rested, as it mostly does in this class of cases, in an ancestor who is dead, there is much carelessness in the recording of a will in all counties where the lands lie so as to give notice under the recording acts. The remainderman has some cause for complaint, when he sues for possession after the life tenant's death, to find that he has been barred because the adverse holder had no notice, actual or constructive, of the instrument which created the estates, due to some technical defect in recording a will or to a failure to record it where the land lay. Nevertheless it must not be forgotten that the American cases which give the remainderman no right to possession till the actual death of the original tenant for life, and hence permit no adverse possession to begin against

[45] Graff *v.* Rankin, 250 Fed. 150; Weigel *v.* Green, 218 Ill. 227; Dugan *v.* Follett, 100 Ill. 581.

[46] Dugan *v.* Follett, 100 Ill. 581; Lewis *v.* Pleasants, 143 Ill. 271; Lewis *v.* Barnhart, 145 U. S. 56.

[47] Dugan *v.* Follett, 100 Ill. 581; Lewis *v.* Pleasants, 143 Ill. 271.

the remainder until that time, have allowed reversioners and remaindermen to recover forty or sixty years after the adverse possession commenced against the life tenant. No doubt this has often appeared to be a great hardship and the courts have to some extent been driven to giving the recording acts an extraordinary operation in order to prevent such results.

TITLE XII.

VARIOUS LEGAL CONSEQUENCES WHICH DEPEND UPON WHETHER THE FUTURE INTEREST—USUALLY A REMAINDER—IS CONTINGENT OR NON-CONTINGENT.

§ 398. When can the tenant in common of a future interest maintain a bill for partition: One of several tenants in common of a reversion [48] or a remainder, which is sure some time to take effect in possession and which the feudal or common law called vested, may file a bill for partition.[49] It is equally clear that one of several persons who were contingent remaindermen by the common law or feudal conception of that term, cannot have partition in this state.[50] Recent cases here have gone far toward establishing the further proposition that a remainder which under the feudal or common law was called vested, but which was uncertain ever to take effect in possession because it may be divested by a condition subsequent, is not subject to involuntary partition while the uncertainty of its ever taking effect in possession continues.[51] The fact that the remainder is

[48] Hill *v.* Reno, 112 Ill. 154; Whitaker v. Rhodes, 242 Ill. 146.

[49] Drake *v.* Merkle, 153 Ill. 318; Deadman *v.* Yantis, 230 Ill. 243. See also Miller *v.* Lanning, 211 Ill. 620; Dee *v.* Dee, 212 Ill. 338, 354; Cummins *v.* Drake, 265 Ill. 111.

[50] Ruddell *v.* Wren, 208 Ill. 508, 513, *et seq.;* Cummings *v.* Lohr, 246 Ill. 577 (where the interest of which partition was sought was an executory devise).

[51] Goodrich *v.* Goodrich, 219 Ill. 426, 1 Ill. Law Rev. 184; Cummings *v.* Hamilton, 200 Ill. 480 (as to 180 acres); Seymour *v.* Bowles, 172 Ill. 521; Heininger *v.* Meissmer, 261 Ill. 105; Quinlan *v.* Wickman, 233 Ill. 39.

The suggestion of Burton *v.* Gagnon, 180 Ill. 345, that for the purpose of enabling one of the several co-owners of a future interest to file a bill for partition, a shifting executory devise would be "vested" provided it conformed to the New York statutory definition of a vested interest, must be regarded as entirely unsound and overruled by the later cases above cited: See Chicago Legal News, June 24, 1905, p. 362, *et seq.; post,* § 482.

Observe, however, that interests in possession may be partitioned

vested in the children of the life tenant subject only to be divested *pro tanto* by the birth of other children, will prevent any child filing a bill for partition.[52] But the fact that the interests of some co-tenants of the future interest are uncertain to vest indefeasibly and so are not subject to partition at their request, does not prevent the filing of a bill for partition by one co-tenant of the future interest whose interest is indefeasibly vested.[53]

It is clear, therefore, that whether a bill for partition lies by the holder of a future interest does not depend upon whether the future interest is a vested or contingent remainder in the feudal sense, but upon whether it is vested and indefeasible on the one side, or vested and defeasible, or contingent on the other. It would follow, therefore, that partition may be had of a certain executory interest, *i. e.*, one which is neither vested nor contingent in the common law sense[54]—as where land is limited to A, B and C from and after the 1st of January next.

It appears that at least so long as the remainderman is out of possession he may agree, or the creator of the remainder may provide that it shall not be subject to partition.[55]

§ 399. Right of holder of future interest to prevent waste by the one in possession: Where the person in possession of the land and committing the alleged act of waste is the holder in fee and the plaintiff is an executory devisee or the holder of a shifting executory interest, or a possibility of reverter after a determinable fee, he has no action for waste at law. Nor will equity enjoin the commission of such acts, done *bona fide*, as a prudent man who was the absolute and indefeasible owner of the land would do.[56] But equity will enjoin the acts of the person in possession where such are done maliciously or where they are in excess of what a prudent man would do with his own.[57]

The contingent remainderman after a life estate had no action

though subject to be terminated: Askins *v.* Merritt, 254 Ill. 92.

[52] Richardson *v.* Van Gundy, 271 Ill. 476.

[53] Bush *v.* Hamill, 273 Ill. 132; Pitzer *v.* Morrison, 272 Ill. 291; Betz *v.* Farling, 274 Ill. 107.

[54] Fearne, Cont. Rem. 1, Butler's note.

[55] *Post*, § 727.

[56] Gannon *v.* Peterson, 193 Ill. 372; Fifer *v.* Allen, 228 Ill. 507; Dees *v.* Cheuvronts, 240 Ill. 486.

[57] Turner *v.* Wright, 2 De G., F. & J., 234; Ames' Cases on Equity Jurisdiction, 476.

at law for waste, because he was not the holder of the next estate of inheritance after the estate in possession, for the reason that the reversioner pending the vesting of the contingent remainder had it, and hence was the only one who had an action at law for waste. The situation so far as the contingent remainderman was concerned was like that where the estates were to A for life, to B for life, and to C in fee. C had no action for waste at law against A. But equity gave C an injunction against A to restrain the same acts on the part of A that C could have recovered damages for at law had C held the next estate in reversion after A's life estate.[58] The injunction was for waste which was in the nature of legal waste. So, it is believed, where after the life estate there is a reversion in fee in B and a contingent remainder in C in fee, while B could have an action at law for waste, and C could not, C could have an injunction in equity to restrain the doing of any acts by the life tenant which would constitute waste, if the suit were by B. That, it is believed, is exactly the result reached in the recent case of *Ohio Oil Co. v. Daughetee*.[59]

Thus, it is clear that if the act of the first taker in fee is that of obtaining oil from the land, one entitled to a shifting estate of inheritance has no ground for an injunction to restrain waste,[60] while a contingent remainderman after a life estate has.[61] In the former case the act must be either malicious or such as a prudent man would not do with his own. Obviously, sinking oil wells is not such an act, while in the latter case any act on the part of the life tenant which would be waste when the suit was by the reversioner, would be enjoined by a court of equity at the instance of the contingent remainderman. Clearly, sinking new oil wells is such an act.

§ 400. When the holder of a future interest need not be made a party defendant to a suit in chancery: Those who have equitable interests subject to a condition precedent in fact and in form to their ever taking effect in possession are represented

[58] Anonymous, Moore, 554, *placitum*, 748; Ames' Cases on Equity Jurisdiction, 467.

[59] 240 Ill. 361. See also Smith *v.* Tucker, 250 Ill. 50. But in Robertson *v.* Guenther, 241 Ill. 511, the injunction was denied because the remainder was contingent.

[60] Dees *v.* Cheuvronts, 240 Ill. 486.

[61] Ohio Oil Co. *v.* Daughetee, 240 Ill. 361.

by the trustee in any litigation relating to the trust estate. The rule is that they are bound by the decree though not made parties.[62] If, however, the future interest is vested in the feudal sense and indefeasible, the holder, to be bound, must be made a party.[63] In one case where the remainder was vested in the feudal sense but was defeasible upon the happening of a condition subsequent in form the remainderman was bound, though not made a party.[64] If this stands it indicates that the determination of what holders of future interests may be bound by a decree when they are not parties, does not turn on the feudal distinction between vested and contingent remainders.

§ 401. Whether an inheritance tax is immediately assessable: Before Section 25 of the Inheritance Tax Act[65] the question arose whether an inheritance tax on a future interest was immediately assessable or not. Of course if the future interest was a vested remainder in the feudal sense and also indefeasible, the tax was assessable at once. On the other hand, if the future interest were subject to a condition precedent in form to its ever taking effect in possession, the assessment of the tax must await the happening of the contingency. It was also held that even though the remainder was vested in the feudal sense, but was also defeasible by the happening of a condition subsequent in form divesting the remainder, it was contingent in such a sense that the inheritance tax was not immediately assessable.[66] This makes it clear that the feudal distinction between vested and contingent remainders was not involved. The real distinction was between non-contingent and indefeasible interests and contingent and defeasible interests. It followed that the tax was assessable upon a non-contingent or certain executory interest—as a gift to A ten years after the testator's death.[67]

[62] American Bible Society *v.* Price, 115 Ill. 623, 644; Temple *v.* Scott, 143 Ill. 290; Thompson *v.* Adams, 205 Ill. 552, 559 (unborn persons).

[63] In Burton *v.* Gagnon, 180 Ill. 345, the court went very far (*post*, § 482) in making out a vested remainder so that the remainderman would be bound by a partition decree to which they were parties.

[64] McCampbell *v.* Mason, 151 Ill. 500, 510-511.

[65] Laws 1909, p. 311 (Ill. Session Laws).

[66] People *v.* McCormick, 208 Ill. 437, 443, 444; Billings *v.* People, 189 Ill. 472, 485; Ayers *v.* Chicago Title & Trust Co., 187 Ill. 42.

[67] *In re* Estate of Kingman, 220 Ill. 563.

CHAPTER XVI.

THE STATUTORY REMAINDER CREATED BY THE STATUTE ON ENTAILS AND REMAINDERS LIMITED AFTER AN ESTATE TAIL.

TITLE I.

THE STATUTORY REMAINDER.

§ 402. Statutes: There have been 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.[1] This last is as follows: "In cases where, by the common law,[2] 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

[1] R. S. 1874, Ch. 30, § 6. Hurd's R. S. 1899, Ch. 30, § 6.

[2] 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, 287, 288.

of the common law, by virtue of such devise, gift, grant or conveyance."

Of these the Missouri Act of 1825 [3] seems to have been the first. It remained in force in Missouri until 1845, when it was so altered [4] as to read that "upon the death of such grantee or grantee, devisee, donee in tail, first pass, according to the course 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." [5] In 1866,[6] however, the Missouri Legislature restored the Act of 1825 to the statute book. In 1827,[7] Illinois copied [8] the Missouri Act of 1825 and since then the law here has remained in force without change.[9] In Arkansas the statute appeared first in 1837;[10] in Vermont in 1840;[11] and in Colorado in 1867.[12] In these three states the statute has remained in force since its first passage in its present form.[13]

[3] R. S. 1825, Act concerning conveyances, § 4; R. S. 1835, Act regulating conveyances, § 5.

[4] R. S. 1845, Act on Conveyances, § 5; R. S. 1855, Ch. 22, § 5.

[5] Observe that the New Jersey Act of June 13th, 1820 (Rev. Stat. 1821, page 774, § 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, § 6; Stat. of N. J. 1874, p. 341, § 11; Nixon's Digest 1709-1855, p. 196, § 11; Gen'l Stats. of N. J. 1709-1895, Vol. 2, p. 1195, § 11).

[6] R. S. 1866, Ch. 108, § 4; Wagner's Mo. Stat. 1870, p. 1351, § 4; R. S. 1879, p. 675, § 3941; R. S. 1899, Vol. 1, § 4592.

[7] Laws 1827, p. 95; 1 A. & D. R. E. S., p. 75.

[8] 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.

[9] R. S. 1845, p. 104; R. S. 1874, p. 273.

[10] R. S. 1837, p. 189, Ch. 31, § 5.

[11] R. S. 1840, Ch. 59, § 1, p. 310.

[12] R. S. 1867, Ch. 17, § 5.

[13] *Arkansas:* Sandels & Hill, Digest of Statutes 1894, p. 352, Ch. 29, § 700. *Vermont:* G. L. 1862, Ch. 64, § 1, p. 446; V. S. 1894, Ch. 105, § 2201, p. 426. *Colorado:* R. S. 1877, Ch. 18, § 6; Mill's Ann. Stats., Vol. 1, p. 584, § 432 (1891).

§ 403. **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 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*,[14] 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.[15] The life tenant would have renounced, and the children would, accordingly, at once have taken the fee.[16]

§ 404. **The statutory remainder—Prior to the birth of issue of the donee in tail:** So long as there is no issue of the donee in tail the statutory remainder is a common law contingent remainder.[17] It now seems to be subject to the rule of de-

[14] 196 Ill. 119.

[15] Winterbottom *v.* Pattison, 152 Ill. 334; Coleman *v.* Coleman, 216 Ill. 261.

[16] 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*, § 406), and the rule, 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, be applicable, the result reached in the above case is explainable upon the application of that rule.

[17] 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;* Winchell *v.* Winchell, 259 Ill. 471, 475; Moore *v.* Reddel, 259 Ill. 36, 47; Doney *v.* Clipson, 285 Ill. 75; Lewin *v.* Bell, 285 Ill. 227.

structibility of contingent remainders.[18]

§ 405. After the birth of issue of the donee in tail—Three views as to the character of the remainder and the persons entitled to it: *First:* 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." 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,[19] and since no one can be the heir of a living person.[20] The remainder, then, was clearly subject to a condition precedent and the conditional element was incorporated into the description of the remainderman.[21] The case, under the English authorities, would be one of the typical examples of a contingent remainder.[22] In Ar-

[18] *Ante,* § 318; Lewin *v.* Bell, 285 Ill. 227; Frazer *v.* Board of Supervisors, 74 Ill. 282 *contra.*

[19] John de Manville's Case, Co. Lit. 26b; 4 Gray's Cases on Prop., 9.

[20] 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.

[21] Gray, Rule against Perpetuities, § 108; *ante,* § 345.

[22] *Ante,* § 308; Fearne C. R. 9; Fearne Cont. Rem. Smith's Notes, §§ 383-385; Leake, Digest of Land Laws, p. 324; Challis, Real Property, 2nd ed. 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 only presumptive or apparent, because such a person may not, in fact, ever be the true heir at all, and there-

kansas[23] and Vermont[24] the remainder is held to be contingent.

Second: Under the New York statutory definition[25] the remainder would be vested and alienable *inter vivos*. It would, however, be divested as to those who died before the life tenant, so that at the life tenant's death only those who were in fact heirs of the body of the life tenant would take.

Third: If the remainder were vested in the feudal or common law sense and not subject to be divested, the statute must be regarded as creating a remainder in the "children" of the life tenant, so that the remainder vests in the feudal sense in each child when born, subject only to open and let in others, and not subject to be divested so far as the operation of the statute is concerned.

§ 406. State of the decisions of the Illinois Supreme Court: These have leaned more or less in favor of each of the three views above mentioned, but seem now to have settled down in favor of the third. In a number of cases where, however, the point was not strictly involved, the court has referred to the statutory remainder as one to the "heirs of the body" of the life tenant,[26] or to "the person or persons who were in the class of persons to whom the estate tail might first pass on the death of the first grantee, as soon as such person or persons came into being.[27] Such expressions described a contingent remainder according to a literal reading of the statute.

During the considerable period when the court was not distinguishing clearly between the New York statutory definition of a vested remainder and the common law definition, it was inclined to say that the remainder to the "heirs of the body" vested upon the birth of an expectant or presumptive heir of the body, but that such a vested interest was subject to be divested by the death of such a presumptive or expectant heir before the

fore 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.

[23] Horsley *v.* Hilburn, 44 Ark. 458, 476.

[24] *In re* Estate Kelso, 69 Vt. 272; *In re* Wells' Estate, 69 Vt. 388.

[25] *Ante*, § 357.

[26] Metzen *v.* Schopp, 202 Ill. 275; Bowlin *v.* White, 244 Ill. 623; Dick *v.* Ricker, 222 Ill. 413.

[27] Aetna Life Ins. Co. *v.* Hoppin, 249 Ill. 406, 415; 214 Fed. 928.

life tenant, so that those who finally took would be in fact heirs of the body of the life tenant at his death. Thus in *Butler v. Huestis*[28] 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.*" Later, in *Lehndorf v. Cope*,[29] we have the *dictum* of Mr. Justice Shope that the remainder though vested is subject to be divested. Speaking of the statutory remainder he said: "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."

From the first, however, there have been *dicta* and actual holdings that the remainder vests in each child of the life tenant upon birth and, when so vested, is indefeasible. This means that the statutory remainder was in reality a remainder to the "children" of the life tenant. Thus in *Voris v. Sloan*,[30] 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. Subsequently in *Welliver v. Jones*,[31] the court again held squarely that the remainder was not subject to be divested, so that, when the sole lineal heir of the donee died 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*,[32] there is an express recognition of the propriety of the result

[28] 68 Ill. 594, 598.

[29] 122 Ill. 317, 331.

[30] 68 Ill. 588.

[31] 166 Ill. 80.

[32] 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."

reached in *Voris v. Sloan* and *Welliver v. Jones*. Recently the court in *Moore v. Reddel*[33] and *Winchell v. Winchell*[34] appears to have settled the law of the State in favor of the holding in *Welliver v. Jones*.[35]

For a long time it was apparently the holding of our Supreme Court that the *Rule in Shelley's Case* only applied to create a fee. It had no application to create an estate tail.[36] Hence it would not apply where the limitations were to A for life, remainder to the heirs of the body of A. The reason for this was that, if upon the application of the *Rule in Shelley's Case* to create an estate tail, the Statute on Entails immediately turned the estate tail back into the same limitations, there was no use in applying the *Rule in Shelley's Case*.[37] Hence it was said that the *Rule in Shelley's Case* was abolished so far as a fee tail was concerned.[38] Since, however, it has become the settled rule of the court that the remainder is in fact to the children of the donee in tail and vests in each child upon birth, subject only to open and let in others, the reason for not applying the *Rule in Shelley's Case* to effect the creation of an estate tail, fails. We, therefore, find the court applying the *Rule in Shelley's Case* freely where the remainder is to the heirs of the body of the life tenant.[39]

§ 407. Assuming that the statutory remainder is limited to "children"—(1) Can the remainderman be restricted to a special class of children in the case of an estate tail special? A New Jersey statute of 1820,[40] in terms created a remainder

[33] 259 Ill. 36.

[34] 259 Ill. 471.

[35] See also Kolmer *v.* Miles, 270 Ill. 20; Richardson *v.* Van Gundy, 271 Ill. 476; Doney *v.* Clipson, 285 Ill. 75; Lewin *v.* Bell, 285 Ill. 227.

[36] *Post*, § 418.

[37] Such is the reasoning of Mr. Justice Shope in Lehndorf *v.* Cope, 122 Ill. 317, 331. 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 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] *Post*, § 418.

[39] *Post*, § 420.

[40] Rev. p. 299, §§ 10, 11.

in the "children" of the donee.[41] Under this Act 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.[42] Yet in this State the remainder has been restricted to children of the donee in tail by the particular wife[43] even when the statutory remainder was held to be vested indefeasibly in the children when born.[44]

§ 408. (2) At what period of time does the class close? The court evidently assumes that the usual rule applies and that the class may increase up to the time of the death of the life tenant; nor does the court find any impediment to this in the circumstances that the estate tail is created by deed[45] and the donee in tail had children *in esse* when the estate tail was created.[46]

§ 409. If the language of the statute were taken literally, who precisely would be entitled to the remainder—Those who are lineal heirs according to Blackstone's Canons of Descent? or those who are lineal heirs according to the Statutes on Descent? Since it is now settled that the statutory remainder is "to children" and not to the "heirs of the body" of the donee entail, the proposed inquiry is academic, and yet it is useful and important as indicating some of the difficulties, and a very great incongruity of result, in taking the wording of the statute literally. Indeed, it may be surmised that these were the considerations which drove the court in *Moore v. Reddel*[47] to hold decisively that the statutory remainder was to "children."

[41] Doty *v.* Teller, 54 N. J. L. 163.

[42] Zabriskie *v.* Wood, 23 N. J. Eq. 541; Weart *v.* Cruser, 49 N. J. L. 475, 480.

[43] Cooper *v.* Cooper, 76 Ill. 57; Welliver *v.* Jones, 166 Ill. 80.

[44] Welliver *v.* Jones, 166 Ill. 80.

[45] Richardson *v.* Van Gundy, 271 Ill. 476; Moore *v.* Reddel, 259 Ill. 36; Kyner *v.* Boll, 182 Ill. 171.

[46] Moore *v.* Reddel, 259 Ill. 36; Richardson *v.* Van Gundy, 271 Ill. 476. Compare this with the holding that a conveyance by deed to A and his children, "born and to be born," does not permit after-born children to take any interest, *post*, §§ 475, 476.

[47] 259 Ill. 36, 44.

In Arkansas,[48] and Vermont,[49] 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 clear that the descent if traced literally "according to the course of the common law," must have followed such of Blackstone's canons[50] 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 remainder in fee, and the rule of primogeniture would have survived to the present day in this one case. Such a conclusion is not so impossible as it might at first seem. It was in fact adopted in two Missouri cases.[51] 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

[48] Horsley *v.* Hilburn, 44 Ark. 458; Myar *v.* Snow, 49 Ark. 125; Wilmans *v.* Robinson, 67 Ark. 517.

[49] Thompson *v.* Carl, 51 Vt. 408.

[50] 2 Bl. Com., Ch. 14, 200-240; 4 Gray's Cases on Prop., 9.

[51] Frame *v.* Humphreys, 164 Mo. 336; Burris *v.* Page, 12 Mo. 358.

Observe the admission of our Supreme Court in Moore *v.* Reddel, 259 Ill. 36, 44.

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, * * *.''[52]

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 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 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

[52] 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.''

parts among them.[53] 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 estate 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,[54] Pennsylvania,[55] and Maine,[56] 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,[57] do not apply to estates tail so that the descent there still continues to be to the eldest son, etc., according to the course of the common law.[58] 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[59] and a consequent disinclination to overrule, by implication merely, a settled

[53] 1 A. & D. R. E. S., 439; also L. 1819, p. 223 (1 A. & D. R. E. S. 446).

[54] Corbin *v.* Healy, 20 Pick. (Mass.) 514 (1838); Wight *v.* Thayer, 67 Mass. 284 (1854).

[55] Reinhart *v.* Lantz, 37 Pa. St. 488 (1860), overruling the earlier case of Price *v.* Taylor, 4 Casey (Pa.) 95, 106; 28 Pa. St. 95, 106; Sauder *v.* Morningstar, 1 Yeates Pa. 313 (1793), 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.

[56] Riggs *v.* Sally, 15 Me. 408 (1839).

[57] 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 hereditaments, 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."

[58] In 1 Leading Cases in American Law of Real Property (note by Sharswood and Budd), 104.

[59] "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.

rule of property.[60] 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.[61]

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 course of the common law" mean the common law as altered by previous statutes then in force? It is difficult 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.[62] This was the position taken by the Missouri

(Mass.) 514, 517 (1838). In Sauder v. Morningstar, 1 Yeates (Pa.) 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."

[60] See language of the Court in Price *v.* Taylor, 28 Pa. St. (4 Casey) 95, 106.

[61] See the suggestion of Lowrie, J., in Price *v.* Taylor, 28 Pa. St. (4 Casey) 95, 106.

[62] 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

court in the recent case of *Frame v. Humphreys.*[63] 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 * * *."[64]

It is difficult to say that the statute of 1829[65] concerning descents, operated in any way to alter the language of the 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,[66] and 1874.[67]

TITLE II.

REMAINDERS AFTER THE ESTATE TAIL.

§ 410. Before the statutory remainder vests by the birth of children of the donee in tail: A remainder limited after the estate tail is not destroyed by operation of the statute, since the fee in remainder created by the statute has not vested and

the common law, but because the statute in terms applied to estates tail and at common law there were none such at all.

[63] 164 Mo. 336.

[64] 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*, § 402, note 6, this "last vestige of the system of feudal tenures" was evidently restored by the re-enactment of the Act of 1825 regarding entails. (Frame v. Humphreys, 164 Mo. 336.)

[65] Laws 1829, p. 191; 1 A. & D. R. E. S., p. 464, § 46.

[66] R. S. 1845, p. 534, § 46.

[67] R. S. 1874, p. 417, Ch. 39, § 1.

may not vest.[68] If the interest after the estate tail be limited to take effect after a definite failure of issue of the donee in tail, it is clearly not void for remoteness.[69] It would, however, be a contingent remainder after the statutory life estate and subject to the rule of destructibility of contingent remainders.[70] Even though the interest after the estate tail were limited to take effect upon an indefinite failure of issue of the donee in tail,[71] it would be valid because it would be a contingent remainder and subject to the rule of destructibility, which requires it to take effect before or at the termination of the statutory life estate or fail entirely. It could not, therefore, be void for remoteness.[72] Furthermore, the remainder is limited in two events: One, if the statutory life tenant dies without having had any issue; and the other if the life tenant having had issue, such issue fail in any generation. In the first event the future interest is a contingent remainder and not too remote. In the second, it is a shifting executory interest and void for remoteness. The two events are not separated by any language of the instrument creating the estates, but under the rule of *Doe d. Evers v. Challis*,[73] they are separable by operation of law and if the event occurs which enables the future interest to take effect as a vested remainder, it may do so.

§ 411. **After the statutory remainder has vested by the birth of a child of the donee in tail:** Recently our Supreme Court said[74] "The statute [on Entails] operated to destroy the entail supporting the remainder, and necessarily destroyed the remainder expectant on the estate tail. The statute operating upon the estate tail to turn the entail into a fee simple, all

[68] Metzen *v.* Schopp, 202 Ill. 275.

[69] *Id.*

[70] *Ante*, § 318.

[71] *Post*, § 548.

[72] *Post*, §§ 687 *et seq.*

[73] 18 Q. B. 224, 231; 7 H. L. C. 531; 5 Gray's Cases, 2nd ed. 582; Kales' Cases on Future Interests, 1059; Gray, Rule against Perpetuities, 3rd ed. §§ 340-340a. The reasoning of this case only applies where the limitations are legal. It cannot apply where they are all equitable: *In re* Benee, [1891] 3 Ch. 242; *In re* Hancock, [1901] 1 Ch. 482; [1902] A. C. 14. See *Post*, § 689.

[74] Kolmer *v.* Miles, 20 Ill. 20, 26. In Blair v. Vanblareum, 70 Ill. 290, 294, the court refused to deal with the same point because the contingency which would make its consideration necessary had not arisen.

subsequent limitations fell."[75] If "die without issue" which introduces the limitation after the estate tail means "die without ever having had issue," the gift over can, of course, never take effect when issue have been born.[76] If "die without issue" means an indefinite failure of issue,[77] the gift over is void for remoteness. Whether the gift over is on a definite or indefinite failure of issue, the question arises whether at once on the birth of issue to the statutory life tenant the gift over is not destroyed by the application of the common law rule that the future interest after a particular estate of freehold, which may take effect as a remainder, shall never be permitted to take effect in any other way.[78]

[75] See Wilkes *v.* Lion, 2 Cow. (N. Y.) 333.

[76] Winchell *v.* Winchell, 259 Ill. 471. For the circumstances under which such a construction is proper, see *post,* § 540.

[77] *Post,* § 549.

[78] For a discussion of this rule and its possible application, see *ante,* § 105.

CHAPTER XVII.

RULE IN SHELLEY'S CASE.[1]

TITLE I.

STATEMENT OF THE RULE AND ITS APPLICATION.

Topic 1.

In General.

§ 412. The Rule in force in Illinois stated: The *Rule in Shelley's Case* is in force in this state.[2] This Rule is not a mod-

[1] The origin and history of the Rule have been dealt with *ante*, §§ 34, 35. In Baker *v.* Scott, 62 Ill. 86, 95, 96, our Supreme Court touched upon some of the suggestions which have been made to explain the existence of the Rule. See also, *post*, §§ 423, 424. In Akers *v.* Clark, 184 Ill. 136, 137, the court observed (quoting from Washburn on Real Property, Vol. 2, p. 242) that the limitations to which the Rule applied would, without the application of the rule, give a life estate to A and a contingent remainder to A's heirs. This actually happened in Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406; 214 Fed. 928; Benson *v.* Tanner, 276 Ill. 594.

[2] 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; Davis *v.* Sturgeon, 198 Ill. 520; Deemer *v.* Kessinger, 206 Ill. 57; McFall *v.* Kirkpatrick, 236 Ill. 281; Lord *v.* Comstock, 240 Ill. 492; Wallace *v.* Foxwell, 250 Ill. 616; Winter *v.* Dibble, 251 Ill. 200; Smith *v.* Smith, 254 Ill. 488; Nowlan *v.* Nowlan, 272 Ill. 526; Greenough *v.* Greenough, 284 Ill. 416. 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*, § 659, for ground upon which the court placed its decision.)

ern rule founded upon the ancient one, but it is the ancient feudal rule itself as adopted and developed by the English courts. Our Supreme Court has recognized the Rule as given by Preston [3] and Jarman.[4] Hayes'[5] 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."[6]

§ 413. **Where the life estate and remainder differ in quality (one being legal and the other equitable) the Rule does not apply:** "The rule," says Hayes,[7] "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.[8]

§ 414. **Where the remainder is not to "heirs," but to "children" the Rule does not apply:** The fact that a remainder to *heirs* is required excludes the application of the Rule in the case where the remainder is, to quote again from Hayes,[9] "to *sons, children,* or other objects, to take, either as individuals or as a class, under what 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

[3] Baker *v.* Scott, 62 Ill. 86 at p. 90, 91; Brislain *v.* Wilson, 63 Ill. 173, citing 1 Preston on Estates, 264.

[4] Lehndorf *v.* Cope, 122 Ill. 317 to 331; citing Jarman on Wills, 5th ed. 332.

[5] 1 Hayes on Conveyancing, 5th ed. 542.

[6] The scheme of this chapter and much of the substance of the different sections is founded upon the exposition in 1 Hayes' Conveyancing 5th ed. 542 *et seq.* For other expositions of the Rule see Bails *v.* Davis, 241 Ill. 536, 539, 540, and Winter *v.* Dibble, 251 Ill. 200, 221.

[7] 1 Hayes on Conveyancing, 5th ed. 542.

[8] 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;* Harvey *v.* Ballard, 252 Ill. 57; Smith *v.* Smith, 254 Ill. 488, 493, *semble.*

[9] 1 Hayes on Conveyancing, 5th ed. 543.

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."[10] It must, however, be an unusual case where this can happen. It is noticeable that, where our Supreme Court has been urged to give such a construction to the word "children," it has usually refused to do so.[11] 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.[12] 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" is meant.[13]

§ 415. Where the grant or devise is "to A and his heirs" the Rule has no application: Here a fee is created in A by the formula of words required by the feudal land law.[14] The *Rule in Shelley's Case* has nothing to do with the result.[15] There is no life estate and no remainder to the life tenant's heirs. Of course, if the contention is being put forward that A has only

[10] Dick *v.* Ricker, 222 Ill. 413 (remainder to children of life tenant's body *in fee tail*).

[11] Beacroft *v.* Strawn, 67 Ill. 28; Griswold *v.* Hicks, 132 Ill. 494; Schaefer *v.* Schaefer, 141 Ill. 337; Hanes *v.* Central Ill. Utilities Co., 262 Ill. 86.

[12] Morris *v.* Phillips, 287 Ill. 633.

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.

Beslay *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."

For other instances where "heirs" is construed children, see *post*, § 574 note.

[13] 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; Crabtree *v.* Dwyer, 257 Ill. 101. 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.

[14] *Ante*, §§ 153, 158.

[15] Johnson *v.* Buck, 220 Ill. 226; Morton *v.* Babb, 251 Ill. 488; Forbes *v.* Forbes, 261 Ill. 424.

a life estate with a remainder to his heirs, it might be replied that, assuming such a situation, the *Rule in Shelley's Case* would give A the fee.[16] In at least three cases,[17] however, our Supreme Court appears to have applied the *Rule in Shelley's Case* to give A the fee where the conveyance ran "to A and his heirs."[18] The danger of introducing an issue of the application of the *Rule in Shelley's Case* in this class of cases appears from *Rissman v. Wierth*.[19] In that case there was a devise to the wife "and to her heirs and assigns forever," with subsequent language indicating that the wife was to have only a life estate. Then there was a clearly expressed gift over to the "above named persons." The court having held that the *Rule in Shelley's Case* applied to give the wife a fee, affirmed a decree which gave the property to the wife's heirs as against the named devisees. The *Rule in Shelley's Case* had nothing to do with the limitations unless they could be construed as giving the wife a life estate with a remainder to her heirs.[20] But whatever view be taken of the wife's estate there was a clear gift over to the named devisees upon her death which was good as a remainder after a life estate or as a shifting executory devise.

§ 416. It does not, however, prevent the application of the Rule that other estates or interests are inserted between the life estate and the remainder to heirs: This is clear from a number of cases.[21] What the operation of the Rule is in such cases is considered, *post*, § 440.

§ 417. The Rule applies though the life tenant takes a part interest in the estate for life and a remainder in the whole,[22] or the entire interest for life and a part interest in the re-

[16] Baker v. Scott, 62 Ill. 86; Lehndorf v. Cope, 122 Ill. 317; Wolfer v. Hemmer, 144 Ill. 554, 559.

[17] Ewing v. Banes, 156 Ill. 61; Silva v. Hopkinson, 158 Ill. 386; Davis v. Sturgeon, 198 Ill. 520.

[18] See the comments of Lessing Rosenthal, Esq., in 28 Chicago Legal News, p. 258.

[19] 220 Ill. 181.

[20] In Miller v. Mowers, 227 Ill. 392, 403, where the deed ran to A and her heirs for life, the court construed it as creating a life estate and not as giving A a life estate with a remainder to her heirs.

[21] McFall v. Kirkpatrick, 236 Ill. 281; Hanes v. Central Ill. Utilities Co., 262 Ill. 86; Carpenter v. Hubbard, 263 Ill. 571.

[22] Bails v. Davis, 241 Ill. 536; Wallace v. Foxwell, 250 Ill. 616; Fuller v. Chamier, L. R. 2 Eq. 682; Hess v. Lakin, 7 Oh. Dec. 300; Kepler v. Reeves, 7 Oh. Dec. Reprint,

mainder:[23] What the operation of the Rule in such cases is will be discussed, *post,* § 440.

TOPIC 2.

WHERE THE LIMITATIONS ARE TO A FOR LIFE REMAINDER "TO THE HEIRS OF THE BODY" OF A.

§ 418. There have been dicta and decisions that the Rule does not apply to such limitations: In *Baker v. Scott,*[24] the court said: "As by section 6 of the same chapter the rule does not operate upon estates tail, as it declares, contrary to the *Rule in Shelley's Case,* that the first devisee or grantee of an estate tail shall take only for life and the remainder to pass in fee to the person or persons to whom the estate tail would, by common law, next pass after the death of the first grantee or devisee, the inference is, no change was intended to be made in the rule where by the deed or will the remainder is limited in fee." In *Butler v. Huestis,*[25] the court said: "It is apparent, therefore, the estate devised [by the will involved in *Baker v. Scott,* 62 Ill. 86] was not an estate tail. It was simply a limitation of the fee to her heirs, and hence the *Rule in Shelley's Case* could be applied. But not so in the case at bar, for here the estate is devised in tail. The statute in this state has saved the entail to the first degree. *It is palpable, therefore, so far as estates-tail are concerned, the Rule in Shelley's Case has been repealed by the 6th section of the Conveyance Act.*" In *Griswold v. Hicks,*[26] the limitations involved were to the children of the grantor "and the heirs of their bodies. * * * Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives." The *habendum* was "to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever." It was held that a life estate was given to the children, with a remainder in fee to their children. The special context here caused "heirs" and "heirs of the

34; Bullard *v.* Goffe, 20 Pick. (Mass.) 252; Fearne, Cont. Rem. 36, 63, 310.

[23] Ward *v.* Butler, 239 Ill. 462.

[24] 62 Ill. 86, 98.

[25] 68 Ill. 594, 599.

[26] 132 Ill. 494, 501.

body" to mean children. The court, however, said: "If the word 'heirs,' when used the second time in the deed in the granting clause, can with certainty be said to mean, 'heirs of their bodies,' as expressly stated immediately following the names of the grantees, then *the Rule in Shelley's Case, as at common law, would have no application, our statute expressly providing in such case that he who would by the common law have taken a fee tail, shall become seized for his natural life only,* and the heirs of his body, tenants in tail according to the common law, take the fee." In *McCampbell v. Mason*,[27] the limitations involved were to the parties of the second part for life "and to the issue, or heirs of the bodies respectively, of said parties of the second part in fee simple," with a gift over if any of the parties of the second part died without leaving issue or heirs of the body, then his portion to go to the surviving party or parties of the second part respectively for life, "and then to the issue or heirs of the body of such survivor or survivors in fee simple," with a gift over if all the parties of the second part died without leaving issue or heirs of their bodies, "to the heirs of the said party of the first part." It was assumed without argument that the *Rule in Shelley's Case* did not apply and that an estate tail was therefore not created and that the remainder in fee to the heirs of the bodies *in fee simple* was a contingent remainder. This was the actual holding of the case and regarded as necessary not only to support the validity of the ultimate gift and avoid the objection that a fee on a fee was being created by deed, but also in order that the contingent remaindermen might be bound by decree by representation, to which they were not made parties. The court said: "Such construction, we think, is plain, viz., that the persons who were to take the remainder on the death of either of the life tenants was left dubious and uncertain, so that until such death, it is impossible to ascertain the persons to whom the remainder will go. If at the death of a life tenant, he or she has issue or heirs of his or her body surviving, it goes to such issue, but if not, it goes to the surviving life tenants for their lives, with remainder in fee to their issue or the heirs of their bodies. It thus seems to be plain that the remainder granted to the grantor's grandchildren, so long as the parent is surviving, is contingent, and

[27] 151 Ill. 500, 510.

that it could only become vested upon the death of the parent leaving surviving children or descendants." After the previous *dicta* and decisions this would seem to rest naturally upon the ground that the *Rule in Shelley's Case* was abolished so far as it applied at common law, where the remainder was to the "heirs of the body" of the life tenant.[28] In *Dick v. Ricker*,[29] the deed ran to Eliza and the children of her body, to have and to hold to Eliza for life and then to the children of her body in fee tail. This was held to create a fee tail, but not because the *Rule in Shelley's Case* applied. The court said: "It has been held by this court that the *Rule in the Shelley Case* did not apply to an estate tail in this State for the reason that our statute had provided to the contrary." In *Aetna Life Insurance Co. v. Hoppin*,[30] the Illinois Supreme Court had two grounds for holding that the *Rule in Shelley's Case* did not apply. One was that the words "heirs of the body" were used as words of purchase by reason of the superadded words of limitation, "their heirs and assigns." The second reason, which the Supreme Court as a matter of fact put first, was that the *Rule in Shelley's Case* would never apply where the remainder was to the "heirs of the body" of the life tenant, for the reason that the *Rule in Shelley's Case* had been abolished by the indirect effect of the Statute on Entails. This meant that in no case of a remainder to the "heirs of the body" of the life tenant would the *Rule in Shelley's Case* apply, even though there were no superadded words of limitation at all. This position was made very clear by Mr. Justice Dunn, speaking for the court: "The appellees have cited section 6 of the Conveyance Act as decisive of this case. *This section abolished estates tail, and with them the Rule in Shelley's Case as applied to such estates.* * * * *That Rule applies in this state only to fees simple.* Under the operation of the Rule where in force as to estates tail, a conveyance to one for life with remainder to the heirs of his body is the same as a conveyance to one and the heirs of his body, and the

[28] In 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. See also Hall *v.* Hankey, 174 Fed. 139.

[29] 222 Ill. 413, 420.

[30] 249 Ill. 406, 411; 214 Fed. 928.

first taker has an estate tail, which is an estate of inheritance. In this state, however, *where the Rule is not in force as to estates tail,* the conveyance operates according to its terms, and the first taker has a life estate, only. Section 6 has no application to this case, because it refers only to 'cases where, by the common law, any person or persons might hereafter become seized in fee tail,' etc., and *this is not such a case.*''

In *Cooper v. Cooper,*[31] there was nothing inconsistent with these *dicta* and decisions. In that case one of the deeds involved seems to have created a life estate in William Cooper and a life estate in his wife, and then a remainder to the heirs of the body of William Cooper ''in fee simple, forever, and to their heirs and assigns.'' One expression of the court seems to indicate that these limitations ''under our statute'' conveyed a remainder in fee simple absolute to the heirs of the body of William Cooper. It is hard to tell whether this means ''under the statute providing that a fee simple may be limited without words of limitation,'' or whether it means that the Statute on Entails applies. In any event, it is entirely immaterial in the case because William Cooper had died, the heirs of his body had been ascertained, and their remainder had vested, and there was no question whatever which would depend upon whether the remainder was created by the language used or by the Statute on Entails. There is nothing in this case, therefore, to indicate that the *Rule in Shelley's Case* applied where the remainder was limited to the ''heirs of the body'' of the life tenant. Nor is there anything in *Voris v. Sloan,*[32] to indicate that the *Rule in Shelley's Case* applies where the remainder is to the ''heirs of the body'' of the life tenant. In that case the limitations were to Francis and Samuel Voris as trustees, in trust for ''the use and behoof solely of the said Christiana Morton and the heirs of her body forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Christiana Morton during her natural life, with a remainder to the heirs of her body; and in case she should die without *issue,* then, in that case, the legal title to revert to the said party of the first part or his heirs.'' These limitations were taken as if they created an active trust, although as the statement goes, the trust would seem to be pas-

[31] 76 Ill. 57, 61. [32] 68 Ill. 588.

sive and executed by the Statute of Uses. Mrs. Sloan, as the life tenant and as the guardian for her children, filed a bill to have the property sold. The surviving trustee was the only party defendant. The sale was ordered and it was decreed that out of the proceeds Mrs. Sloan should receive the value of her life estate and hold the balance as guardian for her children. This was affirmed except that it was held that on the death of two children already deceased, their shares descended to their mother in part, who was entitled on that ground to a portion of the principal. This could only be supported on the theory that the children took absolute indefeasible interests when born. The court received no aid from any counsel opposed to the interests of Mrs. Sloan, the life tenant. No basis upon which the children took an absolute and indefeasible fee on birth is directly stated by the court. The clearest ground upon which this assumption was made is that the gift over "in case the life tenant should die without *issue,*" by reference caused "heirs of the body" to mean "issue." The result of this would be that each issue on birth took a vested and indefeasible interest, subject only to open and let in other members of the class. *Voris v. Sloan* cannot possibly go upon the ground that the Statute on Entails applied, because the court held the children took not only absolute, but also indefeasible interests, while in the very next case reported, *Butler v. Huestis,*[33] the court distinctly declared that the remainder created by the Statute on Entails was subject to be defeated by the death of children before the life tenant. The words of the court are: "Mrs. Huestis, under our statute [on entails], 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 afterborn children, and *be divested as to such as should die before the determination of the life estate.*" If, therefore, the holding of *Voris v. Sloan,* that the children take absolute and indefeasible interests on birth depended on the Statute on Entails, then it is absolutely *contra* to the above *dictum* in the very next case of *Butler v. Huestis,* decided at the same time. It is not necessary to place our Supreme Court in the position of such inconsistency. The way out is the explanation just given, that the gift over in *Voris v. Sloan,* 'if the life tenant should die without issue," causes "heirs of

[33] 68 Ill. 594, 598.

the body" to be construed "issue." It is true that the Court in *Voris v. Sloan* said:[34] "Had the deed contained no limitation over to the grantor or his heirs, then it is manifest that, by the statute *de donis,* the heirs of her body would have taken an estate tail, but as entails have been abolished by our conveyance act they would at birth have taken a fee." It is very difficult to tell what this means. The following explanation is believed to be correct: Omitting the gift, there would have been a straight gift to A for life, remainder to the heirs of her body. Assuming the *Rule in Shelley's Case* did not apply, A would have a life estate. But what estate would the heirs of the body have had by way of remainder? Under the common law strictly they would have had a remainder in tail. The Statute on Entails would, then, apply to this remainder in tail to the heirs of the body of the life tenant, turning the remainderman in tail into tenants for life, with a further remainder in fee simple to the heirs of their bodies. The court, however, regarded this as an absurd result. It regarded the indirect effect of the Statute on Entails as sufficient to warrant the holding that when the heirs of the body of the life tenant took in remainder they would take *a fee simple,* as if the words of limitation indicating a fee simple had been added, thereby terminating a further entailing at once. In *Lehndorf v. Cope,*[35] however, 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."

§ 419. There are three grounds for insisting that the Rule does not apply where the remainder is to the "heirs of the body" of the life tenant: *First:* Estates tail have in effect been abolished by the Statute on Entails. Hence the application of the *Rule in Shelley's Case,* which would result in an estate tail, should be denied as a necessary effect of the Statute on En-

[34] 68 Ill. 588, 592.

[35] 122 Ill. 317, 331.

tails.[36] *Second:* When it was first stated in *Baker v. Scott,*[37] that the *Rule in Shelley's Case* did not apply where the remainder was to the "heirs of the body" of the life tenant, our Supreme Court very likely read the Statute on Entails as creating a life estate in the first taker with a remainder to the "heirs of his body" in fee. Indeed, this was the literal force and effect of the statute.[38] If, then, the *Rule in Shelley's Case* applied to create an estate tail, the statute would turn the limitations back into exactly what they were before the Rule applied. This was absurd and incongruous. Naturally it was avoided by regarding the *Rule in Shelley's Case* as abolished by the Statute on Entails so far as the case of a remainder to "the heirs of the body" of the life tenant was concerned. There is still a *third* ground for the refusal to apply the *Rule in Shelley's Case.* It is the incongruity of result in using one rule to defeat the settlor's or testator's intention in order to apply another rule which does the same thing. Thus, where the remainder is to the heirs of the body of the life tenant, the intent of the testator is twice defeated. The *Rule in Shelley's Case* defeats it by giving A an estate tail, and then the Statute on Entails defeats it by turning it into a life estate in A and a vested and indefeasible remainder to his children on birth thereby destroying any remainder limited over after A's death without heirs of his body at his death.[39] The intent of the testator may be shattered even more violently. Suppose, for instance, that the limitations are to A for life, remainder to the heirs of the body of A, but if A dies without heirs of his body at his death, then to B and his heirs. Suppose that A died without issue surviving him after having had issue. If the *Rule in Shelley's Case* applies A will take an estate tail with a gift over on a definite failure of issue. By the statute A will take a life estate with a remainder in fee in his children, vested in them indefeasibly upon birth, and the gift over, by force of the statute, will be destroyed and the heirs or devisees of A's children (their spouses included) will take. This is ruining the testator's intention with a vengeance.

[36] Compare the reasoning upon which the rule in Wild's case, which operated to create an estate tail was eliminated from the law of this State, *post,* § 562.

[37] 62 Ill. 86, 98.

[38] *Ante,* § 405.

[39] *Ante,* § 411.

§ 420. The recent cases, however, hold that the Rule does apply where the remainder is to "the heirs of the body" of the life tenant: When it was settled that the statutory remainder created by the Statute on Entails vested indefeasibly in the children of the first tenant in tail upon birth [40] one of the reasons for holding that the *Rule in Shelley's Case* did not apply when the remainder was to the heirs of the body of the life tenant failed. The question then arose whether the other reasons were sufficient. Recent cases have assumed without discussion that they were not.

In *Moore v. Reddel*,[41] the limitations were to Marshall Brown for life "with remainder to the heirs of the body of said Marshall Brown and their assigns forever." The question of the application of the *Rule in Shelley's Case* was not mentioned by the court. Nevertheless, the decision necessarily starts with the assumption that the *Rule in Shelley's Case* did apply and gave to Marshall Brown a fee tail by the common law, upon which the Statute on Entails then operated. This assumption appears to have been promoted by the admissions and argument of counsel for the appellants, who were vitally interested in the non-application of the *Rule in Shelley's Case*. An examination of the briefs filed on behalf of these appellants shows that counsel insisted that the *Rule in Shelley's Case* did apply and that an estate tail was created. If *Moore v. Reddel* stood alone it might be seriously doubted that the Supreme Court intended to go back upon the line of precedents already established to the effect that the *Rule in Shelley's Case* would not apply. An assumption of the court induced by a clear admission of counsel could hardly be regarded as making the law of the state and of overruling a line of consistent *dicta* and actual decisions holding *contra* to counsel's admissions.

In *Winchell v. Winchell*,[42] however, decided at the same term of court as *Moore v. Reddel*, and with an opinion by the same justice who wrote the opinion in *Moore v. Reddel*, our Supreme Court held and in terms declared that the *Rule in Shelley's Case* would apply where the remainder was to the heirs of the body of the life tenant. The limitations in *Winchell v. Winchell* were to Fannie for life "and at her death to go to her heirs; but in

[40] *Ante*, § 406.
[41] 259 Ill. 36.
[42] 259 Ill. 471.

case she shall die without issue, then the property above devised to her shall go to my other heirs, share and share alike." "Heirs" in the remainder to Fannie's heirs was construed heirs of the body, and the limitations are to be read as if the remainder was limited to the heirs of the body of the life tenant. Fannie filed a bill to quiet her title as against her daughter and brother, the latter representing those who might be entitled upon the gift over if Fannie died without issue. The decree was that Fannie was entitled in fee simple and that there was no other interest present or future. On a writ of error by the daughter this was reversed and remanded with directions to enter a decree that Fannie had only a life estate with a vested remainder in fee in her children subject to open and let in other children that might be born, and that the gift over if Fannie died without issue could not take effect. This direction can only rest upon the ground that the *Rule in Shelley's Case* applied so that an estate tail was created upon which the Statute on Entails might operate so as to create, under the rule of *Moore v. Reddel,* a remainder in Fannie's children vested as soon as born, and indefeasibly vested except so far as the same was subject to open and let in other children. If the *Rule in Shelley's Case* had not applied, then the Statute on Entails would not have applied and the remainder would have been contingent to those persons who answered the description of heirs of the body of the life tenant at the life tenant's death.[43] The gift over would have been valid as a contingent remainder which was sure to take effect, if at all, at the time of the life tenant's death if the life tenant then died without issue surviving. The court, by Mr. Justice Cartwright, said, that "it [the *Rule in Shelley's Case*] has been abolished as to estates tail by the sixth section of the Conveyance Act. As to limitations controlled by that section, the only use made of the rule is for the purpose of determining whether by the common law a fee tail would have been created. If it would, the person who would have been seized in fee tail is seized for her or his natural life, only, and the remainder passes in fee simple absolute to the person or persons to whom the remainder is limited."[44]

[43] Aetna Life Ins. Co. *v.* Hoppin, 249 Ill. 406, 473; 214 Fed. 928.

[44] Richardson *v.* Van Gundy, 271 Ill. 476, *accord.*

NOTE: *When a remainder to "heirs" of the life tenant is construed to mean "heirs of the body" of the life tenant:* Where there is

TOPIC 3.

WHERE THE REMAINDER IS TO "HEIRS," OR "HEIRS OF THE BODY" OF THE LIFE TENANT, TO WHAT EXTENT CAN "HEIRS," OR "HEIRS OF THE BODY" BE CONSTRUED TO BE WORDS OF PURCHASE AND NOT WORDS OF LIMITATION AND THE APPLICATION OF THE RULE THEREBY AVOIDED.

§ 421. **Conflicting results of the cases:** It has been held that the *Rule in Shelley's Case* does not apply where the remainder is limited to the life tenant's "heir male" (in the singular number) with superadded words of limitation, such as "and the heirs of such heir male."[45] So, if the remainder is to the life tenant's heir (in the singular number) "for life," the *Rule in Shelley's Case* does not apply.[46] In *Evans v. Evans*[47] the remainder was limited to "such person or persons as at the decease of the said A [the life tenant] shall be his heir or heirs at law, and of the heirs and assigns of such person or persons." Sir Howard Elphinstone[48] supports this as within the precise scope of *Archer's* case[49] because the remainder is to the "heir" in the singular number and words of limitation are superadded, together with the direct reference to the "person or persons" who answer the particular description. The word "heirs" in the plural is disregarded because it is inconsistent with the explicit provision that the "person or persons" answering the particular description are to take in fee as a new stock of descent. There is much, however, in the opinion of the court to lead one to conclude that the *Rule in Shelley's Case* was re-

a gift to the testator's daughter for life with a remainder to the life tenant's "heirs," and a gift over if the life tenant dies without issue to "my other heirs," the remainder to the heirs of the daughter means "heirs of the body." (Winchell *v.* Winchell, 259 Ill. 471.) But in Ahlfield *v.* Curtis, 229 Ill. 139, where the limitations were to the testator's daughter and "then to her heirs," with a gift over if the daughter died "leaving no heirs of her own," it was held that the daughter took a fee with a gift over only in case she died without leaving heirs of her body. See also Winter *v.* Dibble, 251 Ill. 200, 216.

[45] Archer's case, 1 Co. 66b; Willis *v.* Hiscox, 4 My. & Cr. 197; Clerke *v.* Day, Moore, 593; Greaves *v.* Simpson, 12 W. R. 773, 10 Jur. N. S. 609.

[46] White *v.* Collins, Comyn's Rep. 289; Pedder *v.* Hunt, 18 Q. B. D. 565.

[47] [1892] 2 Ch. 173.

[48] 9 Law Quart. Rev. 2.

[49] 1 Co. 66b.

garded as not applying in the case where the remainder was "to the person or persons who should be the life tenant's heirs at law and their heirs and assigns." In several American jurisdictions there are cases supporting the holding that the Rule does not apply to such a remainder.[50] In Maryland, however, it has recently been held that the Rule does apply to such remainder.[51] It has been held that the Rule applies when the remainder is limited to the life tenant's "heir" (in the singular number) omitting the subsequent words of limitation, such as "and the heirs of such heir,"[52] and it makes no difference that the remainder is to the "heir" (in the singular number) "forever."[53] It has been held also that the Rule applies when the remainder is "to heirs of the body" with the words of limitation superadded, such as "and their heirs and assigns forever,"[54] or to "heirs and their heirs and assigns" or "in fee simple."[55] But the holding in the English cases was formerly that a remainder to "heirs of the body" as tenants in common, with words of limitation super-

[50] Peer *v.* Hennion, 77 N. J. L. 693 (remainder "to such person or persons as shall be her heir or heirs of lands held by her in fee simple"); Taylor *v.* Cleary, 29 Gratt. (Va.) 448 (remainder "to such person or persons as shall at that time [the death of the life tenant *R*] answer the description of heir or heirs at law of the said *R*, and such person or persons shall take the said land under that description as purchasers under and by virtue of this deed and not by inheritance as heirs of the said *R*"); Earnhart *v.* Earnhart, 127 Ind. 397 (remainder "to the persons who would have inherited the same from the said" life tenant "had he owned the same in fee simple at the time of his death"). In Robinson *v.* Le Grand & Co., 65 Ala. 111, it was provided that after the life tenant's death the land "shall pass according to the Statutes of Descent and Distribution of the State of Alabama *now* in force." The Rule did not apply. Geist *v.* Huffendick, 272 Ill. 99 (remainder for life of another "shall descend in accordance with the laws of Illinois").

[51] Cook *v.* Councilman, 109 Md. 622 (remainder "to such person or persons as would, under the laws of the State of Maryland, inherit the same as the heirs of my said nephew [the life tenant] if he had died intestate seized in fee thereof").

[52] Richards *v.* Bergavenny, 2 Vern. 324; Theobald on Wills, 7th ed. 422.

[53] Fuller *v.* Chamier, L. R. 2 Eq. 682.

[54] Jesson *v.* Wright, 2 Bligh. 1; Doe *v.* Harvey, 4 B. & C. 610; Mills *v.* Seward, 1 J. & H. 733; Clark *v.* Neves, 76 S. C. 484; Carroll *v.* Burns, 108 Pa. St. 386; Kepler *v.* Larson, 131 Ia. 438.

[55] Bonner *v.* Bonner, 28 Ind. App. 147; Brown *v.* Bryant, 17 Tex. Civ. App. 454; Fowler *v.* Black, 136 Ill. 363; Winter *v.* Dibble, 251 Ill. 200.

added, prevented the application of the Rule,[56] and some American jurisdictions seem to have gone so far as to hold that the Rule did not apply where only words were added to the effect that the heirs of the life tenant were to take equally as tenants in common.[57] In some American jurisdictions it has been held that the rule does not apply when the remainder is "to heirs of the body" with the superadded words of limitation, such as "and their heirs and assigns forever"[58] or "in fee simple."[59] Suppose now the remainder were limited to "heirs" with words of limitation superadded, such as "and their heirs and assigns forever," and then it was expressly stated that heirs were to take as purchasers in fee simple, and thereby become a new stock of descent, and that the word heirs was used as a word of purchase and not as a word of limitation. Would the Rule apply? Clearly not in the jurisdiction holding that the Rule does not apply where the remainder is to heirs with words of limitation superadded. But in jurisdictions holding that the Rule does apply even where the remainder is to heirs with words of limitation superadded, what would the court do? Butler,[60] Fearne,[61] Preston,[62] and Sugden[63] all seem to have thought the Rule would not apply in such a case. On the other hand, Lord Commissioner Wilmot[64] seems to have been quite positive that the Rule would apply. The Law Lords in the recent case of *Van Grutten v. Foxwell*[65] seem to leave the question open. Lord Davey seems to say the Rule would not apply;[66] Lord

[56] Doe *v.* Laming, 2 Burr. 1100; Crump *v.* Norwood, 7 Taunt. 362.

[57] Burges *v.* Thompson, 13 R. I. 712 (remainder to life tenant's "heirs at law, him surviving, share and share alike"); Simonton *v.* White, 93 Tex. 50 (remainder "to be equally and impartially divided between her [the life tenant's] bodily heirs").

[58] DeVaughn *v.* DeVaughn, 3 App. Cas. (D. C.) 50; DeVaughn *v.* Hutchinson, 165 U. S. 566; Dott *v.* Willson, 1 Bay. (S. C.) 457; Lemacks *v.* Glover, 1 Rich. Eq. (S. C.) 141; McIntyre *v.* McIntyre, 16 S. C. 290; Butler *v.* Huestis, 68 Ill. 594; Ætna Life Ins. Co. *v.* Hoppin, 249 Ill. 406, 412-413; 214 Fed. 928.

[59] Westcott *v.* Meeker, 144 Ia. 311; Archer *v.* Brockschmidt, 5 Oh. N. P. 349.

[60] Butler's Notes Co. Lit. 376b *et seq.*

[61] Contingent Remainders, p. 189.

[62] Preston on Estates, 282.

[63] Montgomery *v.* Montgomery, 3 Jones & LaT. 47, 51.

[64] Sayer *v.* Masterman, Wilm. 386.

[65] [1897] A. C. 658.

[66] *Id.*, 685.

Macnaghten that it would.[67] Lord Chancellor Herschell is noncommittal.[68]

It is proposed to show that underlying these conflicting results are two theories with respect to the application of the *Rule in Shelley's Case:* The *first*, that it applies only when the word "heirs" in the remainder is used as a word of limitation and not as a word of purchase; the *second,* that the Rule applies precisely when the word "heirs" in the remainder is used as a word of purchase.[69]

§ 422. What is meant by "heirs" as a word of "purchase" and as a word of "limitation": When "heirs" or "heirs of the body" are used as embracing the whole line of inheritable succession they are said to be used as words of limitation. When "heirs" or "heirs of the body" are used to designate the person or persons who would be entitled to take by descent from the ancestor—such person or persons when thus ascertained to take as individuals because they answer that description, and, if they take in fee, to thereupon become a new stock of descent—they may be said to be used as words of purchase. Thus, in the common case of a devise to A for life and then to the testator's heirs at law, heirs is used to designate the person or persons who are entitled to take by descent from the testator at his death. "Heirs" is used as a word of purchase. No doubt in applying the *Rule in Shelley's Case* "heirs" is said to be used as a word of purchase when, in a remainder to the life tenant's heirs, it has been construed to mean "issue" or "children." It is not, however, the most accurate mode of expression to say that "heirs" in such a case is used as a word of "purchase." The word used is used as a word of purchase no doubt, but that word is "issue" or "children" and not "heirs." Let it be understood then that when in this topic reference is made to "heirs" as a word of purchase reference is not made to the case where "heirs" is construed as meaning "children" or "issue," but to the case where "heirs" is used as a word to designate the person or persons who would be entitled to take by descent from the life tenant in case the life tenant died seised and possessed of a fee simple, such person or persons when thus designated to take as individuals because they answer that description.

[67] *Id.*, 680.
[68] *Id.*, 663.
[69] *Ante*, § 35.

§ 423. The first theory of the application of the Rule is that it applies only when "heirs" in a remainder to heirs is used as a word of limitation embracing the whole line of inheritable succession, and that it does not and cannot apply where "heirs" in a remainder is used as a word of purchase: According to Sir Howard Elphinstone the *Rule in Shelley's Case* finds its logical justification in the meaning of the word "heirs." "The heirs of A [the life tenant] are not a definite coexisting group of persons, but an indefinite number of persons who must take, if at all, in succession to one another. They cannot take as joint tenants or tenants in common, and there is no other way for them to take by purchase. Descent, therefore, is the only way in which they can take, and it must be descent from A."[70] "The reason given by Sir Howard [for the *Rule in Shelley's Case*] is that there is no way in which "the heirs of A," a living person, can take as purchasers, for they are an indefinite succession of persons. Therefore the only way of giving effect to such a limitation, following a freehold estate not of inheritance given to A by the same instrument, is to say that it creates no new estate, but enlarges the ancestor's estate into a fee and enables his heirs to take by descent."[71] The fundamental premise in this explanation is that in 1324,[72] when the Rule first made its appearance, "heirs" in a remainder to heirs actually did include the whole line of inheritable succession. It was naturally and primarily taken not as a word of purchase designating the individual or individuals who might answer the description of heir or heirs of the life tenant at the life tenant's death, but as a word of limitation. If this be the basis for the Rule, then it should follow that the condition which invokes the application of the *Rule in Shelley's Case* is the use of the word "heirs" in the remainder as a word of limitation.[73] It should follow also

[70] Review of 4th ed. of Goodeve's Law of Real Property, 14 Law Quart. Rev., 98.

[71] Review of 5th ed. of Goodeve's Law of Real Property, 22 Law Quart. Rev., 333.

[72] "The Rule in Shelley's case is said to be first mentioned in Abel's case, 18 Edw. II, 577 (1324), which will be found translated 7 M. & G. 941, note (a). *Cf.*, also Provost of Beverley's case, Y. B., 40 Edw. III, fol. 9a, b (1366), and Shelley's case, 1 Co. 93b (1581), from which the Rule has its name. 5 Gray's Cases on Prop., 2nd ed. 83.

[73] Butler's Notes Co. Lit. 377a; Fearne, Cont. Rem., p. 189; Preston on Estates, 282.

that if the settlor made it perfectly clear by direct declaration that he used the word heirs as a word of purchase and not at all as a word of limitation, the Rule would not apply.[74] From this it would logically follow that whether "heirs" in the remainder to the life tenant's heirs was used as a word of purchase or as a word of limitation would become a question of construction.[75] The word "heirs" would be in its primary meaning a word of limitation, but a special context sufficiently clear to show that heirs was used as a word of purchase would be available to give heirs a meaning which would prevent the application of the Rule. Such was substantially the position taken in *Archer's* case.[75a] There the remainder was to the life tenant's "next heir male" and "to the heirs male of the body of such next heir male." The word "heir" in the singular number was in its primary meaning a word of limitation, so that the *Rule in Shelley's Case* applied.[76] But when the words of limitation were superadded to "heir" in the singular number it indicated that the person who turned out to be the heir was to take in fee or in fee tail, as the case might be, and thereupon become a new stock of descent. Hence the Rule did not apply. The Rule, in short, did not apply because upon the special context the primary meaning of "heir" as a word of limitation embracing the whole line of inheritable succession was departed from, and "heir" was upon its proper interpretation taken as a word of purchase. It logically followed that when the remainder was "to the person or persons who would be the life tenant's heir or heirs at law and their heirs and assigns forever," the context clearly indicated that the heir or heirs were to take in fee as a new stock of descent as purchasers and that the word "heirs" was not used as a word of limitation but as a word of purchase. Such seems to have been the position actually taken by the Court of Appeal in *Evans v. Evans*.[77] It would logically follow that a remainder limited to "heirs" of the life tenant "and their heirs and assigns" or "in fee simple" would prevent the Rule from applying. This position also the English courts, under the lead of Lord Mansfield, seem to have started to take,[78] and

[74] Butler's Notes Co. Lit. 377a.

[75] Fearne, Cont. Rem. 189; Preston on Estates, 282.

[75a] 1 Co. 66b.

[76] Richards *v.* Bergavenny, 2 Vern. 324; Theobald on Wills, 7th ed. 422.

[77] [1892] 2 Ch. 173.

[78] Doe *v.* Laming, 2 Burr. 1100; Crump *v.* Norwood, 7 Taunt. 362.

some American courts have taken it.[79] Yet the later English cases, and several American courts, have distinctly repudiated it and applied the *Rule in Shelley's Case*.[80]

§ 424. The second theory respecting the application of the Rule is that it applies when the word "heirs" in the remainder is used as a word of purchase: This view starts with the premise that there is no difference between the case of a life estate to A and a remainder "to the heirs of B," and the case of a life estate to A and a remainder "to the heirs of A." In both cases alike "heirs" is used as a word of purchase to indicate the person or persons who answer the description of B's or A's heirs, as the case may be, at the ancestor's death. Thus Challis[81] gives as the example of Fearne's fourth class of contingent remainders, the remainder after a life estate to A "to the right heirs of J. S.," who is at that time living. He takes "right heirs of J. S." as being naturally and primarily words of purchase. The remainder which they create is contingent because the persons who are to take cannot be ascertained till J. S. dies. The same learned author,[82] in referring to the case where the remainder is limited to the heirs of the life tenant, declares that "grammatically, the construction of the second limitation [the remainder to the heirs] might be, to give a *remainder by purchase* to the specified heirs. And since the person whose heirs they are, or rather are to be, is living at the date of the limitation, such a remainder, if taken by the heirs as purchasers, would be a contingent remainder of Fearne's fourth class, being a limitation in remainder to a person not yet ascertained or not yet in being." Such, it is believed, was the situation in 1324 as clearly as it is today. True, under the feudal law of descent no ancestor could have more than one heir, for

[79] DeVaughn *v.* DeVaughn, 3 App. Cas. (D. C.) 50; DeVaughn *v.* Hutchinson, 165 U. S. 566; Dott *v.* Willson, 1 Bay. (S. C.) 457; Lemacks *v.* Glover, 1 Rich. Eq. (S. C.) 141; McIntyre *v.* McIntyre, 16 S. C. 290; Butler *v.* Huestis, 68 Ill. 594; Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 412, 413; 214 Fed. 928; Westcott *v.* Meeker, 144 Ia. 311; Archer *v.* Brockensehmidt, 5 Oh. N. P. 349.

[80] Jesson *v.* Wright, 2 Bligh. 1; Doe *v.* Harvey, 4 B. & C. 610; Mills *v.* Seward, 1 J. & H. 733; Clark *v.* Neves, 76 S. C. 484; Carroll *v.* Burns, 108 Pa. St. 386; Kepler *v.* Larson, 131 Ia. 438; Bonner *v.* Bonner, 28 Ind. App. 147; Brown *v.* Bryant, 17 Tex. Civ. App. 454; Fowler *v.* Black, 136 Ill. 363; Winter *v.* Dibble, 251 Ill. 200.

[81] Real Property, 3rd ed. 131.

[82] *Id.*, 152.

though several females may be co-heiresses, they were in point of law only one heir.[83] The same is true where the males took altogether gavelkind lands.[84] Hence "heirs" in the plural was technically inappropriate as a word to designate the person or persons who would be entitled to take by descent from the life tenant. But today this technically inaccurate use of the word "heirs" in the plural is easily overcome as a matter of construction wherever it is apparent that the word "heirs" is used to describe the individual or individuals who are to take as purchasers. It is surmised that it made no more difference in the fourteenth century than it did in the nineteenth that "heirs" in the plural was used in limiting the remainder to the "heirs" of the life tenant or to the "heirs of J. S." In both cases alike the way in which heirs was used naturally and primarily showed it to have been used as a word of purchase and not as a word of limitation. The result, however, before 1430 of the use of the word "heirs" in a remainder to the heirs of B or of the life tenant A being taken as a word of purchase, was that a contingent remainder was attempted to be limited which was wholly void. The feudal system was not prepared in the fourteenth century to permit any future interest limited after a freehold to any person whose identity could not be ascertained until the termination of a life then in being. The exigencies of tenure and the protection of the feudal dues forbade the practical abeyance of the fee until the death of a living person. A special reason existed for not permitting a remainder to the heirs of the life tenant in the fact that such a remainder might be used to defeat wardship and other feudal burdens if the heirs of the life tenant came in as purchasers and not by descent from the ancestor.[85] The remainder, therefore, to the heirs of the life tenant or to the heirs of B, if the word "heirs" were taken in its natural and primary meaning as a word of purchase, must before 1430 have failed entirely.[86] The result was harsh, especially in the case of the remainder limited to the life tenant's heirs. In that case only the life estate would be left and there would be a reversion in fee to the settlor. The main object of the settlement

[83] Lit. § 241.

[84] Lit. § 265.

[85] Challis on Real Property, 3rd ed. 167.

[86] *Ante*, § 28.

would be defeated and A's family deprived. The *Rule in Shelley's Case* dealt with this situation, and endeavored to ameliorate the hardship of it by placing the fee or fee tail, as the case might be, in the ancestor who was named as life tenant. In view of the fact that the remainder to the heirs as purchasers was wholly void the Rule did carry out the object of the settlor as nearly as might be in the then existing state of the law. The fact that the life tenant took the fee or fee tail, so that upon his death his heirs or the heirs of his body could take by descent from him, was the only way in which the life tenant's heirs or the heirs of his body could take at all. Thus the "heirs" or the "heirs of the body" obtained through the ancestor by *descent* what they were given as purchasers, but which the feudal land law did not permit them to take as purchasers. Thus the *Rule in Shelley's Case* was actually invented to give effect to the settlor's object as neary as possible. In this view the Rule was designed to operate when the words used would have created a contingent remainder to the "heirs" of the life tenant or to the "heir" of the life tenant. The talk about the Rule carrying out the "general intent" meant only that it was better to give the life tenant a fee or fee tail than to have the entire remainder held void and the fee returned to the feoffor. The talk about "heirs" being used as a word of limitation rather than a word of purchase was a mere echo of the result reached and not at all a basis for what was actually done. It was an afterthought to bolster up a rule which gave to words of purchase an effect something like words of limitation. First, the Rule was applied when the remainder was to heirs as purchasers, and then to justify the Rule, or perhaps as merely descriptive of the effect of the Rule, "heirs" was said to be used as a word of limitation. In this view the test of the application of the Rule must always be: would the remainder be a contingent remainder to persons who would answer the description of heir or heirs at law of the life tenant at his death in the jurisdiction where the land lies? In short, if heir or heirs is used as a word of *purchase* the Rule applies. The settlor might, therefore, declare as emphatically as he pleased that the heirs were to take as purchasers, and he would only the more clearly have furnished the basis for the application of the Rule.[87] *A fortiori*, if the remainder were to

[87] Sayer *v.* Masterman, Wilm. 386.

"heirs" with the words of limitation superadded, together with a direction for co-ownership, the Rule would apply.[88] The English cases to the contrary [89] were properly overruled, and American cases to the contrary, under the second theory, are unsound.[90] So, if the remainder is limited "to the person or persons who may be the heir or heirs at law of the life tenant and to their heirs and assigns" the Rule will apply. If *Evans v. Evans* [91] is contrary, it is inconsistent with our second theory. So, if the remainder is to the "heir" (in the singular number) the Rule still applies because as a word of purchase there is no difference between the remainder to the "heir" in the singular number and to "heirs" in the plural.[92] So, if the words of limitation be added to the remainder to the heir in the singular number the Rule should still apply. *Archer's* case to the contrary is, therefore, inconsistent with this second theory.

§ 425. Neither of the above two theories is supported by all the results of the English cases which are now recognized as law: The second, however, seems to have a little the best of it. The first has *Archer's* case,[93] and perhaps the more recent case of *Evans v. Evans*.[94] The second theory has all the other results, including the one that a remainder to the life tenant's heirs with words of limitation superadded will not prevent the application of the Rule.[95] This last represents the triumph in

[88] Jesson *v.* Wright, 2 Bligh. 1; Doe *v.* Harvey, 4 B. & C. 610; Mills *v.* Seward, 1 J. & H. 733; Clark *v.* Neves, 76 S. C. 484; Carroll *v.* Burns, 108 Pa. St. 386; Kepler *v.* Larson, 131 Ia. 438; Bonner *v.* Bonner, 28 Ind. App. 147; Brown *v.* Bryant, 17 Tex. Civ. App. 454; Fowler *v.* Black, 136 Ill. 363; Winter *v.* Dibble, 251 Ill. 200.

[89] Doe *v.* Laming, 2 Burr. 1100; Crump *v.* Norwood, 7 Taunt. 362.

[90] Burges *v.* Thompson, 13 R. I. 712; Simonton *v.* White, 93 Tex. 50; DeVaughn *v.* DeVaughn, 3 App. Cas. (D. C.) 50; DeVaughn *v.* Hutchinson, 165 U. S. 566; Dott *v.* Willson, 1 Bay. (S. C.) 457; Lemacks *v.* Glover, 1 Rich. Eq. (S. C.) 141; McIntyre *v.* McIntyre, 16 S. C. 290; Butler *v.* Huestis, 68 Ill. 594; Ætna Life Ins. Co. *v.* Hoppin, 249 Ill. 406, 412, 413; 214 Fed. 928; Westcott *v.* Meeker, 144 Ia. 311; Archer *v.* Brockschmidt, 5 Oh. N. P. 349.

[91] [1892] 2 Ch. 173.

[92] Richards *v.* Bergavenny, 2 Vern. 324; Theobald on Wills, 7th ed. 422.

[93] 1 Co. 66b.

[94] [1892] 2 Ch. 173.

[95] Jesson *v.* Wright, 2 Bligh. 1; Doe *v.* Harvey, 4 B. & C. 610; Mills *v.* Seward, 1 J. & H. 733; Clark *v.* Neves, 76 S. C. 484; Carroll *v.* Burns, 108 Pa. St. 386; Kepler *v.* Larson, 131 Ia. 438; Bonner *v.* Bonner, 28 Ind. App. 147; Brown *v.* Bryant, 17 Tex. Civ. App. 454;

the nineteenth century of the second view over the first, which had already practically secured two holdings the other way.[96] Nevertheless, this is somewhat balanced by the recent result reached in *Evans v. Evans*,[97] if the opinion in that case be taken as affirming the proposition that the Rule does not apply to a remainder "to the person or persons who answer the description of the life tenant's heirs at law and their heirs and assigns forever." On the English cases alone it seems to be a close contest between the two views. In this country it is plain that the results reached in different jurisdictions show in a number of instances a greater tendency than in England toward the first theory. In a way both theories are being supported at the same time in single jurisdictions. Each theory retains the results which it captures and holds. The point actually undecided in England—*i. e.* where the remainder is to heirs and it is expressly declared that the word is used as a word of purchase and not as a word of limitation—is still open to contest by the advocates of each view. It is probably impossible to say from any direct historical evidence which theory is the correct one. The actual historical foundations for the Rule are largely matters of speculation. If we seek to determine which theory will produce results conforming to the soundest legislative policy the outcome of the contest is still doubtful. The first theory obviously limits the application of the Rule and the second extends it. In favor of restricting its application it may be said that since 1430, when contingent remainders have been permitted,[98] subject, however, to being destroyed by the termination of the preceding freehold estate before the remainder vests, the *Rule in Shelley's Case* defeats the expressed intent and causes a remainder to the "heirs of A" to be a remainder to A in fee. Where the rule of destructibility of contingent remainders has been abolished there is no excuse whatever for thus defeating the expressed intention of the settlor. On the other hand, it is argued that a contingent interest in unascertained persons, especially where those interests are legal, and especially where contingent remainders are no longer destructible, leaves the title in a highly inconvenient state, and

Fowler *v.* Black, 136 Ill. 363; Winter *v.* Dibble, 251 Ill. 200.

[96] Doe *v.* Laming, 2 Burr. 1100; Crump *v.* Norwood, 7 Taunt. 362.

[97] [1892] 2 Ch. 173.

[98] Williams, Real Prop., 412, 413; Gray's Rule against Perpetuities, § 134.

that it is a valuable rule which will at once vest the whole fee in a living person and destroy the contingent remainder or executory interest.

§ 426. If a third theory be desired which will reconcile at least all the English cases it must be formulated something like this: The *Rule in Shelley's Case* only applies when "heirs" in the remainder to heirs is used as a word of limitation and not of purchase. But whether the word "heirs" is so used or not is not left to any ordinary process of construction, but is determined by certain results arbitrarily fixed by certain specified adjudications which become a part of the Rule itself. Thus "heirs" in the plural must always be taken as a word of limitation. It makes no difference that words of limitation are superadded, which as a matter of interpretation show that "heirs" in the remainder to heirs was used as a word of purchase. Some American cases to the contrary make the mistake of assuming that whether "heirs" in the plural is used as a word of purchase or of limitation was a question of construction and not the subject of a rule quite as arbitrary as the *Rule in Shelley's Case* itself. So "heir" (in the singular) standing alone in a remainder to the heir of the life tenant must be taken as a word of limitation, so that the Rule applies; but if to "heir" in the singular words of limitation be superadded, the special context is sufficient to show that "heir" in the singular was used as a word of purchase and the *Rule in Shelley's Case* will not apply. Of course, this so-called reconciling theory is not a rational explanation of the cases at all, since it is founded on an arbitrary assumption as to the meaning to be given to the word "heir" or "heirs" in order to make the particular case fit the theory. The moment it is said that the *Rule in Shelley's Case* does not apply unless "heirs" in the remainder is used as a word of limitation and not as a word of purchase, but that there is an arbitrary rule that "heirs" in a remainder to the heirs of the life tenant must be taken as a word of limitation overriding a context which rationally makes it a word of purchase, we know that we are dealing with the law's roundabout way of saying that the Rule applies even though the word heirs is used as a word of purchase. All the results, therefore, which introduce an arbitrary assumption that the word "heirs" is used as a word of limitation and therefore the Rule applies, are

really applications of the theory that the rule applies when the word heirs is used as a word of purchase. On the other hand, the results based upon the fact that some special context shows that "heir" or "heirs" was used as a word of purchase so that the Rule does not apply, are applications of the theory that the Rule does not apply unless the word "heirs" be in fact used as a word of limitation. Each theory in every generation seems to have had its advocates. Each has captured results which are recognized as law. Neither seems to have triumphed entirely over the other.

§ 427. In American jurisdictions the situation is apt to be chaotic in the extreme: When there is a tendency to adopt the second theory the opportunities for logically extending the rule of *Archer's* case[99] are considerably increased. It may be argued here that since, under the usual American statutes on descent, there is no longer one single heir but always a provision for several heirs to take as tenants in common, the use of the word "heirs" in the plural is just the same as the use in England of the word "heir" in the singular. Hence, "heirs" in the plural in this country does not have any stronger primary meaning as a word of limitation than "heir" in the singular does in England.[1] On the other hand, when the *Rule in Shelley's Case* is applied in this country to the case where heirs in the plural is coupled with words of limitation or any other special context which showed that it was used as a word of purchase, the first theory is very clearly sustained, because the added rule that "heirs" must be taken as a word of limitation appears the more arbitrary and the more indefensible from the point of view of the application of rational principles of construction than it does in England. It is, however, impossible to say that any theory bearing upon the problem here presented has any standing in American jurisdictions. The whole matter is open to contest. Even where some results have been settled in accordance with one view, it does not follow that others will be. If the course of action followed by the English Courts be imitated there should be a fair division of results between the two theories, but what theory will get what result cannot be

[99] 1 Co. 66b.

[1] Ætna Life Ins. Co. *v.* Hoppin, 249 Ill. 406; 214 Fed. 928.

known in advance. Much, if not everything, will depend upon the temper of the court when the point comes up for decision. It is even possible that with respect to the same point a given court may lean toward a result founded upon one view at one time and toward an opposite result founded upon the other view at another time.

§ 428. **The cases in Illinois:** In *Butler v. Huestis* [2] the limitation after the life estate was in these words: "The reversion and *fee t*hereof to the heirs of her body at and after her decease." The *Rule in Shelley's Case* was held not to apply. The special context consisting principally of the use of the word "fee" in the phrase "the reversion and fee thereof" was held to indicate that heirs of the body was to be taken as a word of purchase and not as a word of limitation.[3] This, of course, proceeds upon the first theory.[4] In *Fowler v. Black*,[5] however, we have the remainder limited in these words: "and upon the death of said party of the second part said premises to be held in *fee simple* by his heirs and their assigns forever." Here the Rule was applied. The court said: "There is nothing in the deed which can be held, either expressly or by implication, to limit or qualify the word 'heirs,' or to give to it any other than its ordinary legal significance, *viz.*, those persons, whoever they may be, upon whom the law at the death of the ancestor would cast the inheritance, thus including all possible heirs, to take in succession from generation to generation, under the name of heirs of the ancestor." On the whole this result, together with the language used, supports the second theory. The court in effect says that when the word heirs is used as a word of purchase, meaning the person or persons designated by the statute as heirs at law of the life tenant, it must be taken to embrace the whole line of inheritable succession as a word of limitation, and hence the *Rule in Shelley's Case* applies. Of course, the second step is a fiction. The plain truth is that when heirs is used as a word of purchase so as to create a contingent

[2] 68 Ill. 594.

[3] See also McCampbell *v.* Mason, 151 Ill. 500.

[4] Another ground for the decision was that the Rule in Shelley's Case had no application where the remainder was to "heirs of the body." *Ante*, § 418. This seems to be no longer the law in this state. *Ante*, § 420.

[5] 136 Ill. 363.

remainder in the heirs of the life tenant as purchasers, the Rule applies. However, in *Ætna Life Ins. Co. v. Hoppin*,[6] where the remainder was to "the heirs of the body of the said Sarah Hoppin [the life tenant], their heirs and assigns," one ground for the decision of the court was that the *Rule in Shelley's Case* did not apply because "heirs" in the phrase "heirs of the body" was used as a word of purchase by reason of the added words of limitation. The court refers to the passages from Preston on Estates,[7] Fearne on Contingent Remainders,[8] and Butler's Notes to Coke on Littleton,[9] which lay it down that the Rule does not apply unless the word "heirs" be used as a word of limitation, and then the court relies upon *Archer's* case,[10] *Evans v. Evans*,[11] *DeVaughn v. Hutchinson*,[12] *DeVaughn v. DeVaughn*,[13] *Taylor v. Cleary*,[14] and *Peer v. Hennion*[15] for the proposition that when words of limitation are added to a remainder to heirs of the body, "heirs" is used as a word of purchase and not of limitation. This, of course, is all in support of the first theory. The rehearing in *Ætna Life Ins. Co. v. Hoppin*[16] was denied at the April Term, 1911. At the June Term of the Court in the same year a decision was made in the case of *Winter v. Dibble*.[17] There the remainder was limited in these words: after the death of the life tenants "the property shall descend to their [the life tenants'] respective heirs in fee simple absolute." It was here strongly pressed upon the court that the words *"in fee simple absolute"* showed that the word "heirs" was used as a word of purchase and not of limitation, and therefore the Rule should not apply. The passages from Preston, Fearne, and Butler, which the court referred to in *Ætna Life Ins. Co. v. Hoppin*, and also the cases relied upon in that case, were called to the attention of the court, together with the first theory. Nevertheless, the court, relying upon *Fowler v. Black*, held the rule did apply, thus in fact proceeding upon the second theory. In *Carpenter v. Hubbard*,[18] there was a devise to the testatrix's husband, Gilbert Hubbard,

[6] 249 Ill. 406; 214 Fed. 928.
[7] p. 282.
[8] p. 189.
[9] p. 377a.
[10] 1 Co. 66b.
[11] [1892] 2 Ch. 173.
[12] 165 U. S. 566.
[13] 3 App. Cas. (D. C.) 50.
[14] 29 Gratt. (Va.) 448.
[15] 77 N. J. L. 693.
[16] 249 Ill. 406; 214 Fed. 928.
[17] 251 Ill. 200.
[18] 263 Ill. 571.

with a remainder for life to the children of the testatrix and Gilbert Hubbard, with an ultimate remainder to the heirs of Gilbert Hubbard. A great effort was made to show by the application of the ordinary rules of construction that "heirs at law" was used as a word of purchase, meaning those persons who would have been the heirs at law of Gilbert Hubbard had he died at the period of distribution—thus excluding his children as his heirs at law—and that, therefore, the *Rule in Shelley's Case* did not apply. This, however, was denied and it was held that the Rule did apply. In *Moore v. Reddel,*[19] the limitations were to A for life, remainder "to the heirs of the body of A and their assigns forever." Surely the words "and their assigns forever" were superadded words of limitation sufficient under section 13 of our Act on Conveyancing to show an intent that the heirs of the body of A were to take the fee. This point was not made by counsel. Indeed, it was assumed both by counsel and the court that the *Rule in Shelley's Case* did apply.

It might have been urged in attempting to reconcile the results in the foregoing cases that the superadded words of limitation which will prevent the application of the *Rule in Shelley's Case* must be the words of limitation of the common law and that therefore the superadded words of limitation must include the word "heirs." Therefore, superadded words such as "in fee simple," or "assigns forever," would be insufficient, while "heirs and assigns" would be effective. Technical as such a distinction would appear to be, there is some authority for it.[20] The recent case of *Benson v. Tanner,*[21] however, now removes this ground for reconciling the cases. There the limitations were to A for life "remainder *in fee simple* to the heirs of her body." It was held that the superadded words of limitation "in fee simple" were sufficient to prevent the application of the *Rule in Shelley's Case.*[22] The cases, therefore, leave our Supreme Court in this position: If the remainder is to "heirs of the body," the first theory would be applicable, and

[19] 259 Ill. 36.

[20] Fuller *v.* Chamier, L. R. 2 Eq. 682 (1866).

[21] 276 Ill. 594; 12 Ill. Law Rev., 564.

[22] In Doney *v.* Clipson, 285 Ill. 75, the only question was whether the first taker had a life estate or a fee. It was held that he had a life estate. This was correct whether the Rule in Shelley's Case applied or not, for the limitations were to A for life and then to the heirs of his body in fee simple forever.

a special context which showed that heirs of the body was, as a matter of construction, used as words of purchase and not as words of limitation, would be sufficient to prevent the Rule from applying.[23] But if the remainder is to "heirs" generally, the second theory is applicable and the Rule applies precisely when heirs is used as a word of purchase, meaning the person or persons who would be entitled to take by the Statute on Descent from the life tenant. It would make no difference that the superadded words of limitation included the word "heirs."[24] This is simply a new way of dividing the results obtained equally between the first and second theories. It is hard to say that it is not just as rational as the division of results which the English cases have reached. The important thing always is that neither theory should triumph over the other. There should always be, in every jurisdiction, the possibility of getting results according to each theory until all possible variations which may occur have been passed upon and each theory awarded the results to which it is to be entitled for all time to come.

Topic 4.

Where the Interests Are Equitable—Executory Trusts.

§ 429. The Rule applies where the limitations are equitable: The *Rule in Shelley's Case* was of purely feudal origin, dating at least from the year 1324.[25] Modern equitable interests in land, however, commenced about the middle of the 17th century.[26] It is not surprising, therefore, that at the beginning of the 18th century it should still be a matter of doubt under the decisions whether the *Rule in Shelley's Case* would be held to apply where the limitations were equitable. As a matter of fact Lord Hardwicke undertook in *Bagshaw v. Spencer*,[27] to hold the *Rule in Shelley's Case* would not apply where the limi-

[23] In view of this, the assumption by counsel in Moore *v.* Reddel, 259 Ill. 36, that the Rule did not apply, was unfortunate.

[24] In Geist *v.* Huffendick, 272 Ill. 99, where it was provided that the remainder for the life of another "shall descend [from the life tenant] in accordance with the laws of Illinois." *Quaere*, whether the Rule in Shelley's Case applied.

[25] *Ante*, §§ 34, 35.

[26] "The Origin of Uses and Trusts," by Professor J. B. Ames, 21 Harv. Law Rev., 270, 271.

[27] 1 Ves. Sr. 142.

tations were equitable. In that case "heirs" in a limitation to heirs of the body was held to be used as a word of purchase and was given effect as such. If speculations already set out as to the origin of the *Rule in Shelley's Case*,[28] are correct, it is submitted that there was ample justification for Lord Hardwicke's position. Nevertheless, Lord Hardwicke's decision in *Bagshaw v. Spencer* was overruled and it became settled in England that the *Rule in Shelley's Case* would apply to equitable interests in precisely the same way that it did to legal.[29] Such is clearly the Rule in this state.[30]

§ 430. The Rule does not apply where the trust is executory: At the beginning of the 18th century when it was still uncertain whether the *Rule in Shelley's Case* would apply to equitable interests, it became settled that if in addition to the limitations being equitable, there was also an executory direction or trust, that a settlement should be made by the trustee so as to give to A an estate for life and a remainder to his heirs or the heirs of his body, the *Rule in Shelley's Case* would not apply. A court of chancery in directing what settlement should be made would require one which would carry out an expressed intent, according to which heirs or heirs of the body were to take as purchasers.[31] This was the holding that the *Rule in Shelley's Case* would not apply if the trust was executory. It was, it is believed, a product of the original hesitation of the English Chancery court to apply the *Rule in Shelley's Case* to equitable limitations. Lord Hardwicke's holding in *Bagshaw v. Spencer*[32] to that effect was founded upon *Papillon v. Voice*,[33] which stands today as the principal authority in favor of the proposition that the *Rule in Shelley's Case* does not apply in the case of an executory trust. The holding, however, that the *Rule in Shelley's Case* does not apply where the trust is executory, now persists as an exception to the general rule that the *Rule in Shelley's*

[28] *Ante*, §§ 34, 35.

[29] Wright *v.* Pearson, 1 Eden 119; Jones v. Morgan, 1 Bro. C. C. 206.

[30] Baker *v.* Scott, 62 Ill. 86, 90; Ryan *v.* Allen, 120 Ill. 648, 653; Glover *v.* Condell, 163 Ill. 566; McFall *v.* Kirkpatrick, 236 Ill. 281; Lord *v.* Comstock, 240 Ill. 492; Wallace *v.* Foxwell, 250 Ill. 616; Carpenter *v.* Hubbard, 263 Ill. 571, 580; Nowlan *v.* Nowlan, 272 Ill. 526.

[31] Papillon *v.* Voice, 2 P. Wms. 471 (1728); Leonard *v.* Sussex, 2 Vern. 526 (1705); 1 Preston on Estates, 355.

[32] 1 Ves. Sr. 142.

[33] 2 P. Wms. 471 (1728).

Case applies where the interests are equitable. Our Supreme Court has clearly recognized this exception.[34]

§ 431. **What trusts are executory—Two views not generally adopted:** It has been held that a trust which was merely active as distinguished from a passive or dry trust, was executory, so that the *Rule in Shelley's Case* would not apply and "heirs" in a limitation to the heirs of the equitable life tenant must be given effect as a word of purchase.[35] This is in effect an adherence to Lord Hardwicke's position that the *Rule in Shelley's Case* never would apply where the interests were equitable. Such a position is, of course, untenable in England since *Bagshaw v. Spencer* was overruled.[36] It cannot be maintained in this state in view of the cases holding that the *Rule in Shelley's Case* regularly applies where all the limitations are equitable.[37]

It has been held also that the trust is executory, so that the *Rule in Shelley's Case* will not apply if the trust is an active one, and there is a provision that the trustee shall at the termination of the equitable life estate *convey* the legal estate to the heirs of the equitable life tenant.[38] But this view of what is an executory trust so that the *Rule in Shelley's Case* will not apply is denied.[39] It is in fact inconsistent with *Lord v. Comstock*.[40] It would seem on the whole to be a sort of half way attempt to maintain Lord Hardwicke's position that the *Rule in Shelley's Case* would not apply to equitable limitations at all.

§ 432. **The generally accepted view:** The view of the English cases, followed by at least one well considered American decision [41] as to what trusts are executory, so that the *Rule in*

[34] Baker *v.* Scott, 62 Ill. 86, 102; Bennett *v.* Bennett, 217 Ill. 434, 445; Geist *v.* Huffendick, 272 Ill. 99. But compare Wicker *v.* Ray, 118 Ill. 472, explained, *post*, § 433.

[35] Sieeloff *v.* Redman's Adm., 26 Ind. 251, 262; Wagstaff *v.* Lowerre, 23 Barb. 209; Carrigan *v.* Drake, 36 S. C. 354, 366; Porter *v.* Doby, 19 S. C. Eq. 49; Reynolds *v.* Reynolds, 61 S. C. 243.

[36] *Ante*, § 429.

[37] *Ante*, § 420.

[38] Edmondson *v.* Dyson, 2 Ga. 307; Bucklin *v.* Creighton, 18 R. I. 325; Nightingale *v.* Phillips, 29 R. I. 175. See also Lawrence *v.* Lawrence, 181 Ill. 248; Kirby *v.* Brownlee, 7 Oh. Cir. Dec. 460.

[39] Cushing *v.* Blake, 30 N. J. Eq. 689. See also Tillinghast *v.* Coggeshall, 7 R. I. 383; Angell, Petitioner, 13 R. I. 630.

[40] 240 Ill. 492.

[41] Cushing *v.* Blake, 30 N. J. Eq. 689.

Shelley's Case will not apply, may thus be stated: Even if the terms of the trust require a settlement or conveyance to be executed by a trustee, yet if the testator has acted as his own conveyancer and defined precisely the settlement to be made, then a court of equity has nothing to do but to direct a settlement according to the directions and the trust is not executory in any sense which prevents the application of the *Rule in Shelley's Case*. The trust is executory, so that the *Rule in Shelley's Case* does not apply only where a settlement is to be executed or a conveyance made by the trustee and where there is an informal or imperfect indication as to what that settlement is to be, or where the language used to describe the settlement to be made is not intended by the settlor or testator to be taken in its strict legal sense.

This statement of what active trusts are executory and what are not, so far from eliminating difficulties, is the source of them. It now becomes a question of construction to determine whether the testator "has been his own conveyancer" or whether he has used language not in its strict legal sense, but informally and imperfectly as the mere suggestion for a settlement or conveyance to be made in apt language to carry out his intention.

§ 433. **Suggestions of the cases in aid of the problem of construction:** *First:* When there is a direction that a conveyance be made by the trustee to contain certain limitations, an inference at once arises that the gift is imperfect and the language describing the limitations to be made is informal and that the testator or settlor has not been his own conveyancer.[42] This suggestion is sound because there is ordinarily no reason for the testator or settlor directing such a conveyance to be made if he is intending to act as his own conveyancer.

Second: The usual cases where the testator is held to have acted as his own conveyancer, although directing the execution of a future instrument, are (1) where the settlement to be executed is designated by reference to another instrument con-

[42] In Davenport *v.* Davenport, 1 Hem. & M. 775, 777, Sir Page Wood, V. C., said: "Where a future deed is directed, the court assumes that the testator may not have stated fully all the details of his scheme, and endeavors to give the fullest possible effect to his directions by the mode in which it carries them into execution."

taining full and complete limitations,[43] and (2) where the direction is very short and simple—such as a direction to convey to A and the heirs of his body.[44]

Third: It is regularly held that when there is a direction to convey to A for life with a remainder to A's heirs or a remainder to the heirs of A's body, an intention is manifested not to use the words in their strict legal sense and it follows, therefore, that the expression is regarded as informal and imperfect and merely suggestive of what the testator or settlor desires to have done by an instrument appropriately framed to carry out his purpose. It is believed that the English[45] and American[46] cases support without dissent this position.

The logical basis for this position is as follows: It is conceded that the *Rule in Shelley's Case* always defeats the intention as expressed, by placing upon the language used by the testator or settlor a legal effect different from the ordinary meaning of the words, and the meaning actually placed by the testator or settlor upon the words as used. From this it necessarily follows that whenever there is a direction that trustees are to make a conveyance or settlement upon A for life and then to the heirs of A, the words actually used by the testator or settlor are not used in accordance with their strict legal import. The legal effect of the words which results from applying the *Rule in Shelley's Case* being what it is, and the actual expressed intent of the testator being what it is and different from the legal effect of the words, it follows that the words are necessarily used informally and imperfectly as suggesting what the testator or settlor desires to have accomplished and not at all because the testator is acting as his own conveyancer. Hence, whenever the direction is to trustees to make a conveyance with limitations to A for life and then to A's heirs, the trust is executory so that the *Rule in Shelley's Case* will not apply.

[43] Theobald on Wills, 7th ed. 725; Christie *v.* Gosling, L. R. 1 H. L. (Eng. & Ir. App.) 279.

[44] Seale *v.* Seale, 1 P. Wms. 290.

[45] Theobald on Wills, 7th ed. 725, 726; Papillon *v.* Voice, 2 P. Wms. 471; Parker *v.* Bolton, 5 L. J. Ch. N. S. 98; Duncan *v.* Bluett, Ir. Rep. 4 Eq. 469; Hadwen *v.* Hadwen, 23 Beav. 551; Stoner *v.* Curwen, 5 Sim. 264; Bastard *v.* Proby, 2 Cox 6; Rochfort *v.* Fitzmaurice, 2 D. & War. 1.

[46] Tallman *v.* Wood, 26 Wend. 9; Wood *v.* Burnham, 6 Paige (N. Y.) 513; Hanna *v.* Hawes, 45 Ia. 437; Saunders *v.* Edwards, 55 N. C. 134; Berry *v.* Williamson, 11 B. Mon. (Ky.) 245, 258, 261.

The only case found which seems at all opposed to this is that of *Wicker v. Ray*.[47] In that case there was a direction that the one-fourth devised to the testator's daughter Harriet "shall be so secured to her that she shall enjoy it during her natural life, and after her decease then to her right heirs forever." The testator directed that the one-fourth interest of his grandchildren, Jennie and Eliza, be secured to them "in like manner." He clothed his executors "with power to secure to my daughter, Harriet, the one-fourth interest in my estate as above, and also to secure to my grandchildren their interest of one-fourth." It is submitted that here was most clearly an executory trust, and yet the court held that the grandchildren, Jennie and Eliza, had the absolute interest in fee. The briefs of counsel as reported contain no suggestion whatever with respect to the rule that the *Rule in Shelley's Case* does not apply where the trust is executory. The court did not refer to it. The court seems to have regarded the will itself as vesting the fee in the grandchildren and the subsequent words as very doubtful in their effect of cutting down the fee to a life estate, and then merely added in the most offhand manner that if the subsequent words did cut down the fee to a life estate, the *Rule in Shelley's Case* applied. It is submitted that if *Wicker v. Ray* stands in any degree for the proposition that the *Rule in Shelley's Case* applies where the trust is executory, or that the trust is not an executory trust so that the Rule will apply where there is a direction to trustees to make a conveyance with limitations in favor of A for life and then to A's heirs or the heirs of A's body, it is out of line with all the authorities and should not be followed as the law of this state.

TOPIC 5.

THE RULE DOES NOT APPLY TO PERSONAL PROPERTY.

§ 434. **Conclusion stated**: If the *Rule in Shelley's Case* were a rule of construction it might fairly be argued that it would apply to the appropriate limitations of personal property. But the Rule arose as early as 1324 in England to create limitations of freeholds.[48] It was dictated by purely feudal considerations which have had little or no reality since the sixteenth century.

[47] 118 Ill. 472.

[48] *Ante*, §§ 34, 35.

It has long been known as a rule of law defeating a clearly expressed intent. For a short time only in the eighteenth century an attempt was made practically to destroy it by turning it into a rule of construction. This failed in England, and has failed in Illinois.[49] Since future interests in personal property were recognized as valid in the seventeenth century,[50] long after feudal considerations which were the basis for the *Rule in Shelley's Case* had ceased to exist, and since feudal considerations were inapplicable anyway to limitations of personal property, there never was any reason why the *Rule in Shelley's Case* should apply to personal property. On the contrary there was every reason why it should not. An examination of the authorities will demonstrate that it does not apply to personal property.

§ 435. **Where the bequest is to A for life and then to A's "executors and administrators"**: Here it is settled that A takes an absolute interest.[51] This, however, proceeds upon the ground that such is the intention actually expressed by what amounts to a gift to A, and then to his estate. That this result depends upon the application of the principle of carrying out the testator's real intent, and not at all upon the *Rule in Shelley's Case,* sufficiently appears from *Powell v. Boggis*[52] and *Atkinson v. L'Estrange.*[53] In both of these cases the gift was to A for life and then to A's heirs. In both cases there was a considerable special context which justified the court in taking "heirs" as meaning "personal representatives," so that by the application of the general rule, A took an absolute interest. In both cases, however, the court proceeded solely upon what it found to be the real expressed intent, and denied that the *Rule in Shelley's Case* applied to personality, or that the result reached was in any degree due to the application of the *Rule in Shelley's Case.* In *Powell v. Boggis,* Lord Romilly, Master of the Rolls, said: "It is quite true that the *Rule in Shelley's Case* is a technical rule and applies only to real estate. * * * There is no question as to the *Rule in Shelley's Case,* which in no sort of way applies to this case."[54] In *Atkinson v. L'Estrange,* Chatterton, V. C., said: "I do not rely upon the *Rule in Shelley's*

[49] *Post,* § 441.
[50] *Ante,* §§ 107, 109.
[51] Theobald on Wills, 6th ed. 461.
[52] 35 Beav. 535.
[53] L. R. Ir., 15 Ch., 340.
[54] 35 Beav. 535, 541.

Case, as governing this case, to which I think it has no application."[55] It is unfortunate that the Illinois court, in *Glover v. Condell,*[56] while referring with approval to the rule that a bequest, whether legal or equitable, to A for life, and after his decease to his executors, administrators and assigns, will cause A to be entitled absolutely, should have seemed to ascribe such a result to the application by analogy of the *Rule in Shelley's Case.*

§ 436. Where the bequest is to A for life and then to his "heirs": Even where the court holds that "heirs" in the technical sense of those who inherited real estate, was meant, we find it held that the interest which A takes is limited to a life estate, and a separate and distinct future interest in A's heirs is recognized, thus repudiating the proposition that A obtains an absolute interest in the personalty. The language of the court is also clear that the *Rule in Shelley's Case* is not applicable to bequests of personalty. The principal case to this effect is *Smith v. Butcher,*[57] decided by Jessel, M. R. This was followed by *In re Russell*[58] and in this country by two Delaware cases, *Gross v. Sheeler*[59] and very recently *Jones v. Rees.*[60] So, where the gift was to A for life, with (as the court construed the language) a future interest to A's "next of kin," A did not take an absolute interest, and there was no application of the *Rule in Shelley's Case* by analogy. On the contrary, A was held to take a life interest with a separate and distinct future and contingent interest to those who should turn out to be her next of kin at her death.[61]

The case of *Glover v. Condell*[62] does not seriously militate in this state against the adoption of Jessel's ruling. In the Condell case the testator devised personal property to trustees to pay the income to Albert for life, and after his death "the principal of his share or part to be paid to his heirs." Then followed a gift over in the event of Albert's death "without living heirs" of his body, to the testator's wife for life and after her

[55] L. R. Ir. 15 Ch., 340, 343.
[56] 163 Ill. 566, 587.
[57] L. R. 10 Ch. Div. 113.
[58] 52 L. T. R. 559.
[59] 7 Houst (Del.) 280. In Siceloff *v.* Redman's Adm., 26 Ind. 251, at 262, the court says that the Rule in Shelley's Case does not apply to personal property.
[60] 6 Penn. (Del.) 504.
[61] Low *v.* Smith, 25 L. J. Ch., 503.
[62] 163 Ill. 566.

death to the testator's children. Albert died without leaving any living heirs of his body. The trustees asked for instructions and the court held that the gift over upon Albert's death without living heirs of his body was valid and must take effect as limited. That is all the court needed to hold on this branch of the case. Against this view it was evidently argued that the gift over was void for repugnancy, because A took an absolute interest. The court needed only to admit for the sake of argument that A did take an absolute interest, and then to make the obvious holding that the executory devise was valid, overruling in terms as it did, the previous cases of *Ewing v. Barnes* [63] and *Silva v. Hopkinson.*[64] As a matter of fact, that is all the court did. The court said in substance that whether the *Rule in Shelley's Case* be applied, or whether the gift be regarded as to A and his heirs, A would take the ownership of the fund "subject to the limitation over thereof to the children of the testator, upon the contingency of his death without living heirs of his body at the time of his death." If the court undertook to go beyond this and to say that Albert did actually have an absolute interest because a gift of personalty to Albert for life and then to Albert's heirs gives Albert an absolute interest by the application by analogy of the *Rule in Shelley's Case,* it is mere *obiter dictum,* and is open to subsequent re-examination whenever that question becomes directly involved. It seems, however, extremely doubtful whether the court ever took any such position. It is worth noticing that in referring to the application of the *Rule in Shelley's Case* by analogy to personality, the court does so only in connection with the supposed gift to A for life and then to A's executors, administrators and assigns. In such a case, as we have seen, the authorities are agreed that A takes the absolute interest. It is simply an unfortunate adoption of some generalization of the American and English Encyclopedia of Law, that leads the learned judge who wrote the opinion of the court, to refer to such a result as the application by analogy of the *Rule in Shelley's Case.*[65]

[63] 156 Ill. 61.

[64] 158 Ill. 386.

[65] In the following cases there are suggestions that the Rule in Shelley's Case may apply by analogy to personal property to some extent: Bennett *v.* Bennett, 217 Ill. 434; Wallace *v.* Foxwell, 250 Ill. 616.

Whatever doubt previous decisions may have cast upon the matter, the law is now clearly settled by the recent decision of our Supreme Court in *Lord v. Comstock*,[66] where it was held that the *Rule in Shelley's Case* as such did not apply to personal property, and that the limitations of equitable interests in personal property in substance to A for life and then to A's heirs, conferred upon A only a life interest, with a future interest to A's heirs according to the expressed intent of the testator.[67]

§ 437. Where there is a bequest to A for life, with a remainder to "the heirs of A's body": Here the situation is peculiar. It is settled by a long line of English cases,[68] which have been followed apparently without exception or dissent, at least in the earlier cases in the United States,[69] that A takes an absolute interest. Upon what reasoning, however, does this apparently settled result rest? It is clear from *Smith v. Butcher* and the cases following it, that it cannot rest upon the *Rule in Shelley's Case,* for if that Rule does not apply where the limitations are to A for life, and then to A's heirs, it certainly cannot apply where the limitations are to A for life and then to the heirs of A's body. The sound explanation of the rule that a bequest to A for life and then to the heirs of A's body, gives A an absolute interest, is this: The English cases so settling the rule were decided in the eighteenth century, if not before, and at a time when there was certainly a very strong impression abroad that the *Rule in Shelley's Case* was a rule of construction which somehow determined and fixed the meaning of the words which a testator had used.[70] If that were true, then what would

[66] 240 Ill. 492.

[67] *Accord:* Wallace *v.* Foxwell, 250 Ill. 616.

[68] Theobald on Wills, 6th ed. 462; Butterfield *v.* Butterfield, 1 Ves. Sr. 133; Richards *v.* Bergavenny, 2 Vern. 324; Elton *v.* Eason, 19 Ves. 73.

[69] Dott *v.* Cunnington, 1 Bay (S. C.) 453; Polk *v.* Faris, 9 Yerg. (Tenn.) 209; Pressgrove *v.* Comfort, 58 Miss. 644; Hampton *v.* Rather, 30 Miss. 193; Powell *v.* Brandon, 24 Miss. 343; Smith *v.* McCormick, 46 Ind. 135; Watts *v.* Clardy, 2 Fla. 369; Mason *v.* Pate's Exr., 34 Ala. 379; Machen *v.* Machen, 15 Ala. 373; Denson *v.* Thompson, 19 Ark. 66; *In re* Tillinghast, 25 R. I. 338; King's Heirs *v.* King's Admr., 12 Ohio 390; Williamson *v.* Daniel, 12 Wheat. 567; Stocton *v.* Martin, 2 Bay. 471 (S. C.); Hughes *v.* Niklees, 70 Md. 484.

[70] See Lord Mansfield's decision in Perrin *v.* Blake, King's Bench Div. (1769), 1 W. Bl. 672, and the discussion which arose with reference to it, Fearne, C. R., 155-173, Fearne's letter to Lord Mansfield,

be more natural than to hold that what created an estate tail as to realty was sufficient to express the same intent as to personalty? Perhaps, in addition to this, there was a certain rude inference that a limitation to A for life and then to the heirs of his body was meant to give A an estate tail. Once an intent to give A an estate tail in personalty was found, A took the absolute interest, since there was no such thing as an estate tail with respect to personalty. As soon, however, as the controversy over Lord Mansfield's decision in *Perrin v. Blake* passed into history, and it became fully recognized that the *Rule in Shelley's Case* was a feudal common law rule which defeated the intent as expressed,[71] it became clear that the *Rule in Shelley's Case* could have no effect to control the disposition of personal property, but that such disposition depended solely upon the real expressed intent of the testator. Hence, the very positive and clear results reached by Jessel, when he met a bequest to A for life and then to A's heirs. In the light of *Smith v. Butcher,* and the more recent cases following it, it is clear that the older cases which give A the absolute interest where the limitations are to A for life and then to the heirs of his body, are indefensible upon principle. They are to be sustained only upon authority. In any event, the language of Lord Chancellor Hardwicke, in *Garth v. Baldwin,*[72] that A takes an absolute interest no matter whether the testator intended it or not, cannot be supported. The holding of the Mississippi court[73] that although the *Rule in Shelley's Case* was abolished as to real estate, yet it still applied to personalty so as to give A the absolute interest where the limitations were to A for life and then to the heirs of A's body, seems very curious. As a matter of fact, in a jurisdiction like Illinois, when the question arises for the first time to-day as to what estates are created in personalty by language bequeathing to A for life and then to the heirs of A's body, there is the same argument for disregarding the old authorities and construing the language rationally according to its primary meaning by present-day usage, that there is for taking the same

appended to the 1st volume of the 4th ed. of the Treatise on Contingent Remainders, 3 Campbell's Lives of the Chief Justices, 3rd ed. 305-312.

[71] *Post,* § 441.

[72] 2 Ves. Sr., 646, 661.

[73] Pressgrove *v.* Comfort, 58 Miss. 644.

course with respect to the construction of gifts over if the first taker "dies without issue." [74] Indeed, two recent cases, one from North Carolina[75] and the other from Pennsylvania,[76] go a long way toward disregarding the old authorities and establishing the rule that the testator's expressed intent must be carried out. In both the bequest was to A for life, and then to the heirs of A's body, and in both it was held that A took only a life estate, and that there was a separate future interest in the heirs of A's body. The excuse for this result was that the rule giving A an absolute interest was a rule of construction which yields readily to a contrary intention, and that in the will in question the whole context showed that a life estate and a separate future interest was meant. If this be sound, then it cannot be said that the *Rule in Shelley's Case* ever applied, even by analogy, for the *Rule in Shelley's Case* defeats intention.

§ 438. **There are recent decisions which seem to hold that upon a bequest to A for life and then to A's heirs, the Rule applies, and A has an absolute interest:** None, however, will be found impressive as authority. The most cock-sure case is *Knox v. Barker.*[77] Upon examination, however, this case will be found to have been decided upon the Pennsylvania law, which was held to be controlling with respect to the construction of the will there involved. The decision amounts only to the North Dakota court's interpretation of what was the law of Pennsylvania. The court cites two Pennsylvania cases in support of the conclusion that the *Rule in Shelley's Case* applied.[78] Neither of these cases will be found to support the conclusion of the North Dakota court. In both there was language sufficient to show an express intention to create an estate tail in A as to the personalty, and on this ground, and this ground alone, was the conclusion reached that A took an absolute interest in the personalty. Such a result is very different from that reached where the language purports to create a life estate in A with a future interest to A's heirs. The Pennsylvania case of *Appeal of*

[74] Stisser *v.* Stisser, 235 Ill. 207; 3 Ill. Law Rev. 369.

[75] Crawford *v.* Wearn, 115 N. C. 540.

[76] Clemens *v.* Hecksher, 185 Pa. 476.

[77] 8 No. Dak. 272.

[78] Smith's Appeal, 23 Pa. St. 9; Mengal's Appeal, 61 Pa. St. 248.

Cockins and Harper[79] might appear to hold that the *Rule in Shelley's Case* applies to a gift of residuary real and personal estate to A for life and then to A's heirs, not only as to the realty, but also to the personalty. The court, however, does not say that the *Rule in Shelley's Case* applies, but seems to proceed upon a construction of the word "heirs" as if it meant executors and administrators. It is very apparent that the court's reasoning is tainted with the idea that the *Rule in Shelley's Case* is a rule of construction. *In re Keys's Estate*[80] is somewhat inexplicable. In that case personalty was bequeathed to the widow for life and then to her heirs. The widow renounced. It seems to have been held that the residuary legatee took until the widow's death, and that at that time the widow's heirs would take. This would seem to be a holding that the *Rule in Shelley's Case* does not apply, because if it did, so that the widow took an absolute interest, upon the renunciation of the widow, the residuary legatee would take the whole personalty bequeathed, and the widow's heirs would get nothing. Nevertheless, some language of the opinion appears to admit that the *Rule in Shelley's Case* does apply, or at least, to leave that matter open. In a Maryland case,[81] decided by a single judge at *nisi prius*, in the County Court of Baltimore County, it was held squarely that where there was a bequest of a leasehold to A for life and then to A's heirs, the *Rule in Shelley's Case* would apply, and A would have the absolute interest.[82] The reasoning of the court is that since it was settled that a bequest to A for life and then to the heirs of A's body, gave A an absolute interest, and this result must rest upon the application of the *Rule in Shelley's Case*, the same Rule must apply to a bequest to A for life and then to A's heirs. The fallacy of this is now plain. The modern English cases show plainly that the judge was confused in his premise. While it is true that a bequest to A for life and then to the heirs of A's body gave A an absolute interest, this was not properly the result of any application of the *Rule in Shelley's Case*. Furthermore, from the modern point of view, it is of doubtful propriety upon principle, and perhaps

[79] 111 Pa. St. 26.

[80] 4 Pa. Dist. 134.

[81] Horne *v.* Lyeth, 4 Har. & J. (Md.) 431.

[82] See also Maulding *v.* Scott, 13 Ark. 88.

contrary to the most recent cases. It certainly does not furnish a premise to be reasoned from in the case where the bequest is to A for life and then to A's heirs. Rather, are the results of the modern cases, like *Smith v. Butcher,* where the gift is to A for life and then to A's heirs, to be regarded as correct upon principle. These are the ones to be used as the basis of criticism of the result of the eighteenth century cases, holding that A takes the absolute interest where the bequest is to A for life and then to the heirs of A's body. In the Rhode Island case of *Taylor v. Lindsay,*[83] the settlor settled personalty upon himself for life and then limited a future interest to his own heirs. Without the application of the *Rule in Shelley's Case* it was perfectly proper to hold that there was a resulting trust or a resulting estate to the settlor absolutely. Hence, he took not only a life interest but the absolute interest in reversion as well. Such is the explanation of *Taylor v. Lindsay,* made by the Rhode Island court in *Bucklin v. Creighton*[84] In this latter case the court held that because the testator made his intent clear that A was to have only a life estate and that then there was to be a separate future interest to A's heirs, the intent must be carried out as expressed. In *Evans v. Weatherhead*[85] the actual limitations do not appear, but the Rhode Island court again announces in terms that if there is a clear intent expressed that A is to have a life estate, and that then there is to be a separate future interest to A's heirs, that intent will be carried out. The highest court of Pennsylvania has recently gone as far, if not farther, in emphasizing the necessity of carrying out the testator's expressed intent. In Dull's Estate,[86] there was a trust for the testator's son Joseph for life with a spendthrift trust clause and at his death, to his "heirs." The son, it was held, took only a life estate, because the spendthrift clause clearly showed that such was the testator's actual intent. In a recent case in this state[87] also, we find our Supreme Court announcing that the *Rule in Shelley's Case,* as it applies to personal property, yields to the expressed intent of the testator. All jurisdictions in the United States, it is believed, would admit with these cases, that if the expressed intent were clear that A was to have only

[83] 14 R. I. 518.
[84] 18 R. I. 325.
[85] 24 R. I. 502.
[86] 137 Pa. St. 112.
[87] Bennett *v.* Bennett, 217 Ill. 434.

a life estate, and that his heirs were then to have a separate contingent interest, such expressed intent must be carried out. This of itself is a real admission that the *Rule in Shelley's Case*, as a rule of law defeating intent, does not apply, but that the *Rule in Shelley's Case* applies only as a rule fixing intent. The moment, then, it is clear that the *Rule in Shelley's Case* is entirely a Rule and not at all a rule of construction, it is inapplicable on the very hypothesis upon which some American courts appear to apply it. In a state like Illinois where the court is so firmly rooted to the correct view that the *Rule in Shelley's Case* defeats intent,[88] there can be no justification for applying that rule to personal property, even as a *prima facie* rule of construction.

§ 439. **Suppose the limitations of personal property are included in a residuary gift of real and personal property to A for life and then to A's heirs:** It is clear that as to the realty A takes a fee by the *Rule in Shelley's Case* and by the doctrine of merger. Is there any difficulty in A's taking a life estate in the residuary personalty, with a separate, distinct and valid future interest to his heirs in the same residuary personalty, according to the testator's expressed intent? It would seem not. The case is not one where the question as to the disposition of the realty and personalty alike must be determined solely by following the expressed intent of the testator. The disposition of the realty is determined not only by what the testator expressly intends, but also by the application of the *Rule in Shelley's Case*, which defeats that intention. On the other hand, the disposition of the personalty depends solely upon the expressed intent. This simple aspect of the matter upon principle is amply sufficient to account for the fact that the results as to the real estate are different from the results reached as to personalty, and that both results, while quite inconsistent with each other, are each entirely correct. Such is the position of our Supreme Court in *Lord v. Comstock*.[89]

TITLE II.

METHOD OF OPERATION OF THE RULE.

§ 440. **The Rule operates in no manner whatever upon the estate of freehold in A, but only upon the remainder:** It

[88] *Post*, § 441.

[89] 240 Ill. 492.

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.[90] Thus, in the usual case for the application of the *Rule in Shelley's Case, i. e.,* where the gift is to A for life, 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,[91] 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.[92] Of course this is the ultimate result in the case put,[93] 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.[94] So where the limitations were to A for life remainder to the children of

[90] 1 Hayes on Conveyancing, 543-544.

[91] *Ante,* § 412, notes 3, 4.

[92] Muhlke *v.* Tiedemann, 177 Ill. 606, 615.

[93] 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.

[94] Carpenter *v.* Hubbard, 263 Ill. 571. 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 more of such cases. 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

A surviving, in fee, but if no such children, to A's heirs, A had a life estate with a contingent remainder in fee to the children, and by the *Rule in Shelley's Case* a future contingent remainder in fee in himself.[95] If the life estate be subject to a spendthrift trust clause, it should prevent a merger of the life estate and the remainder in the life tenant created by the *Rule in Shelley's Case*.[96] So where A has a life estate in one-half, with a remainder to her heirs in the whole, the Rule applies, but its operation is confined to the remainder, so that the life estate and remainder in fee only merge as to one-half the property and in the other half A has a remainder in fee subject to the life estate of another.[97]

TITLE III.

CHARACTER OF THE RULE.

§ 441. The Rule is not one of construction, but an absolute rule of law which operates to defeat the intent of the testator or settlor:[98] 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.[99] *Perrin v. Blake* [1] and the later English authorities [2] have clearly declared it to be 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*,[3] the first and leading case in this state on the *Rule in Shelley's Case*. In *Butler v. Huestis*,[4] however, there is some language

and the estate of the heirs.'' (Article in 28 Chicago Legal News, p. 258, by Lessing Rosenthal.)

[95] Hanes *v.* Central Ill. Utilities Co., 262 Ill. 86.

[96] Wallace *v.* Foxwell, 250 Ill. 616. See also Wehrhane *v.* Safe Dep. Co., 89 Md. 179.

[97] Bails *v.* Davis, 241 Ill. 536.

[98] 1 Hayes on Conveyancing, 5th ed. 545-547.

[99] 1 Hayes on Conveyancing, 5th ed. 543.

[1] 1 W. Bl. 672 (5 Gray's Cases on Prop. 2nd ed. 89).

[2] Roe d. Thong *v.* Bedford, 4 M. & S. 362; 5 Gray's Cases on Prop., 1st ed. 99. See also opinion of Cockburn, C. J., in Jordan *v.* Adams, 9 C. B. N. S. 483; 5 Gray's Cases on Prop., 2nd ed. 96.

[3] 62 Ill. 86.

[4] 68 Ill. 594.

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,[5] and in *Belslay v. Engel*[6] 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*[7] 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*,[8] Mr. Justice 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*[9] 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

[5] See *dictum* of Mr. Justice Mulkey in Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 199.

[6] 107 Ill. 182.

[7] 120 Ill. 648.

[8] 127 Ill. 42 (quoting at page 48 from Hayes' Principles, 7 Law Lib. 52).

[9] 136 Ill. 363.

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.[10]

[10] 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.* Sweeny, 163 Ill. 603, 610; Deemer *v.* Kessinger, 206 Ill. 57; Ward *v.* Butler, 239 Ill. 462, 467, 468; Winter *v.* Dibble, 251 Ill. 200, 222.

CHAPTER XVIII.

SPRINGING AND SHIFTING FUTURE INTERESTS.

§ 442. **Introduction:** A springing future interest is one limited upon an event which can take effect only after the termination of a preceding interest expressly created, or at a future time where no preceding interest has been limited.[1] Thus, if the limitations are to A for life and one year after A's death to B,[2] or to B ten years after date, B's interest is in both cases a springing future interest. So where a future interest in land is limited upon a contingent event after a term for years it must be classified as a springing interest, because from the feudal point of view the term for years was not an interest in land.[3] Therefore, the freehold limited upon a contingency was to take effect at a future time without any preceding interest in the land being created.[4]

A shifting future interest is one limited upon such an event that it necessarily cuts short or defeats prematurely a preceding interest expressly created.[5] The stock example occurs where a fee or absolute interest is limited to A with a gift over if A dies without issue him surviving to B. B's interest is a shifting future interest. A life estate may, however, be subject to a shifting gift over, as where a life estate is limited to A with a condition subsequent upon the happening of which it is terminated and a gift over made to B.[6]

Springing and shifting future interests exist in sharp contrast to reversions and vested remainders, which always follow a particular estate of freehold and stand ready throughout the continuance of the particular estate to take effect in possession whenever and however the preceding estate determines.[7] They

[1] *Ante*, § 26.

[2] Jacobs *v.* Ditz, 260 Ill. 98 (to A for life and then to B provided he pay a certain sum to C); Kolb *v.* Landes, 277 Ill. 440, 446.

[3] *Ante*, § 33, 80.

[4] Kingman *v.* Harmon, 131 Ill. 171.

[5] *Ante*, § 26.

[6] Blackman *v.* Fysh, [1892] 3 Ch. 209.

[7] *Ante*, §§ 25, 29, 308, 327, 328.

are differentiated from contingent remainders which are future interests limited after a particular estate of freehold on an event which may happen before or after, or at the time of or after, the termination of the preceding estate, but which by a rule of law can only be valid if the event happens before or at the time of the termination of the preceding estate.[8]

Springing and shifting interests in land when created by way of use are called springing and shifting or future uses. When created by will they are called executory devises. The term "conditional limitations" is used properly to designate all shifting interests whether created *inter vivos* or by will.

TITLE I.

BY DEED—FUTURE USES.

TOPIC 1.

SHIFTING INTERESTS BY DEED ARE VALID IN ILLINOIS.

§ 443. **Introduction:**[9] 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.[10] 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.[11] He would object, but he would be

[8] *Ante*, §§ 27, 29, 96, 309.

[9] This introduction (§§ 443-461) 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.

[10] *Post*, §§ 652 *et seq.*

[11] *Post*, §§ 717-719.

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.[12] 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 [13] but not by deed?

§ 444. The Illinois authorities are divided—Cases in support of the validity of shifting interests by deed: It seems settled here that a power, created by deed, to appoint a new trustee is valid.[14] The donee of the power may be the *cestui que trust*,[15] or an utter stranger to the transaction, as the court of chancery of a judicial circuit.[16] 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,[17] 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* [18] the trust was an active one for the benefit of the settlor's wife.[19] The same object is, in the present day Cook County Trust Deed by way of mortgage, more often accomplished directly without

[12] *Post*, §§ 722-725.

[13] *Post*, § 467.

[14] 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;* Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238.

[15] Lake *v.* Brown, 116 Ill. 83; Craft *v.* I. D. & W. Ry. Co., 166, 580.

[16] Morrison *v.* Kelly, 22 Ill. 610; See also Leman *v.* Sherman, 117 Ill. 657, 668.

[17] 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, 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. 650-651; 2 Chance on Powers, 400 *et seq.*

[18] 22 Ill. 610.

[19] Observe also the English practice of inserting such powers in settlements *inter vivos* where trustees have active duties. 2 Hayes on Conveyancing, 71-72. For the law generally relating to power to appoint new trustees see Sugden on Powers, 8th ed. 883-890; 2 Chance on Powers, 393-411; 2 Lewin on Trusts, 1st Am. from 8th Engl. ed. 645-673.

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 self-acting, for at once upon the happening of the event the successor in trust becomes invested with the legal title.[20]

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.[21] We have, also, the direct *dictum* of *Abbott v. Abbott*[22] that shifting interests by deed may be valid[23] in this state.

§ 445. **Cases against the validity of shifting future interests by deed**: The court has frequently referred to the rule that, while there cannot be a remainder after a remainder in fee, you may have two contingent remainders in fee in double aspect.[24]

[20] Equitable Trust Co. *v.* Fisher, 106 Ill. 189, *semble;* Irish v. Antioch College, 126 Ill. 474.

[21] Observe that the holding in Boatman *v.* Boatman, 198 Ill. 414, and Chapin *v.* Nott, 203 Ill. 341, now overruled (*ante*, § 359), logically leads to the sustaining of shifting future interests 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.

[22] 189 Ill. 488, 498.

[23] 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: 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'."

[24] City of Peoria *v.* Darst, 101

This is a perfectly sound proposition as regards *remainders,* or common law future interests by way of succession,[25] and no confusion need have arisen out of the expression of it, had not the court, on at least three occasions,[26] 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.[27] 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.[28] The decisions in both these cases may, however, be sustained upon the ground that the gift over was to take effect, in one case,[29] upon the first taker's intestacy, and in the other,[30] upon an attempted alienation by will by the first taker.

Passing from *dicta* to actual decisions: In two cases[31] 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 children, a vested fee simple which may be divested or shifted *pro tanto* to let in after-born children. In *Palmer v. Cook,*[32] an ordinary shifting interest was held invalid on grounds which would make void all shifting interests whatsoever. There, the conveyance

Ill. 609; McCampbell *v.* Mason, 151 Ill. 500; Seymour *v.* Bowles, 172 Ill. 521. See also Summers *v.* Smith, 127 Ill. 645, 650; Smith *v.* Kimbell, 153 Ill. 368, 372.

[25] *Ante,* § 307.

[26] City of Peoria *v.* Darst, 101 Ill. 609, McCampbell *v.* Mason, 151 Ill. 500; Seymour *v.* Bowles, 172 Ill. 521.

[27] Siegwald *v.* Siegwald, 37 Ill. 430, 438; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeny, 163 Ill. 603, 605; Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[28] Kron *v.* Kron, 195 Ill. 181; Stewart *v.* Stewart, 186 Ill. 60.

[29] Kron *v.* Kron, 195 Ill. 181, *post,* §§ 720 *et seq.*

[30] Stewart *v.* Stewart, 186 Ill. 60, *post,* § 718.

[31] Morris *v.* Caudle, 178 Ill. 9; Miller *v.* McAlister, 197 Ill. 72; *post,* §§ 475, 476.

[32] 159 Ill. 300.

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.[33] 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,[34] 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."[35]

§ 446. 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."[36] Sometimes it is said 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.[37] The

[33] *Post*, § 544.

[34] But see "Remainders after Conditional Fees," by F. W. Maitland, 6 Law Quart. Rev. 22, 25.

[35] In Ackless *v.* Seekright, 1 Breese (Ill.) 76, 78, the court quotes from 2 Blackstone's Com. 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*, § 448, note 54, and § 449, note 57.

[36] Siegwald *v.* Siegwald, 37 Ill. 430, 438; Summers *v.* Smith, 127 Ill. 645, 650; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeny, 163 Ill. 603, 605; Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[37] 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.

only reason ever suggested for this is, that the shifting future interest is *repugnant* to the grant and void.[38]

§ 447. **Repugnancy:** It is worth observing that only two cases put forward this reason of repugnancy.[39] In both of them, the holding of the gift over void, was sound, because the shifting interest was, in one case,[40] to take effect if the first taker died without having aliened in his lifetime,[41] and, in the other,[42] if the first taker died intestate.[43] The reason of repugnancy has always been confined to just such cases, and is particularly invoked in support of the latter.[44] 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.[45] In this view, the only repugnancy that exists is between the first absolute interest and the direction for its forfeiture. Until *Ewing v. Barnes*,[46] our Supreme Court always carefully recognized the very special and limited application of the reason of repugnancy to this particular sort of case. In *Ewing v. Barnes* and *Silva v. Hopkinson*,[47] 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 *Glover v. Condell*,[48] these two cases were overruled. The error into which they fell was fully recognized and corrected, and, since then, the court has been very accurate 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 it 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

[38] Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[39] Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181.

[40] Stewart *v.* Stewart, 186 Ill. 60.

[41] *Post*, § 718.

[42] Kron *v.* Kron, 195 Ill. 181.

[43] *Post*, § 720 *et seq.*

[44] *Post*, § 723.

[45] *Id.*

[46] 156 Ill. 61, *post*, § 469.

[47] 158 Ill. 386, *post*, § 469.

[48] 163 Ill. 566, *post*, § 470.

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.[49]

§ 448. 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."[50] In another, the court says: "at common law a fee could not be limited upon a fee."[51] 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.[52] Thus, it has said that "a remainder limited after a remainder in fee would be void;"[53] 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 granted, cannot be defeated and transferred to another by way of remainder."[54] Practically, then, the basis put forward to sustain the 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[55]

[49] *Post*, §§ 467 *et seq.*

[50] Peoria *v.* Darst, 101 Ill. 609, 616.

[51] Summers *v.* Smith, 127 Ill. 645, 650.

[52] *Ante*, §§ 25, 26, *post*, § 451.

[53] Peoria *v.* Darst, 101 Ill. 609, 619; McCampbell *v.* Mason, 151 Ill. 500, 509.

[54] Smith *v.* Kimbell, 153 Ill. 368, 372. See also Palmer *v.* Cook, 159 Ill. 300, 303. Doubtless Blackstone in the passage quoted *ante*, § 445, note 35, meant no more than a shifting future interest though void as a *remainder*, was good as an executory devise. See *post*, § 449, note 57.

[55] This analysis of the court's meaning finds additional support in the court's constant admission that shifting interests by will were valid,

§ 449. 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*,[56] 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.'"[57]

§ 450. 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 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.[58] It is equally true that, by conveyances operating under the Statute of Uses, such future interests might be limited.[59] It is true, also, that both of these principles are preserved in our law to-day. 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.

for, at common law, there was no power to devise lands, and the power of testators to create future interest created by way of 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*, §§ 451, 452.

[56] 189 Ill. 488, 498.

[57] In spite of the language quoted from Blackstone, *ante*, § 445, note 35, that learned writer clearly recognized the validity of shifting future interests created by way of use. 2 Bl. Com. 334.

[58] *Ante*, § 26.

[59] *Ante*, § 72.

§ 451. 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.[60] 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."[61]

The feudal system required a conveyance of the present freehold interest to be by livery of seizin,[62]—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 at the time of the conveyance.[63] 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,[64] and without it, therefore, the grant was void.[65] 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.[66]

With regard to the creation of future interests, the limita-

[60] 1 Pollock & Maitland, History of English Law, 207-332.

[61] "Future Interests in Land, by Edward Jenks," 20 Law Quart. Rev. 280, 282.

[62] Co. Lit. 48a, b; 1 Gray's Cases on Prop., 2nd ed. 352; 2 Pollock & Maitland, History of English Law, 82; Thoroughgood's Case, 9 Co. 136; 1 Gray's Cases on Prop., 1st ed. 437; Digby, History of the Law of Real Property 146 *et seq.*: Williams on Real Property, 17th ed. 174-176; Pollock on Land Laws, 75, 76; Challis on Real Property, 363-374. For form of deed of feoffment with form for endorsement of livery of seisin, see 2 Hayes on Conveyancing, 5th ed. 3.

[63] 2 Pollock & Maitland, History of English Law, 82 *et seq.*

[64] "The Mystery of Seisin," F. W. Maitland, 2 Law Quart. Rev. 481, 490.

[65] *Ante*, §§ 43, 379.

[66] Digby, History of Law of Real Property, 28, 377; 1 Gray's Cases on Prop., 1st ed. 451, 452, note.

tions 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, whenever and however the preceding interest determined.[67] That reduced the possible future interests of this sort to those which are properly called remainders.[68]

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.[69] If it cut short or interrupted a preceding freehold estate expressly limited, it was a shifting interest.[70] 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."[71] If the future interest was certain, in case it took effect at all, to cut short a reversionary interest in the settlor, it was a springing estate.[72] 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."[73] Under these common law rules governing the creation of future

[67] *Ante*, § 25.

[68] *Id.*

[69] Leake, Digest of Land Law, 46-48; 1 Gray's Cases on Prop., 2nd ed. 348-350; Digby, History of Law of Real Property, 262; Sugden on Powers, 8th ed. 26; 1 Hayes on Conveyancing, 5th ed. 111, 112; Challis on Real Property, 2d ed. 90, 93 *et seq.* *Per* Baker, P. J., in Vinson *v.* Vinson, 4 Ill. App. 138, 140, *ante*, § 26.

[70] *Ante*, § 26.

[71] "Future Interests in Land," by Edward Jenks, 20 Law Quart. Rev. 280, 281. See also treatises referred to, *supra*, note 69, except that for the invalidity of shifting interests at common law see Challis on Real Property, 2nd ed. 71-73.

[72] *Ante*, § 26.

[73] "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."

interests, a present conveyance to A's children, A not having any child at the time, was entirely ineffective.[74] 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."[75] 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.[76] 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.[77] In short, there would, from 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.[78]

§ 452. **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

[74] 1 Hayes on Conveyancing, 5th ed. 119.

[75] *Id.*

[76] *Ante*, §§ 27, 28, 96, 309.

[77] *Id.*

[78] *Ante*, §§ 28, 97.

to a certain extent accomplished.[79] The effect of the Statute of Uses, was, it has been said, to interrupt this practice,[80] but the Statute of Wills of Henry VIII[81] 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 seisin 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 seised to uses, or by a bargain and sale (enrolled), or by a lease for a year 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.[82] By similar modes of conveyance the transfer of a remainder or reversion might be effected without attornment.[83]

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,[84] and after the statute these springing and shifting interests by way of use were turned into springing and shifting legal estates.[85] Thus, it became 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.[86] In the same way, it became possible

[79] Gray's Rule against Perpetuities, § 53; Pollock on Land Laws, 95, 96.

[80] Sugden on Powers, 8th ed. 20; Pollock on Land Laws, 102; Gray's Rule against Perpetuities, § 53.

[81] 32 Hen. VIII, C. I. (1540); 4 Gray's Cases on Prop., 2nd ed. 30.

[82] Pollock on Land Laws, 104-107; Digby, History of the Law of Real Property 357; Williams on Real Property, 17th ed. 233; 1 Hayes on Conveyancing, 5th ed. 118; 1 Gray's Cases on Prop., 2nd ed. 395.

[83] *Ante*, § 379.

[84] Challis on Real Property, 157-158; Digby, History of Law of Real Property, 332; Gray's Rule against Perpetuities, §§ 52, 135, 136, 138.

[85] 1 Hayes on Conveyancing, 5th ed. 113-115; Pollock, Land Laws, 124-125; Leake, Digest of Land Law, 112-113; 1 Gray's Cases on Prop., 2nd ed. 402; Digby, History of Law of Real Property, 357-360; Challis on Real Property, 157-159, 161-164; Fearne, Cont. Rem. 372; Sugden on Powers, 8th ed. 26-28, 32-34; Gray's Rule against Perpetuities, § 52.

[86] Leake, Digest of Land Law, 114; Sugden on Powers, 8th ed.

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,[87] 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,[88] "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 'children 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 estates.[89] Logically, it should have followed that the future interests were indestructible.[90] 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.[91] That analogy was entirely superficial and improper in all cases of contingent future interests except one.[92] If to be applied at all, it was appropriate only to the case of future uses, limited after a particular estate of freehold upon

17-18; 1 Hayes on Conveyancing, 5th ed. 70 *et seq.*

[87] *Ante*, § 444.

[88] 1 Hayes on Conveyancing, 5th ed. 119.

[89] *Ante*, §§ 72, 85.

[90] *Id.*

[91] *Id.*

[92] *Ante*, §§ 77, 97.

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.[93] 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.[94]

It is believed that this rule of law represents the extreme limit to which the validity of future uses were controlled by the restrictions of the common law.[95] 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*,[96] 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.

§ 453. 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

[93] *Id.*

[94] *Ante*, § 97.

[95] It is true that in Adams *v.* Savage, 2 Ld. Raym. 854; 2 Salk, 601, 679, 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 Law Quar. Rev. 412; and Sugden on Powers, 8th ed. 35 *et seq.*

[96] Cro. Jac. 590; 2 Roll. Rep. 196; *ante*, § 85.

directly abolished by that which came after. The second, for the time being at least, left the first standing in full force. 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.[97] 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 territorial government of Illinois, it is clearly established by an early act of our state legislature.[98]

Are not, therefore, the common law modes of conveyance theoretically, at least, in force in this state? In *Fisher v. Deering*,[99] our Supreme Court, as we have seen,[1] 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 to do so? There certainly is no statutory abolition of livery of seizin. Sec. 1 of the Act concerning Conveyances[2] 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.[3] 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,[4] and because the Statute of Uses is in

[97] 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.

[98] In force Feb. 4, 1819. Revised Laws 1833, p. 425; R. S. 1845, Ch. 62, sec. 1; R. S. 1874, ch. 28. See also Baker *v.* Scott, 62 Ill. 86, 94 *et seq.*

[99] 60 Ill. 114.

[1] *Ante*, § 379.

[2] 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.

[3] 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.

[4] R. S. 1874, ch. 30, secs. 9, 10, 11.

force,[5] by which validity is practically given to all deeds of conveyance as bargains and sales. Furthermore, livery of seizin in actual use is unknown.[6] There is nothing, however, which declares that it shall not be used.

It would seem, also, on the same reasoning, that the feudal rules concerning the creation of future interests are very properly recognized by our Supreme Court [7] 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.[8] 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.

§ 454. 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

[5] 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: Re Qua *v.* Graham, 187 Ill. 67; Glaubensklee *v.* Low, 29 Ill. App. 408; Cole *v.* Bentley, 26 Ill. App. 260.

[6] Shackelton *v.* Sebree, 86 Ill. 616, 621.

[7] *Ante*, § 448.

[8] *Id.*

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.

§ 455. **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 proposition 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.[9] 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.

§ 456. **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, by one of which the conveyance might be void and by 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 in-

[9] See cases of transfer of remainders after a life estate, *ante*, § 379.

strument of conveyance may be sustained upon whichever system it is necessary to rely 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 feoffment without livery, and so, in either case, ineffective under the common law system of conveyancing. Yet, if it 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.[10] 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.[11]

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 insignificant, actually given.[12] 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.[13] If so much of the Statute of Enrollments [14] 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.[15] For a covenant to stand seized, only an

[10] Edward Fox's Case, 8 Co. 93b; 1 Gray's Cases on Prop., 1st ed. 489.

[11] Roe *v.* Tranmer, 2 Wils. 75; 1 Gray's Cases on Prop., 2nd ed. 391; Fraser's note to Edward Fox's Case, 8 Co. 93b; 1 Gray's Cases on Prop., 1st ed. 490.

See also H. Clay Horner's contribution on this subject, dealing with the Illinois cases; Chicago Legal News of July 12, 1902, p. 375.

[12] Barker *v.* Keete, Freem. 249, 1 Gray's Cases on Prop., 2nd ed. 389.

[13] 3 Gray's Cases on Prop., 2nd ed. 249, note on recital of consideration; also Vinson *v.* Vinson, 4 Ill. App. 138; Ill. Cent. Ins. Co. *v.* Wolf, 37 Ill. 354.

[14] 27 Henry VIII, ch. 16 (1536), 1 Gray's Cases on Prop., 2nd ed. 382-383.

[15] Tiedeman on Real Property, 2nd ed. § 783. See, however, Jackson d. Gouch *v.* Wood, 12 Johns. (N. Y.) 73.

instrument under seal was necessary, purporting to convey title to the blood relation of the transferor.[16]

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 entirely capable of taking effect as a bargain and sale.[17] 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 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.

§ 457. 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.[18] If the transfer occurred before 1872, they would fall back upon section 1 of the Act of 1827 concerning Conveyances.[19] 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 perhaps 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 believed 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

[16] Callard v. Callard, Moore 687; 1 Gray's Cases on Prop., 2nd ed. 386; Roe v. Tranmer, 2 Wils. 75; 1 Gray's Cases on Prop., 2nd ed. 391.

[17] Shackelton v. Sebree, 86 Ill. 616, 621.

[18] Laws 1871-2, p. 282, secs. 2, 9, 10, 11.

[19] 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).

usual form, 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 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.

§ 458. 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 exigencies 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 seem to have been as follows: 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 feoffment to the use of the feoffee's will, shifting uses might be created by will.[20] So, after the Statute of Wills direct shifting devises of legal interests were permitted.[21] 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

[20] Pollock, Land Laws, 91. [21] *Id.* 98.

the common law formality of livery and seizin or grant and attornment.[22] 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 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 property. 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.[23] This, it is conceded, was impossible at common law.[24] 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 considerations 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.[25] This view is strictly in accord with the

[22] Digby, History of Law of Real Property, 332.

[23] Shackelton *v.* Sebree, 86 Ill. 616; *post*, § 463.

[24] *Post*, § 463.

[25] Gray's Rule against Perpetuities, §§ 67, 68, citing Abbott *v.* Holway, 72 Me. 298: Gorham *v.* Dau-

way uses were treated after they had received recognition, and in direct analogy to the results reached under the Statute of Wills.

§ 459. 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.[26] The Statute of Uses was reactionary[27] 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,[28] the decreased cost of transfer[29]

iels, 23 Vt. 600; Ferguson *v.* Mason, 60 Wis. 377; Kuuku *v.* Kawainui, 4 Hawaiian 515.

[26] Sugden on Powers, 8th ed. 3.

[27] Pollock on Land Laws, 102-104. Observe, however, Sugden on Powers, 8th ed. 8.

[28] Pollock on Land Laws, 165-171.

[29] *Id.* 171-178.

and the abolition of particular survivals of the feudal 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,[30] are efforts toward decreasing the cost of land transfers.[31]

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.[32]

§ 460. 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.[33] It would be opposed to that fundamental endeavor of modern times to give effect to the expressed intention of the land owner whenever 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 judges, turned that statute to its permanent advancement, and has continued to hold the advantage then gained as one of the heritages of freedom.

[30] Laws 1897, p. 141.

[31] "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.

[32] "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.

[33] 12 Car. II (1660), ch. 24; 1 Gray's Cases on Prop., 2nd ed. 327.

§ 461. 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,[34] 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.[35] Everything else is *dicta*, being wholly *obiter*,[36] 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,[37] or by way of forfeiture on alienation by will.[38] 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*,[39] 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.[40] 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,[41] and it is submitted that if the validity of shifting interests by deed came up today and the question fully considered, *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.[42] On the other side we have the actual result of at least two lines of cases[43] which cannot be sustained without recognizing the validity of shifting interests by deed. We have, also, the assurance from *Abbott v. Abbott*[44] that, whenever the effect of the Statute of

[34] Palmer *v.* Cook, 159 Ill. 300.

[35] Morris *v.* Caudle, 178 Ill. 9; Miller *v.* McAlister, 197 Ill. 72.

[36] *Ante*, § 445, notes 24, 27, 28.

[37] Kron *v.* Kron, 195 Ill. 181.

[38] Stewart *v.* Stewart, 186 Ill. 60.

[39] 159 Ill. 300.

[40] Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386.

[41] Glover *v.* Condell, 163 Ill. 566; *post*, § 467, 470.

[42] *Post*, § 476.

[43] *Ante*, § 444, notes 14, 20.

[44] 189 Ill. 482, 498.

Uses to support the future interest is clearly pointed out to the court, it will recognize the soundness of that position.

§ 462. Trend of the Illinois authorities since the foregoing argument appeared: The foregoing §§ 443-461 have been reprinted substantially as they appeared in the author's Future Interests, published in 1905. Since then our Supreme Court has made progress toward a definite holding that shifting interests by deed are valid—that is, that a fee on a fee by deed may be created.

The court has only once said,[45] and then as the most casual *dictum*, that a fee on a fee "in a conveyance is void." On two occasions the court has made statements by way of *dicta* merely, which indicated that it was referring to the feudal or common law of land or to the law of remainders as distinguished from the law of future uses. In one case Mr. Justice Cartwright said:[46] "A *remainder* cannot be limited to take effect after a fee simple for the reason that, a fee being the entire estate, there can be no remainder after it to be disposed of." Mr. Justice Dunn in another case said:[47] "A fee cannot be limited upon a fee in a deed *at common law*." In *Cover v. James*[48] where the limitations were by deed to A and in case of his death to B in fee, the court seems to have been anxious to construe A's interest as a life estate so as to avoid the difficulty which might arise if B's interest were a fee on a fee by deed. The same is true of *Bauman v. Stoller*,[49] where the limitations were in substance to A, and if A died before his wife leaving children surviving him, to the wife and surviving children.

In *Brown v. Brown*,[50] however, the limitations created by deed were to Catherine in fee with a shifting interest to Cora when she reached eighteen for her life, and then to Cora's children for life. After the death of Cora and her children Catherine and those taking under her claimed to be entitled in fee. It was held that they were so entitled; that if the life estate were valid Catherine's fee was only cut down to the extent of that life estate. The validity of the shifting interest for life

[45] Johnson *v.* Buck, 220 Ill. 226, 235.

[46] Morton *v.* Babb, 251 Ill. 488, 492.

[47] Pitzer *v.* Morrison, 272 Ill. 291, 293.

[48] 217 Ill. 309.

[49] 235 Ill. 480.

[50] 247 Ill. 528.

was not actually involved but its validity was assumed and the case decided upon that assumption rather than on the assumption that the life estate upon the fee was void. In principle there is no difference between a life estate after a fee and a fee on a fee. If the former is valid so is the latter.

In *Morton v. Babb*[51] the limitations by deed were to A in fee, but if A died without leaving issue, to the grantor. The gift to the grantor was a fee on a fee by deed. It was held valid. This was placed upon the ground that a determinable fee in the feudal or common law sense might be created with a possibility of reverter in the creator of the base fee and that that was what had been done. The court said: "The rule that a fee cannot be mounted upon a fee by deed does not mean that it is impossible to grant an estate less than a fee simple [a base or determinable fee] by deed." Thus we observe that the court preferred to resort to the diffieult doctrine that determinable fees in the feudal or common law sense might still be created rather than to rest its decision on the clear ground that a fee could be mounted upon a fee by way of use and that the deed in question operated as a bargain and sale and therefore by way of use.

The decision in *Bauman v. Stoller*[52] seemed to rest upon the ground that the limitations were to A for life and if he died before his wife and left children surviving, to such children and his wife. If such were the interests created it was pointed out that the contingent remainders had been destroyed by the merger of the life estate in the reversion, due to certain conveyances which had been made.[53] This point was urged when the case came up to the Supreme Court a second time under the title of *Stoller v. Doyle*.[54] The only way of avoiding the defeat of the interests of the children was to hold that the first taker had a fee and that the shifting limitation to the children was valid and indestructible. This was done and the court recognized that a fee on a fee could take effect as a future use under the Statute of Uses. Here, therefore, we have a direct decision that a fee can be mounted upon a fee by deed.[55]

[51] 251 Ill. 488, 493; 7 Ill. Law Rev. 130.

[52] 235 Ill. 480.

[53] 3 Ill. Law Rev. 383.

[54] 257 Ill. 369; 8 Ill. Law Rev. 495.

[55] In Duffield *v.* Duffield, 268 Ill. 29, the court said: "The power

In *Roberts v. Dazey*[56] the deed conveyed and warranted the title to Amanda, with the proviso "if said grantee herein die before attaining the age of twenty-one years" over to Mary and Martha. Amanda died under twenty-one and it was held that the gift over took effect as a conditional limitation. Thus the

ERRATUM

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Read second line of Sec. 463 as:

"valid: Conveyances by deed to a person *in esse* expressed to"

§ 463. Conveyances to take effect at the grantor's death two theories: Our Supreme Court has fully recognized that 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.[57]

to limit a future estate has been recognized," citing Abbott *v.* Abbott, 189 Ill. 488 and Stoller *v.* Doyle, 257 Ill. 369.

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.

[56] 284 Ill. 241.

[57] Shaekelton *v.* Sebree, 86 Ill. 616; Harshbarger *v.* Carroll, 163 Ill. 636; Latimer *v.* Latimer, 174 Ill. 418; Noble *v.* Fickes, 230 Ill. 594; White *v.* Willard, 232 Ill. 464, 472; Hathaway *v.* Cook, 258 Ill. 92, 96; Nowakowski *v.* Sobeziak, 270 Ill. 622; Vinson *v.* Vinson, 4 Ill. App. 138; Calef *v.* Parsons, 48 Ill. App. 253, 257, *semble.*

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

§ 464. The 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.[58] 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.[59]

The principal ground for sustaining such a future interest, as set out in the leading case of *Shackelton v. Sebree*,[60] is, that, by the operation of the conveyance, the grantor becomes seized of a life estate and the future interest then takes effect as a remainder.[61] 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.[62] As such it is read as if the grantor was expressed to 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.[63] 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.[64] They agreed that the inability of the feoffor upon making a trans-

took effect. The validity of the springing interest was, therefore, not involved.

[58] 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.

[59] Shackelton *v.* Sebree, 86 Ill. 616, 621. See also cases cited *ante*, § 453.

[60] 86 Ill. 616.

[61] This is the only ground relied upon in Harshbarger *v.* Carroll, 163 Ill. 636, and Latimer *v.* Latimer, 174 Ill. 418.

[62] *Ante*, § 456.

[63] Gilberton Uses (Sugden's ed.), 150-152 note, quoted in 1 Gray's Cases on Prop., 2nd ed. 403-404; Sugden on Powers, 8th ed. 2526; Challis on Real Property, 2nd ed. 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. 90. The *dictum* of Callard *v.* Callard, Moore, 687 (1 Gray's Cases on Prop., 2nd ed. 386), *contra*, is not sound.

[64] 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.

fer, to reserve to himself a life estate,[65] arose from the character and formalities of the conveyance by livery of seizin, which required an actual change of possession.[66] 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.[67]

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.[68] 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*.[69] It was somewhat vaguely suggested in *Shackelton v. Sebree*.[70] The future springing interest might as well have been regarded as validly created on the ground that the deed 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.[71]

§ 465. 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?

[65] Callard *v.* Callard, Moore, 687.

[66] *Ante*, § 451.

[67] Shackelton *v.* Sebree, 86 Ill. 616; White *v.* Willard, 232 Ill. 464, 472; 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.

[68] *Ante*, § 456.

[69] 4 Ill. App. 138. See also for the same view: Leake, Digest of Land Law, 112, 113; Roe *v.* Tranmer, 2 Wils. 75; 1 Gray's Cases on Prop., 2nd ed. 391.

[70] 86 Ill. 616.

[71] Vinson *v.* Vinson, 4 Ill. App. 138.

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 the application of the rule of *Buckworth v. Thirkell.*[72] So, if the grantor have a life estate, the remainderman may 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.[73] Again, if A stood seized to the use of his heirs after his death, then, if there be a resulting use to A in fee in his lifetime, the *Rule in Shelley's Case*[74] 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.[75]

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,[76] cannot be

[72] 1 Coll. Juris. 322; 3 Bos. & Pul. 652, note, Butler's Co. Lit. 241a, note; Gray's Cases on Prop., 2nd ed. 588; 1 Scribner on Dower, 2nd ed. 302, 10 Am. & Eng. Enc., 2nd ed. 161, 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. *Post,* § 484. 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.

[73] Abbott *v.* Holway, 72 Me. 298; Gannon *v.* Peterson, 193 Ill. 372; Turner *v.* Wright, 2 De G. F. & J. 234; 1 Ames' Cases on Equity Jurisdiction, 476.

[74] *Ante,* §§ 412 *et seq.*

[75] Fearne, Cont. Rem., 41, 42.

[76] Of course, where there is an express 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.* Parsons, 48 Ill. App. 253.

sustained.[77] There can be no resulting estate for life, since resulting estates by operation of law are always in fee.[78] Nor is it possible, when one observes how strong a necessity must exist before a life estate will be implied,[79] 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.[80] 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*,[81] 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, that there must be a freehold to support the future interest. Under these circumstances the English judges seem to have been quick to imply a life estate limited to the covenantor himself.[82] *Adams v. Savage*, however, is unsound on principle and should not be regarded as law in a jurisdiction where it has not already been adopted.[83] There would appear, therefore, to be no ground to day for implying any life estate.

§ 466. **Conclusion**: It would seem best to sustain a limitation after the grantor's death, when no life estate is expressly reserved,[84] 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,[85] a legal limitation

[77] Abbott *v.* Holway, 72 Me. 298.

[78] 2 Hayes on Conveyancing, 5th ed. 464, 465; Leake, Digest of Land Law, 112, 113.

[79] 1 Jarman on Wills, 6th ed. (Bigelow) Star pages 498 *et seq.* *Ante*, §§ 204 *et seq.*

[80] Pibus *v.* Mitford, 1 Vent. 372; Fearne, C. R., 42; Elphinstone on Interpretation of Deeds, 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 Quart. Rev. 412, 414.

[81] 2 Ld. Raym. 854; 2 Salk, 601, 679 (1703). *Ante*, § 80.

[82] Sugden on Powers, 8th ed. 36, 37.

[83] Gray's Rule against Perpetuities, §§ 58-60; "On a point in the Law of Executory Limitations," by Challis, 1 Law Quart. Rev. 412; Sugden on Powers, 8th ed. 35 *et seq.* *Ante*, § 80.

[84] 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.

[85] Fowler *v.* Black, 136 Ill. 363;

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.

TITLE II.

BY WILL—EXECUTORY DEVISES.

§ 467. 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,[86] and their continued use in England for three centuries and a half and in this country since its settlement, have, in blind ignorance, judicially legislated the executory devise out of existence is so monstrous and absurd a conclusion, that it cannot be seriously suggested.[87] Furthermore, a thorough examination of all the authorities in this state which touch the subject will find the validity of executory devises in general unimpeached.

In several instances[88] 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 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,[89] often with a fullness of reasoning which

Palmer *v.* Cook, 159 Ill. 300; Bowler *v.* Bowler, 176 Ill. 541; Calef *v.* Parsons, 48 Ill. App. 253.

[86] *Ante*, § 85.

[87] 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*, § 459.

[88] Lambert *v.* Harvey, 100 Ill. 338; Kingman *v.* Harmon, 131 Ill. 171, 172; Cassem *v.* Kennedy, 147 Ill. 660; Jacobs *v.* Ditz, 260 Ill. 98; Kolb v. Landes, 277 Ill. 440, 446.

For some observations on the disposition of the intermediate income, or legal title, see *ante*, §§ 207-209.

[89] Ackless *v.* Seekright, Breese (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; Harri-

leaves the validity of executory devises in general beyond all doubt.

Springing[90] and shifting[91] limitations by way of executory

son *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; Johnson *v.* Buck, 220 Ill. 226; Ahlfield *v.* Curtis, 229 Ill. 139; Mayer *v.* McCracken, 245 Ill. 551; Askins *v.* Merritt, 254 Ill. 92; Ashby *v.* McKinlock, 271 Ill. 254; Pitzer *v.* Morrison, 272 Ill. 291; McClintock *v.* Meehan, 273 Ill. 434; Gavvin *v.* Carroll, 276 Ill. 478; Aloe *v.* Lowe, 278 Ill. 233; Blackstone *v.* Althouse, 278 Ill. 481; Fitzgerald *v.* Daly, 284 Ill. 42; Fulwiler *v.* McClun, 285 Ill. 174; Smith *v.* Carroll, 286 Ill. 137; Morris *v.* Phillips, 287 Ill. 633.

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.

[90] (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,* § 610, note 5.) 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.

[91] (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,* § 610, note 5.) 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;* and 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

devise, arising by the exercise of a power, have been repeatedly upheld.

§ 468. **Three cases contra—Andrews v. Andrews:** [92] 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. The testator then 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 discussion was doubtless irrelevant in the case, for even if the shifting gift to the new trustee had been void the trust would not necessarily have failed for that reason. Even if revelant 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 doubt.

§ 469. **Ewing v. Barnes** [93] **and Silva v. Hopkinson:** [94] 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

held not to have been properly exercised: Griffin *v.* Griffin, 141 Ill. 373; Clark *v.* Clark, 172 Ill. 355.

[92] 110 Ill. 223.

[93] 156 Ill. 61.

[94] 158 Ill. 386.

scrutiny by a learned member of the Chicago bar,[95] 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,[96] the first taker would have an estate tail, with a vested remainder in fee to the ultimate devisee, which could not be too remote.[97] By our statute,[98] however, the estate tail would be turned into a life estate to the first taker, with a contingent remainder in fee to children still unborn, so that the ultimate gift would be a contingent remainder and not void for remoteness because of the rule of destructibility of contingent remainders.[98a] 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. 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.[99] 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[1] in both cases.[2]

[95] Mr. Lessing Rosenthal in 28 Chicago Legal News, 257 (April 4, 1896).

[96] *Post*, § 549.

[97] Gray's Rule against Perpetuities, § 443 *et seq.*

[98] *Ante*, §§ 402 *et seq.*

[98a] *Post*, § 550.

[99] See 28 Chicago Legal News, 260.

[1] *Post*, §§ 531, 539.

[2] 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*, § 349; Phayer *v.*

§ 470. 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 by will and arising upon a definite failure of issue,[3] 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." The recent cases have established beyond question the validity in general of springing[4] and shifting[5] executory devises.

§ 471. The recent cases have also disposed of the fallacy that because some shifting interests were void for "repugnancy" all must be void: In another place[6] those cases are dealt with in detail which hold that shifting gifts over by way of forfeiture on alienation of the first taker's interest and gifts over on intestacy are void. They are mentioned here because in them one of the reasons given for the result is that of the repugnancy of the gift over to the fee or absolute interest in the first taker.[7] This reason of repugnancy, often repeated,

Kennedy, 169 Ill. 360. See also Johnson *v.* Johnson, 98 Ill. 564; Schaefer *v.* Schaefer, 141 Ill. 337.

[3] Glover *v.* Condell, 163 Ill. 566.

[4] Jacobs *v.* Ditz, 260 Ill. 98; Kolb *v.* Landes, 277 Ill. 440, 446.

[5] Ahlfield *v.* Curtis, 229 Ill. 139; Mayer *v.* McCracken, 245 Ill. 551; Askins *v.* Merritt, 254 Ill. 92; Ashby *v.* McKinlock, 271 Ill. 254; Pitzer *v.* Morrison, 272 Ill. 291; McClintock *v.* Meehan, 273 Ill. 434; Gavvin *v.* Carroll, 276 Ill. 478; Aloe *v.* Lowe, 278 Ill. 233; Blackstone *v.* Althouse, 278 Ill. 481; Fitzgerald *v.* Daly, 284 Ill. 42; Fulwiler *v.* McClun, 285 Ill. 174; Smith v. Carroll, 286 Ill. 137; Morris *v.* Phillips, 287 Ill. 633.

[6] *Post,* §§ 717-725.

[7] In Ackless *v.* Seekright, Breese (Ill.) 76, our Supreme Court approved 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. See Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 203; Wilson *v.* Turner, 164 Ill. 398, 405-

came in the minds of some judges to mean that the gift over was void because it was an attempt to cut short a previous absolute bequest or devise in fee. This meant that all shifting executory devises and all shifting interests by deed were void.[8] It was evidently while laboring under this misapprehension, induced by an over-emphasis of the reason of repugnancy, that our Supreme Court in *Ewing v. Barnes*[9] and *Silva v. Hopkinson*[10] held an ordinary executory devise over on a definite failure of issue of the first taker void, and in *Palmer v. Cook*[11] held a similar shifting interest by deed void. In all these cases alike the court rested its decision on the ground of repugnancy, not perceiving at all that that reason was confined to gifts over on intestacy and gifts over by way of forfeiture on alienation by the first taker. 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, "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[12] and adopted by this court in *Wolfer v. Hemmer.*" In recent cases the court has not only repudiated *Ewing v. Barnes*, *Silva v. Hopkinson*[13] and *Palmer v. Cook*[14] but has clearly recognized that while shifting executory devises in general are valid, gifts over by way of forfeiture on alienation by the first taker and gifts over on intestacy are void for

410; Lambe *v.* Drayton, 182 Ill. 110, 116; Dalrymple *v.* Leach, 192 Ill. 51, 56; Wolfer *v.* Hemmer, 144 Ill. 554.

[8] 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."

[9] 156 Ill. 61; *ante*, § 469.

[10] 158 Ill. 386; *ante*, § 469.

[11] 159 Ill. 300; *ante*, § 445.

[12] 4 Com. 270.

[13] Johnson *v.* Buck, 220 Ill. 226, 235; Morton *v.* Babb, 251 Ill. 488, 492.

[14] *Ante*, § 462.

special reasons, and that the reason of repugnancy, so far as it may be a reason at all, applies only to the latter class of shifting interests.[15]

TITLE III.

BY MEANS OF TRUSTS—WHETHER CREATED INTER VIVOS OR BY WILL.

§ 472. Equitable springing and shifting interests valid: So far as equitable springing and shifting future interests are concerned, their general validity, apart from the question of remoteness, and the rules restricting the creation of gifts over by way of forfeiture on alienation, may be entirely relied upon.[16]

TITLE IV.

VALIDITY OF GIFTS TO CLASSES.

§ 473. Under the feudal land law: If under the feudal land law a conveyance were attempted to be made to a class none of whom were *in esse,* without any preceding estate whatever, it failed entirely[17] for two reasons: *First,* because there was no transferee *in esse;* and *second,* because springing future interests even to an ascertained transferee were void. If a conveyance were attempted to A and his children "born and to be born," or to the children of A "born and to be born," where one child was *in esse,* the gift to the after-born child would, if valid, have been a shifting interest divesting *pro tanto* interests already vested in possession. This was contrary to the feudal rule and the gift to the after-born child failed entirely.[18]

[15] Mayer *v.* McCracken, 245 Ill. 551, 557; Williams *v.* Elliott 246 Ill. 548, 552; Forbes *v.* Forbes, 261 Ill. 424, 430.

[16] Gray's Rule against Perpetuities, § 69. In Wilson *v.* Galt, 18 Ill. 431, a springing trust by deed was fully sustained.

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. 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; Hull *v.* Ensinger, 257 Ill. 160.

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; Johnson *v.* Buck, 220 Ill. 226; Defrees *v.* Brydon, 275 Ill. 530, 546.

[17] 1 Hayes on Conveyancing, 5th ed. p. 119; *ante,* § 26.

[18] *Id.*

§ 474. **By devise after the Statute of Wills:** By will springing and shifting executory devises were allowed. This meant that the devise to a class, none of whom were *in esse*, was valid even though no preceding interest was attempted to be conferred. The devise vested in the first member of the class born, subject to open and let in the others who were, by the proper interpretation of the devise, included. So if a member of the class were *in esse* when the testator died and if the devise were to those "born and to be born," the gift to the member of the class *in esse* took effect subject to open and let in the others.[19] If by devise there is limited a life estate to A with a remainder to the children of A and the remainder vests in interest in one child born before A's death, it is subject to open and let in others born after the testator's death and before the death of the life tenant.[20]

§ 475. **By a conveyance inter vivos which can take effect as a bargain and sale or otherwise by way of use—(1) If the conveyance is to "the children of A born and to be born" and A has at the time of the conveyance no children, can the after-born children 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.[21] 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,[22] has set out the reasoning upon which a bargain and sale to a person not *in esse* is to be sustained. Owing, however, to the turn which the authorities in this state have taken in regard to the problem discussed in the next section, the application of the views set out must be regarded as in doubt. In *Kepler v. Castle*[23] the court appears to have expressed a definite opinion that a deed to "the heirs"

[19] Mogg *v.* Mogg, 1 Mer. 654; Gooch *v.* Gooch, 14 Beav. 565; Eddowes *v.* Eddowes, 30 Beav. 603; Cook *v.* Cook, 2 Vern. 545; Theobald on Wills, 7th ed. 311.

[20] See *ante*, § 308.

[21] *Ante*, §§ 62, 456.

[22] §§ 61-65.

[23] 281 Ill. 444. See also Duffield *v.* Duffield, 268 Ill. 29.

of a husband and wife who were then alive is void because no heirs are or can be ascertained when the deed becomes effective.

§ 476. (2) 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 after-born children of A are excluded.[24] This goes upon the ground that, by the proper construction of the deed, the grantor intended that only existing children should take.[25] 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? This question has in other jurisdictions very properly received an affirmative answer.[26]

Two very recent Illinois cases have answered the question in the negative.[27] In *Morris v. Caudle*,[28] 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.[29] We have, then, a holding that such an intent cannot be given effect in a deed in the ordinary form in use in this

[24] Faloon *v.* Simshauser, 130 Ill. 649; Elphinstone on Interpretation of Deeds, p. 358.

[25] *Post*, § 564.

[26] Mogg *v.* Mogg, 1 Mer. 654; Kales' Cases on Future Interests, 232; 3 Preston on Conveyancing, 555; 1 Hayes on Conveyancing, 5th ed. 119, *ante*, § 452; Mellichamp *v.* Mellichamp, 28 S. C. 125; Pierce *v.* Brooks, 52 Ga. 425.

[27] See also Cooper *v.* Cooper, 76 Ill. 57, 65, 66.

[28] 178 Ill. 9.

[29] See, for instance, Weld *v.* Bradbury, 2 Vern. 705, where upon a devise to children of A, A having no children at the time the will

state. *Miller v. McAlister*,[30] 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.[31]

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*.[32] 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:*[33] "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 afterward be divested *pro tanto* in favor of an after-born child. You cannot do by deed what you can do by will.[34] Such a rule is reactionary. It is the application of a principle which got its life from the feudal system of conveyancing.[35] 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,[36] and that, whatever supposed difficulties there may be with regard to a bargain and sale to persons, none of whom are *in esse*,[37] there can be no doubt about the validity of the limitations where there is one grantee *in esse* who might have paid the consideration and taken the whole legal title at once.[38] It ignores, too, the freedom which such modern legislation as sec. 1 of our Act on Conveyances[39] may have introduced.[40]

was made or at the death of the testator, it was held that all the children of A born at any time were included.

[30] 197 Ill. 72.

[31] See also Duffield *v.* Duffield, 268 Ill. 29; Dick *v.* Ricker, 222 Ill. 413, 416.

[32] 130 Ill. 649.

[33] 197 Ill. 72, at p. 77.

[34] *Post*, § 467.

[35] *Ante*, §§ 26, 451.

[36] *Ante*, § 456.

[37] Ante, § 475.

[38] 1 Hayes on Conveyancing, 5th ed. 119; *ante*, § 452.

[39] R. L. 1827, p. 95, § 1; R. S. 1845, ch. 24, § 1 (p. 102); R. S. 1874, ch. 30, § 1; 1 A. & D. R. E. S. pp. 75, 100.

[40] *Ante*, § 458.

§ 477. (3) Suppose that by deed the limitations are to A for life remainder to the children of A "born and to be born," and one child is in esse at the time of the conveyance: On principle there is no difference between the situation of the after-born child in this case and that of the after-born child where there is no preceding life estate. If he cannot take where no preceding estate is limited then he cannot take in the case now put. Yet our Supreme Court is committed to the rule that when an estate tail is created by deed, which the statute turns into a life estate in the donee in tail with a remainder in fee to his children vested and indefeasible on the birth of any child, the remainder opens during the life of the life tenant to let in after-born children.[41] It is difficult to believe that the same result will not be reached when the court has before it a case where there is limited by deed a life estate to A with a remainder vested in A's children on birth.[42]

§ 478. By the creation of equitable interests in favor of the class: If the interest of the class is equitable there is, it is believed, no reason why (apart from such special rules as the Rule against Perpetuities) the gift to the class should not be carried out as it is expressed. If land be limited to trustees upon trust, with active duties, for the children of A "born and to be born," the after-born children are entitled whether any were *in esse* when the deed was executed or not and whether there is any preceding life estate or not.

TITLE V.

ALIENATION OF SPRINGING AND SHIFTING FUTURE INTERESTS IN LAND—PARTITION.[43]

§ 479. 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

[41] Richardson *v.* Van Gundy, 271 Ill. 476; Moore *v.* Reddel, 259 Ill. 36; Kyner *v.* Boll, 182 Ill. 171.

[42] Indeed, the Supreme Court in its first opinion in Hill *v.* Hill, 264 Ill. 219 (not published), where it held the remainder to the children of the life tenant vested, also held that the remainder opened to let in after-born children.

[43] As to partition of executory interests, see *ante*, § 398.

that there was as much freedom in the alienation of executory devises as in the alienation of contingent remainders.[44] If so the executory devise may pass by descent[45] 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[46] just as a contingent remainderman may release to the holder of the particular estate.[47] It seems, however, that an executory devisee's legal interest is not subject to sale on execution.[48]

§ 480. 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.[49]

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.[50] 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.[51] Until *Pells v. Brown*,[52] 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.[53] Perhaps it was during that time that the rules applicable to the

[44] *Ante*, §§ 320 *et seq.*

[45] Ackless *v.* Seekright, Breese (Ill.) 76; Blackstone v. Althouse, 278 Ill. 481; Fitzgerald *v.* Daly, 284 Ill. 42.

[46] Williams *v.* Esten, 179 Ill. 267. But see Cummings *v.* Lohr, 246 Ill. 577; *ante*, § 320a.

[47] *Ante*, § 320a.

[48] Ridgeway *v.* Underwood, 67 Ill. 419, 430; Jacobs *v.* Ditz, 260 Ill. 98.

[49] Smith *v.* Carroll, 286 Ill. 137; Gavvin *v.* Carroll, 276 Ill. 478, 481; *ante*, § 321. As to how far an executory devise may pass by estoppel upon a lease and release, see Ridgeway *v.* Underwood, 67 Ill. 419, 428.

[50] Smith on Executory Devises, § 751; 2 Preston on Abstracts, 284.

[51] *Ante*, § 48.

[52] Cro. Jac. 590; 2 Roll. Rep. 196.

[53] Gray, Rule against Perpetuities, §§ 142-147, 159.

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,*[54] even before vesting, it was too late to change the rule concerning their transferability. Since our Supreme Court has followed the common law rule that contingent remainders are inalienable *inter vivos,* we should expect the court to follow with the same strictness the rule that springing and shifting future interests are inalienable *inter vivos.* Yet in two recent cases there are *dicta* to the effect that where "the identity of the executory devisee is certain and the object of the devise is fixed, so that upon the happening of the contingency the executory devisee will take the estate, the future interests is *assignable* and transmissible."[55] Very likely the court was only referring to transmissibility by descent.

§ 481. **In equity**: In equity at least springing and shifting future interests are assignable[56] in the sense that the attempted conveyance will be treated as a contract to convey, of which equity will give specific performance if the proper requirements as to the consideration given have been fulfilled,[57] and if the event has happened upon which the future interest is to take effect.[58] The conveyance, however, must show an intent to transfer the future interest. 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 ex-

[54] "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.

[55] Per Cartwright, J., in Blackstone *v.* Althouse, 278 Ill. 481, 486. In Gavvin *v.* Carroll, 276 Ill. 478, 481, Farmer, J., said: "It is generally, though perhaps not universally, held that executory devises are alienable when the devisee is an ascertained person."

[56] Smith on Executory Devises, § 749.

[57] See *ante,* §§ 369 *et seq.*

[58] Cummings *v.* Lohr, 246 Ill. 577.

pressly. Suppose, for instance, there is merely 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 will be no expressed intent to convey the future interest,[59] and it seems to make no difference whether the quit claim deed be governed by the law as it stood before[60] the act of 1872 concerning the effect of the statutory quit claim deed, or after that act.[61] Even where the grantor and grantee are co-tenants and their quit claim deeds are mutual and by way of partition, only the interest in possession is affected and the future interest remains as it was. Thus, if each has an undivided interest in fee with a gift over in case he dies without children to the survivor, upon a partition and giving of quit claim deeds each will hold the fee which is allotted to him, but with a gift over to the survivor if he dies without children.[62]

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 in equity to transfer the executory devise? The cases seem inclined to answer this question in the negative. In *Kingman v. Harmon*,[63] the testator (as the court construed the will there involved) created a springing executory interest by devising lands to his children to be divided among them when the youngest attained the age of twenty years.[64] The guardian of the children by proceedings in the county court,[65] mortgaged the children's interest. On a bill to foreclose the mortgages it was assumed that since the children's interest was contingent (as the court

[59] 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.

[60] Ridgeway *v.* Underwood, 67 Ill. 419.

[61] Glover *v.* Condell, 163 Ill. 566; Thompson *v.* Becker, 194 Ill. 119. See also Shephard *v.* Clark, 38 Ill. App. 66. Compare Goff *v.* Pensenhafer, 190 Ill. 200, 216.

[62] Thompson *v.* Becker, 194 Ill. 119; Striker *v.* Mott, 28 N. Y. 82. *Contra*, Coates Street, 2 Ashm. (Pa.) 12.

[63] 131 Ill. 171.

[64] 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.

[65] No objection was made to these proceedings, so it is assumed that they were proper.

put it) the wards had no assignable estate. It may be that the court meant that under the statute the guardian had no power to convey an interest which was not assignable *at law* by the party if he had been of age.[66] Such a view would dispose of the case without any decision as to whether in equity the deed would be taken to refer to the future interest and thereby operate in equity as if made by the ward if of full age.

Both *Nevius v. Gourley*[67] and *Cassem v. Kennedy*,[68] present instances of the attempted transfer of legal executory devises. In both cases there had been a conveyance by deed 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 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."

TITLE VI.

WHEN AN EXECUTORY INTEREST VESTS IN INTEREST.

§ 482. **Springing and shifting future interests never vest in interest till they take effect in possession or are turned into vested remainders:**[70] It does not follow, however, that an executory interest is always contingent until it vests. It may be an interest which is neither vested nor contingent,[71] but merely what is known as a "certain executory interest."[72] Such is a gift to take effect at a certain time in the future,

[66] Shephard *v.* Clark, 38 Ill. App. 66; *ante*, § 320.

[67] 95 Ill. 206; 97 Ill. 365.

[68] 147 Ill. 660.

[70] 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.* Dickinson, 20 Ill. 193, 196, must be regarded as a slip.

[71] Gray's Rule against Perpetuities, § 114; 1 Fearne, Contingent Remainders, 1, Butler's note.

[72] Smith on Executory Devises, §§ 85, 90, 117, 301.

which is sure to arrive—as a gift to come into possession after ten years,[73] or after a certain life.[74]

In *Blanchard v. Maynard*,[75] it was 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 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*,[76] to be the law of this state, it is clear that the ground that the son had no vested interest in the lands involved till the ten years had expired was sufficient.[77]

In *Burton v. Gagnon*,[78] 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 devises 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

[73] Gray's Rule against Perpetuities, § 114; Blanchard *v.* Maynard, 103 Ill. 60; Rhoads *v.* Rhoads, 43 Ill. 239, *post*, § 732.

[74] 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.

[75] 103 Ill. 60.

[76] See *post*, § 484.

[77] 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; *ante*, § 30.

[78] 180 Ill. 345.

vested—apparently upon some such view of what interests are vested as afterwards obtained in *Boatman v. Boatman*[79] and *Chapin v. Nott.*[80] The court said:[81] "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 only the opinion of a minority. Three judges dissented entirely, and Mr. Justice 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.[82]

TITLE VII.

INDESTRUCTIBILITY OF SPRINGING AND SHIFTING FUTURE INTERESTS.

§ 483. General principle: 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 contingent future interests after a particular estate of freehold to vest in possession at the termination of the preceding estate or fail entirely,[83] 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*,[84] in 1620, it is fundamental that springing and shifting interests by way of use or devise are not destructible in this sense by any act of the first taker.[85] There is

[79] 198 Ill. 414; *ante*, § 365.

[80] 203 Ill. 341; *ante*, § 366.

[81] p. 356.

[82] *Post*, § 725.

[83] *Ante*, §§ 28, 97, 310 *et seq.*

[84] Cro. Jac. 590; 2 Roll. Rep. 196, 216. 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."

[85] Williams *v.* Elliott, 246 Ill. 548, 552; Jacobs *v.* Ditz, 260 Ill. 98; Blackstone *v.* Althouse, 278 Ill. 481, 485, 486; Morris *v.* Phillips, 287 Ill. 633.

Where the first taker has a fee subject to a shifting executory devise over, there is no reversion in

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 usually held invalid as being an illegal forfeiture upon alienation.[86] 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, 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*,[87] that the future interest might be defeated.

TITLE VIII.

WHETHER DOWER IN THE FIRST TAKER'S FEE IS DEFEATED BY THE TAKING EFFECT OF A SHIFTING GIFT OVER.

§ 484. Buckworth v. Thirkell:[88] In this case a fee was devised to A with a shifting executory devise over to B if A died under twenty-one without having issue. The event happened. The executory devise took effect. It was held, however, that A's wife had dower as against the executory devisee. This has recently been followed in this state.[89] The soundness of this has been questioned and it should be observed that where A had a fee with a general power to appoint by deed or will and appointed in his lifetime to B and then died, A's wife did not have dower.[90] Yet the cases are the same in principle. The appointee, when the power was exercised, took a shifting interest cutting short the previous fee of A.

which the first taker's interest can merge: Morris *v.* Phillips, 287 Ill. 633; Stoller *v.* Doyle, 257 Ill. 369.

[86] *Post*, §§ 717-725.

[87] 107 Ill. 125; *post*, §§ 724, 725.

[88] Coll. Juris., 322; 3 Bos. & Pul. 652, note; Co. Lit. 241a, Butler's note; 6 Gray's Cases on Prop., 2nd ed. 588; 1 Scribner on Dower, 2nd ed. 302; 10 Am. & Eng. Enc. 2nd ed. 161; *ante*, § 465, note 72.

[89] Aloe *v.* Lowe, 278 Ill. 233.

[90] Sugden on Powers, 8th ed. 144.

CHAPTER XIX.

FUTURE INTERESTS IN PERSONAL PROPERTY.[1]

§ 485. **Their validity—In general**: Where personal property is conveyed either *inter vivos*[2] or by will[3] upon certain trusts, it seems that the equitable future interests of whatever sort are validly created.[4] The important problem of his 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*[5] the court recognized the force of *Manning's* case[6] and *Lampet's* case[7] which established the validity of such a future interest. In *Welsch v. Bellville Savings Bank*[8] 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[9] created in this manner.

As regards *chattels personal* it seems to be the law here that the future interest limited by *will* after a gift for life is enforcible.[10] The validity of the same future interest when at-

[1] *Ante*, §§ 107-112.

[2] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 205.

[3] 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.

[4] Gray on Rule against Perpetuities, §§ 75, 78, 87.

[5] 45 Ill. 421, 427.

[6] 8 Co. 94b.

[7] 10 Co. 46b (1612).

[8] 94 Ill. 191, 204.

[9] See *infra* this section.

[10] 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;* Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 353, *semble;* Dean *v.*

tempted 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.*[11] But since the case of *McCall v. Lee*[12] the rule in this state is 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.

§ 486. 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.[13] Suppose, now, that a future interest in these same chattels be limited to B absolutely after the death of A, to whom a gift for life is made, 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?[14] This is a question of some nicety upon the authorities at large.[15] Our Supreme Court has not hinted at the result which it might reach.[16]

Northern Trust Co., 266 Ill. 205. See also Wilson *v.* Turner, 164 Ill. 398; 55 Ill. App. 543; Randolph *v.* Hamilton, 84 Ill. App. 399.

In Defrees *v.* Brydon, 275 Ill. 530, 542, "Executory devises are applicable to testamentary dispositions of personal property as well as real estate."

[11] 94 Ill. 191, 205.

[12] 120 Ill. 261. See also Thornton v. Davenport, 1 Scam. (2 Ill.) 296, 299, *semble, accord.*

[13] 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.

[14] *Ante,* § 722.

[15] 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).

[16] Observe, however that if the chattels personal specifically bequeathed be not of the sort neces-

§ 487. 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*,[17] 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,[18] the view of the learned judge may be doubted.

§ 488. Whether vested or executory[19]—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.[20] 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.[21] This was certainly the view upon which the earlier English cases proceeded.[22] "The reason why there could be no estate or interest for life in a chattel real," says Professor Gray,[23] "was the technical one that in the eye of the law a life estate was greater

sarily consumed in the using, the addition of a power for life in the first taker to sell, dispose, or use up for his own benefit (*post*, §§ 648 *et seq.*; 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. See *post*, § 726.

[17] 94 Ill. 191, 204.

[18] "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law Rev. 397, 417; Gray's Rule against Perpetuities §§ 86, 88; Hoare *v.* Parker, 2 T. R. 376; Anonymous (1802), 2 Haywood (3 N. C.) 161; Duke *v.* Dyches, 2 Strob. Eq. (S. C.) 353n; Brummet *v.* Barber, 2 Hill, (S. C.) 543; Rogers *v.* Randall, 2 Speers. (S. C.) 38.

[19] On vesting of legacies in general, see *post*, §§ 495, *et seq.*

[20] For a full treatment of this question see "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law Rev. 397.

[21] Waldo *v.* Cummings, 45 Ill. 421, 427 (adopting the doctrine of Manning's Case & Lampert's Case); Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 204.

[22] "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law Rev. 397, 410, 411.

[23] "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law Rev. 397, 402.

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."

§ 489. **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 the court, whether it is vested or executory. In *Waldo v. Cummings* [24] the court said, in substance, that the gift of a chattel [25] 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* [26] 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 acquires nothing but the right to the use, and such is the recognized doctrine at the present time." In *Glover v. Condell* [27] we find an apparent subscription to the statement from the American & English Encyclopedia of Law [28] 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 vested, it can also be executory in the ordinary sense. Finally, in *Hobbie v. Ogden* [29] we find the court saying that "the principles applicable to the vesting of real estate apply generally in the case of personal property."

[24] 45 Ill. 421, 427.

[25] 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*, § 488.

[26] 94 Ill. 191, 204, 205.

[27] 153 Ill. 566, 586.

[28] Vol. 20, 1st ed. 930.

[29] 178 Ill. 357, 365.

§ 490. 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[30] 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.*[31] 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 earlier English cases. 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.[32]

§ 491. Whether the future interest in chattels personal is contingent upon the one who takes it surviving the life tenant or not: This is the same question which comes up in regard to remainders in real estate after a life estate.[33] Even though the rules regarding the vesting of legacies apply, the interest in personal property is *in futuro* only for the convenience of the estate—to accommodate the life estate—and no contingency of survivorship is found by interpretation unless it be definitely expressed.[34] That in effect makes the problem of construction the same whether real or personal property is involved. Cases of this sort, where only personal property was involved, have,

[30] "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law Rev. 397, 413-414, 417.

[31] 36 Ill. 355. For other cases in accord with this see Professor Gray's article, 14 Harvard Law Review, 397, 418, note 5; cases *contra* referred to pp. 417-418.

[32] "Future Interests in Personal Property," by John Chipman Gray, 14 Harv. Law. Rev. 397, 410-411.

[33] *Ante,* §§ 329 *et. seq.*

[34] *Post,* §§ 503 *et seq.* But see *In re Tritton,* 6 Morrell, Bankruptcy Cases, 250.

therefore, already been classified with the cases involving remainders of real estate.[35]

§ 492. Rights of those interested in personal property[36] in which future interests are created—Enjoyment in specie or conversion and investment—Where the intent of the settlor 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.[37] 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.[38] 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.[39]

[35] Strickland *v.* Strickland, 271 Ill. 614; *ante,* §§ 345, 346.

[36] Questions on the subject matter of this and §§ 493 and 494 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. 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."

[37] Buckingham *v.* Morrison, 136 Ill. 437, 449.

[38] 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,* § 648.

[39] *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.* Wetzel, 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 con-

§ 493. Where no intent has been explicitly indicated by words: For the determination of the result to be reached in this sort of case certain rules have arisen 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.[40]

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.[41] The investment must, it is believed, be in such securities as trustees are allowed to hold.[42] 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,[43] 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?[44]

sume 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.

[40] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206; Buckingham *v.* Morrison, 136 Ill. 437, 446.

[41] 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.

[42] 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.

[43] For a more particular enumeration of property of this description, see *infra* in this same paragraph.

[44] In Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206, the Court speaks as if any general be-

3. Suppose, as is frequently the case, the bequest is a general residuary gift of personal estate:[45]

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,[46] annuities, or chattels, such as live stock,[47] or 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.[48] It seems entirely clear that the wasting or perishable property must be at once converted and the proceeds invested.[49] 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.[50] 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

quest of wasting personal property, whether residuary or otherwise, must be converted and the proceeds invested.

[45] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, (bequest of "all my estate of whatever the same may consist"); Burnett *v.* Lester, 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.

[46] Burnett *v.* Lester, 53 Ill. 325, 335.

[47] *Id.*

[48] Welsch *v.* Belleville Savings Bank, 94 Ill. 191, 206.

[49] 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.

[50] See, however, Dickinson *v.* Griggsville Nat. Bk., 209 Ill. 350, 354.

proper for trustees to hold, and the income from these latter only, paid over to the life tenant.[51] This seems to be an extension of the rule which requires perishable or depreciating property to 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 the property in question. Nevertheless, the improper trustees' investments must be converted in order to avoid such danger.[52]

One reason for making a 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 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.[53] "In some of the American cases,"

[51] Buckingham *v.* Morrison, 136 Ill. 437, 448, *semble*, (partnership interest must be converted).

[52] 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.

[53] 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

our Supreme Court said in *Buckingham v. Morrison*,[54] "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,[55] the standard rate of interest to be used,[56] and whether the income in favor of the life tenant is to be computed at simple interest or with rests.[57]

§ 494. **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 possession of the property *in specie*—as in the case of a specific bequest—no security can be demanded, unless there is a threatened damage.[58]

2. If the first taker is entitled to the possession of the property *in specie* and has power, either express 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*,[59] and in *Welsch v. Belleville Savings Bank*,[60] certainly furnishes some

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 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.

[54] 136 Ill. 437, 448.

[55] Buckingham v. Morrison, 136 Ill. 437, 447.

[56] *Id.* 448.

[57] *Id.* 448.

[58] Williams on Executors (7th Am. from 9th Eng. ed.) star page 1252-3.

[59] 53 Ill. 325, 335.

[60] 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." [61]

Hetfield v. Fowler,[62] 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, it is believed, support such a proposition. 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.[63] 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 at least to 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.[64]

[61] 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.

[62] 60 Ill. 45, 48.

[63] This distinguishes the case from Waldo *v.* Cummings, 45 Ill. 421, 430, where the time having come by the express terms of the will for distributing to the legatee for life, the trustees had no discretion but to distribute and could not demand security.

[64] The writer at first thought that the language of the court in Hetfield *v.* Fowler went very far toward the establishment of a rule that the Probate Court might require the legatee to give security. Upon submitting to the Honorable

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.[65] The result reached in *Gannon v. Peterson*,[66] may indicate that such a distinction would be sustained. There it was held 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

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."

[65] Gray's Rule against Perpetuities, § 90; 2 Woerner on Administration, 2nd ed. § 454.

[66] 193 Ill. 372.

that the event would happen upon which the gift over would take effect.

5. Where real estate is devised to A for life with power to sell the fee and A exercises the power and converts the real estate into personal property, if the power is merely to convert and enjoy the proceeds for life, the life tenant must invest and use the income only and is under a fiduciary obligation to preserve the principal for the remainderman.[67] Even if the life tenant has unlimited power to use up the proceeds of sale it is suggested that, to prevent the gift over being void for uncertainty, the life tenant should be held to be under a fiduciary obligation at least to account, so that what is left may at all times be ascertainable. Where the life tenant has a limited power to use the proceeds for a particular purpose—as for her support—it is submitted that the life tenant should be subject to the fiduciary obligation to account so that what part of the principal is so used and what part remains may at all times be ascertainable.[68]

[67] Barton *v.* Barton, 283 Ill. 338.

[68] But see Ellis *v.* Flannigan, 279 Ill. 93.

CHAPTER XX.

VESTING OF LEGACIES.

§ 495. **Sense in which "vest" is used when the question of the vesting of legacies is considered:** "Vest" is not here used in the sense in which the feudal land law employed the term—*namely,* as that quality of a remainder which consisted in its standing ready throughout its continuance to take effect in possession whenever and however the preceding estate determined.[1] It is used in the more popular sense as describing that quality of an interest which consists either in its not being subject to any condition precedent in form to its taking effect in possession, or in its taking effect in possession immediately as distinguished from the future. If the legatee dies before the period of distribution and the question arises whether the legatee's representatives are entitled, the sole question is whether the legacy was contingent on the legatee's surviving the period of distribution. In that case whether the legacy is vested or not is simply the question whether the legacy is subject to a condition precedent that the legatee must survive the period of distribution or not. If the point is whether the legacy payable at a future time violates the Rule against Perpetuities, it is not enough that the legacy is not subject to a condition precedent that the legatee survive the period of distribution. The legacy would still violate the rule if it were a certain executory interest—that is, an interest limited certainly to take effect in possession at too remote a time, but not subject to any condition precedent of survivorship and hence transmissible in the meantime upon the death of the legatee. To render such a legacy valid it must appear to be not only not contingent but actually effective in possession at once (or within the time required by the Rule against Perpetuities) subject only to a postponement as to payment. Here, then, the distinction between a legacy which is vested and one which is not is a distinction between a legacy

[1] *Ante,* § 29.

which takes effect in possession at once (or within the limits required by the Rule against Perpetuities) subject to a postponement of the payment merely, and one which does not take effect at all till too remote a time whether it be contingent upon the legatee surviving that time or not. Thus, the problem of whether a legacy is vested or not conceals at least two problems which are slightly different. It is highly desirable, therefore, to deal with the actual problems involved without leaning too much on the term "vest."

§ 496. **A distinction must be drawn between the case where the question is whether a legacy is contingent on the legatee surviving a future period of distribution and where the same question arises in respect to legal remainders and springing interests in land:** The considerations involved in determining whether a legal remainder is subject to a condition precedent that the remainderman survive the life tenant have been dealt with *ante*, §§ 329-356. It has been assumed that when the remainders are equitable the courts will reach the same conclusion as where they were legal, on the principle that equity follows the law. So where the future interest in land is a springing executory interest which vests in interest and in possession at a future time, the question may arise whether the one who is to take must survive that time.[2] In the present chapter the same problem with reference to legacies and trusts of personal property which are made payable at a future time is considered. Are they contingent upon the legatee's surviving the period of distribution? Do they take effect in possession at once subject to a postponement as to payment, or are they actually not given until the future time?

The reason for this separate treatment of a question of construction which is apparently the same, regardless of the subject-matter of the gift, is this: The determination of whether a legal remainder was subject to a condition precedent of survivorship was decided in England by the common law courts. A remainder which was so contingent was destructible by a rule of law defeating intent. The common law courts, therefore, leaned very strongly against finding any such contingency. They would not imply it. They insisted that it must expressly appear.[3] So where legal springing and shifting future interests

[2] *Ante*, § 482.

[3] *Ante*, §§ 329 *et seq.*

in land were involved the common law courts passed upon the question of construction. It is believed that they required here, as well as in the case of remainders, that any contingency that the devisee survive the period when the interest vested in possession must be definitely expressed.[4] When the courts of chancery dealt with equitable remainders in land they followed the rules of the courts of law and declined to find by any process of implication or construction a condition of survivorship unless it was explicitly expressed.[5] The question whether a legacy payable at a future time was contingent upon the legatee's surviving that time came up in the chancery court in suits for the administration of deceased's estates. In these cases the chancery adopted and followed its own rules, based to some extent, upon the civil law.[6] It happened, therefore, that the results reached rested upon some rules and considerations which were not recognized as effective by the common law courts in dealing with future interests in land. So where equitable interests in personal property were involved, the court of chancery followed its own rules applicable to the cases of legacies. The result has been, and still is, that the cases dealing with whether a legacy or an equitable interest in personalty payable at a future time is contingent upon the legatee surviving that time must be considered apart from similar questions as to legal or equitable interests in land by way of remainder.

TITLE I.

LEGACIES CHARGED ON LAND.

§ 497. A distinction must be observed between the cases where the question is whether a legacy payable out of the personal estate is contingent on the legatee surviving at a future period of distribution and where the same question arises in respect to a legacy charged on land and actually paid out of the proceeds of the land: Where a legacy payable *in futuro* was charged on land and actually paid out of the proceeds of

[4] *Ante*, §§ 329 *et seq.*

[5] As to the position which our courts have taken where equitable interests not analogous to remainders in land or equitable interests in a mixed fund of real and personal property are involved, see *post*, § 528.

[6] Leeming *v.* Sherratt, 2 Hare, 14 (1842); McCartney *v.* Osburn, 118 Ill. 403, 420.

the land, the determination of whether the legacy was contingent on the legatee surviving the period of distribution was subject to the rules enforced by the common law courts. Even where the question was decided by the chancery court in the administration of estates that court purported to follow the decisions of the common law courts.[7] The latter seem to have determined that a legacy not payable till a future time was regularly contingent upon the legatee surviving the date of payment. Even when the legacy was "to A, *to be paid* at twenty-one," so that it would not, as a legacy payable out of personal property, be contingent on A's reaching twenty-one, it was held to be contingent on A's surviving twenty-one if and so far as the legacy was paid out of the proceeds of real estate upon which it was charged.[8] This result was recognized as a proper one by our Supreme Court in *McCartney v. Osburn*.[9] Even when interest was given in the meantime upon a legacy charged on land the legacy, so far as it was actually paid out of the land, was held by the English common law courts to be contingent upon the legatee surviving the period of distribution.[10] It was held, however, that where payment was "postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life," the legacy was not contingent upon the legatee surviving the date of payment.[11] This was recognized and applied in *Carper v. Crowl*[12] and a legacy payable out of land after the death of the widow, who had a life estate in it,

[7] Per Lord Hardwicke, C., in Prowse *v.* Abingdon, 1 Atk. 482, 486 (1738). See *accord*, Pearce *v.* Loman, 3 Ves. 135 (1796).

[8] Yates *v.* Phettiplace, 2 Vern. 416; Chandos *v.* Talbot, 2 P. Wms. 601.

[9] 118 Ill. 403, 420. 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.

[10] Gawler *v.* Standerwick, 2 Cox 15. But see Murkin *v.* Phillipson, 3 M. & K. 257.

[11] Per Lord Cottenham, C., in Evans *v.* Scott, 1 H. L. C. 43, 57 (1847). See also 1 Jarman on Wills (6th ed. Bigelow) star page 792. Same passage quoted with approval in Powers *v.* Egelhoff, 56 Ill. App. 606; Theobald on Wills, 2nd ed. 407 (same statement); King *v.* Withers, 2 Eq. Cas. Ab. 656, pl. 10, Cas. temp. Talb. 117; 5 Gray's Cases on Prop., 1st ed. 266.

[12] 149 Ill. 465, 482, 485.

was not contingent on the legatee surviving the date of payment.

The different rules as to the contingency of legacies payable out of personalty and those charged upon, and actually paid out of, land, might result in the same legacy being non-contingent so far as it was payable out of personalty and contingent on the legatee surviving the period of distribution so far as it was payable out of the proceeds of land on which it was charged.[13]

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.[14] The rules applicable to the vesting of legacies payable out of personalty[15] therefore apply.[16]

TITLE II.

LEGACIES ACTUALLY PAID OUT OF PERSONAL PROPERTY.

§ 498. The results reached by the courts are for the most part merely suggestive as to what considerations will furnish a substantial inference for or against the vesting of the legacy: It is improper to dogmatize about the results reached by courts in determining whether or not a legacy is contingent upon the legatee surviving the period of distribution. Each case depends upon a balance of all the considerations for and against the presence of the contingency and most cases will present a somewhat different alignment of these considerations. All the writer can do is to classify the elements of context which make for and against the contingency and indicate as far as possible the weight which the courts give to each. The process of balancing these considerations must be done by the practitioner in each

[13] Chandos *v.* Talbot, 2 P. Wms. 601.

[14] Lash *v.* Lash, 209 Ill. 595, 604; Ebey *v.* Adams, 135 Ill. 80, 85; Dorsey *v.* Dodson, 104 Ill. App. 589, 592.

[15] Theobald on Wills, 2nd ed. 407; *In re* Hart's Trusts, 3 DeG. & J., 195.

[16] Scofield *v.* Olcott, 120 Ill. 362; Hawkins *v.* Bohling, 168 Ill. 214.

case as it arises. The writer has, however, at the end of this chapter undertaken to present a few leading cases and to analyze them for the reader for the purpose of illustrating the process of balancing all the elements of a context for and against the contingency of the gift.[17]

TOPIC 1.

WHERE THERE IS A DIRECT GIFT WITH A SUPERADDED DIRECTION TO PAY AT A FUTURE TIME.

§ 499. **In these cases the context justifies the prima facie inference that the gift is immediate subject only to a postponement as to payment and is not contingent upon the legatee surviving the period of distribution:** If, for instance, a legacy be bequeathed "to A, *to be paid* at twenty-one," the gift is construed to take effect at once with merely a postponed enjoyment. The legacy is, therefore, said to vest immediately upon the testator's death.[18] This follows the well settled rule of the English cases.[19]

Howe v. Hodge[20] presents an example of such a context. 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

[17] *Post*, § 527.

[18] 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, 419-422.

[19] Theobald on Wills, 2nd ed. 410.

[20] 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.

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 above quoted, 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.[21]

So, in *Armstrong v. Barber*[22] and *Mettler v. Warner*,[23] where there was a direct gift to trustees with a direction that the trust was to continue for a certain number of years from the probate of the will, the gift to the trustees was clearly immediate and did not violate the Rule against Perpetuities.

Suppose 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 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. Such has been the holding in this state,[24] and elsewhere.[25]

Topic 2.

Where the Only Gift is to Be Found in the Direction to Pay or Divide at a Future Time.

§ 500. In such cases the context justifies the prima facie inference that the legacy is contingent upon the legatee sur-

[21] Theobald on Wills, 2nd ed. 410; 1 Jarman on Wills (6th ed. Bigelow), star page 796.

[22] 239 Ill. 389, 397.

[23] 243 Ill. 600, 608.

[24] Chapman *v.* Cheney, 191 Ill. 574; 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*, § 505, seems *contra*.

[25] Collier *v.* Grimesey, 36 Oh. St. 17.

viving the date of payment: This has been constantly recognized as the well settled rule.[26] It has been applied where the time of distribution is sure to arrive and is unconnected with the legatee—such as the expiration of a given number of years.[27] It applies also where the legacy is contained only in the direction to pay to the legatee at a certain age. Thus, where the legacy is "to A at twenty-one," it is contingent upon A's reaching that age.[28]

It has been asserted that the general rule which makes a legacy contained only in the direction to pay at a future time contingent "is usually applied where the gift is to a class, but the court will hesitate in applying it where the gift is to legatees by name."[29] It is difficult to deny this carefully phrased state-

[26] 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; Armstrong *v.* Barber, 239 Ill. 389, 399; Dime Savings Co. v. Watson, 254 Ill. 419, 425; Meldahl *v.* Wallace, 270 Ill. 220, 231 (*semble*); O'Hare *v.* Johnston, 273 Ill. 458, 467; Walker *v.* Walker, 283 Ill. 11.

[27] Walker *v.* Walker, 283 Ill. 11; Reid *v.* Voorhees, 216 Ill. 236 (disposition of the principal "thirty years after my death"—held contingent and void); Smell *v.* Dee, 2 Salk. 415 (legacy "to the two children of J. S. at the end of ten years after my decease"); Bruce *v.* Charlton, 13 Sim. 65 (legacy "at the expiration of ten years from the time of my death"); *Re* Eve, 93 L. T. R. 235 (legacy payable "six years after my decease"); *Re* Cartledge, 29 Beav. 583 (legacy of £1000 payable immediately after daughter's death); Hall *v.* Terry, 1 Atk. 502 (legacy payable six months after a certain reversion came into possession); Kountz's Estate, 213 Pa. 390, 399 (gift ten years after the testator's youngest grandchild reached twenty-one to the testator's grandchildren held contingent); Andrews *v.* Lincoln, 95 Me. 541 (gift thirty years after testator's death to two named grandchildren *in esse* at the testator's death, but if they died within the thirty year period then to their issue at the termination of said period—held gift to the issue of the grandchildren contingent and void); Anderson *v.* Menefee, 174 S. W. 904 (Tex.) (disposition of residue thirty years from testator's death to children or heirs of the body of such as die before that time).

[28] Bennett *v.* Bennett, 217 Ill. 434; 66 Ill. App. 28; Eldred *v.* Meek, 183 Ill. 26; Pitzel *v.* Schneider, 216 Ill. 87; Howe *v.* Hodge, 152 Ill. 252, 275-277; Cassem *v.* Kennedy, 147 Ill. 660; Schofield *v.* Oleott, 120 Ill. 362, 372; McCartney *v.* Osburn, 118 Ill. 403, 421, 423; Powers *v.* Egelhoff, 56 Ill. App. 606.

[29] Armstrong *v.* Barber, 239 Ill. 389, 400. In Dime Savings Bank *v.* Watson, 254 Ill. 419, 424, the court

ment, and yet it may easily be misleading. The fact is, the general rule is constantly applied where the legacy is to one by name as well as where the gift is to a class. It is submitted that the circumstance that the gift is to a class does not give rise to any substantial inference in favor of the contingency of the gift.[30] Of course, where the only gift is contained in the direction to pay to A "when" or "if" he reaches twenty-one, or "to such children of A as reach twenty-one," the context fortifies the inference, which arises according to the rule, that the legacy is contingent upon the legatee surviving the age in question.[31] The context may even more clearly require the gift to be contingent.[32]

§ 501. Cases where a difficulty arises in determining whether there is a direct gift with a superadded direction to pay at a future time, or a gift contained only in the direction to pay at a future time: In *Furness v. Fox*[33] a testator bequeathed to his grandson "five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor hereinafter named." It was held that the words "if he shall arrive to the age of twenty-one years" related to what followed and not to what went before, so that the gift was "to John William Furness; to be paid to him if he reached twenty-one:" Hence the gift was vested at once subject only to a postponement. This case at least indicates that where there is doubt the court will adopt the construction which vests the legacy.[34]

In two cases, however, our Supreme Court seems to have over-

emphasized the application of the general rule where the gift was to a class.

[30] *Post*, § 523.

[31] In Howe *v.* Hodge, 152 Ill. 252, 275-277, we have the very carefully considered *dictum* of the court that the gift 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.

[32] In Lunt *v.* Lunt, 108 Ill. 307, it was practically conceded that, apart from the effect of other clauses (*post*, § 519), the gift to the testator's children, which 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.

[33] 1 Cush. (Mass.) 134.

[34] See Jones *v.* Miller, 283 Ill. 348, 356.

looked the fact that there was a direct gift to the legatee with merely a superadded direction as to payment. In *Bennett v. Bennett*[35] there was a bequest to trustees for the "benefit of my son, Charles W. Bennett, * * * as hereinafter provided." Then followed the provision that the income was to be paid him till he reached forty and the principal "shall then become his absolutely," with a gift over if he died before the period of distribution. The only question was whether the trust could be terminated by the son at once and before he reached forty. The gift over[36] as well as the refusal of the trustee to permit the termination of the trust[37] prevented the result which the son sought. The opinion of the court, however, seems to be based upon the fact that because the only gift was in a direction to pay at a future time, it was contingent upon the legatee's surviving the period of distribution. It is submitted that so much of the opinion is misleading. In *Kingman v. Harmon*[38] the testator provided that all of his real estate "be reserved for my children, and be divided equally among them when the youngest attains the age of twenty-one years." The court here applied the rule relating to legacies that where the only gift was contained in the direction to pay at a future time the legacy was contingent on the legatee surviving that time. The court entirely overlooked the fact that there was in the words "be reserved for my children," a fair basis for a direct gift with a superadded direction to divide at a future time.

Topic 3.

Whether the Direction to Pay at the Future Time is For Reasons Personal to the Legatee or Merely For the Convenience of the Estate.

§ 502. **This is important in determining whether or not the legacy is contingent:** When the only gift is in the direction to pay or divide at a future time the fact that the payment appears to be deferred for reasons which are personal to the legatee—for instance, till he reaches a certain age—is an added consideration in favor of the contingency of the gift. On the other

[35] 217 Ill. 434.
[36] *Post*, § 526.
[37] *Post*, §§ 732 *et seq.*
[38] 131 Ill. 171.

hand, our Supreme Court, following the statements of Jarman [39] and Theobald [40] has actually announced that "even though there be no other gift than in the direction to pay or distribute *in futuro*, yet, if such payment or distribution 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 decease of the legatee for life, or after payment of debts, the gift in remainder vests at once, and will not be deferred until the period in question."

§ 503. **Cases where the only gift was contained in the direction to convert and divide after a life estate and where the postponement was held to be merely for the convenience of the estate:** In *Scofield v. Olcott*,[41] 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 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

[39] Jarman on Wills (6th ed. Bigelow), star page 798.

[40] Theobald on Wills, 2nd ed. 412.

[41] 120 Ill. 362.

general rule given in § 502 and to apply it to the limitations in question.

So, in *Hawkins v. Bohling,*[42] 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 said sale to be divided, share and share alike," between Ettie 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 that in such cases the interest will vest on the death of the testator." [43]

In *Ducker v. Burnham,*[44] 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,*[45] 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 was deferred merely because of the presence of the life estate and not for any reasons personal to the legatee.

In *Dee v. Dee,*[46] after a gift to the testator's wife for life

[42] 168 Ill. 214.

[43] 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.

[44] 146 Ill. 9, 24.

[45] 176 Ill. 368, 373.

[46] 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,

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.[47]

In these cases the fact that the gift is expressed to take effect "on the death" of the life tenant ought to be, and no doubt is, negligible as the basis of an inference in favor of contingency,[48] but on occasion it is put forward as justifying such an inference.[49]

§ 504. Similar cases which hold, or appear to hold, the legacy contingent upon the legatee surviving the life tenant—People v. Jennings:[50] 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, Julia, 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

483; 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.* Sowerby, 1 Drew 488; Leeming *v.* Sherratt, 2 Hare 14; Rumsey *v.* Durham, 5 Ind. 71, 75; Allen *v.* Watts, 98 Ala. 384; McClure's Appeal, 72 Pa. St. 414; Thomman's Estate, 161 Pa. St. 444; Weymouth *v.* Irwin, 5 Oh. N. P. 248; Moore *v.* Herancourt, 10 Oh. C. C. 420.

[47] *Accord:* Strickland *v.* Strickland, 271 Ill. 614; *ante*, §§ 345, 346; Sherman *v.* Flack, 283 Ill. 457; McComb *v.* Morford, 283 Ill. 584 (where the first taker took an absolute interest with a gift over at her death).

[48] *Ante*, § 330; People v. Byrd, 253 Ill. 223, 228.

[49] *Ante*, § 330, note 62.

[50] 44 Ill. 488. See also, Bates *v.* Gillett, 132 Ill. 287, and Boyd *v.* Broadwell, 19 Ill. App. 178.

of his widow. Suit was brought 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*,[51] 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 in accord with the Illinois cases cited in § 503, 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.[52]

§ 505. Banta v. Boyd:[53] Here we have *People v. Jennings* over again with the same correct ground of decision present and the same misleading 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

[51] 2 Edw. Ch. (N. Y.) 156.

[52] Whether the *dictum* that the interest is contingent can be supported by the gift over, see *post*, §§ 519-521.

[53] 118 Ill. 186; see also Boyd *v.* Broadwell, 19 Ill. App. 178.

the 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*,[54] 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.[55]

§ 506. **Ebey v. Adams**:[56] 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 fact,

[54] 44 Ill. 488, *ante*, § 504.

[55] As to how far the argument based upon the gift over will take you, see *post*, §§ 519-521.

[56] 135 Ill. 80.

operate to divest any previously vested interest in Elmira.[57] 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)[58] 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.[59] 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.[60]

§ 507. Barnes v. Johnston:[61] Here the testator after providing for various legacies and making provision for the widow, directed his executor to convert all the estate not specifically

[57] *Ante*, § 173.

[58] Theobald on Wills, 2nd ed., 493.

[59] 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 decision 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.

[60] As to how far the arguments based upon the gift over will carry, see *post*, §§ 519-521.

[61] 233 Ill. 620, 622.

devised to pay legacies, and to "divide the said remainder equally among my children [naming them]," with a gift over "if either of them shall be then deceased, leaving then a child or children of their bodies, such child or children shall take the deceased parent's share of such remainder." One of the children died before the period of distribution leaving a widow and children and the question arose whether the widow of the deceased child was entitled as next of kin or devisee of her husband. It was held that she was not. This is correct because the gift over took effect. The court, however, instead of placing its decision on that ground, declared that the legacy was contingent upon the legatees surviving the period of distribution, as if such a contingency existed for all purposes. The gift over, while it furnished some argument for contingency, was not strong enough to overcome the inference in favor of vesting from the fact that the postponement was for the convenience of the estate. The language of the court should have been that the gift was vested subject to be divested, and that the event upon which the divesting was to occur had happened. The statement that the gift was contingent is sure to lead to unfortunate results in the case where the only gift over is if the legatee dies leaving children and then the legatee dies before the period of distribution without leaving any children, but leaving a widow or devisee. In such a case the gift over does not take effect. The divesting clause does not operate and the widow or devisee should be entitled. But if the gift is to be taken literally as contingent on the legatee surviving the period of distribution, the widow or devisee will not take.

§ 508. **Strode v. McCormick**:[62] 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 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

[62] 158 Ill. 142.

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 dismissd 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. The court entirely disregarded the fact that the postponement was clearly for the convenience of, or owing to the position of the estate in the hands of the life tenant.[63]

§ 509. Cases where it is doubtful whether the direction to pay at the future time is for the convenience of the estate or personal to the legatee: Suppose the direction is to divide among all the testator's grandchildren ten years from his death. Here the testator may have designated the ten-year period as a convenient one in which to settle and realize most effectively his assets, or he may have done it because he thinks a distribution at that time for the best interests of the legatees them-

[63] *Quære*, whether Ridgeway *v.* Underwood, 67 Ill. 419, is not open to criticism upon the same ground as Strode *v.* McCormick, *supra*, and the cases in §§ 504-506. 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.

selves, allowing them to reach a certain period of maturity before having the care and disposition of property. If the context is entirely indecisive and there is no resort to surrounding circumstances, there is no argument either way and the fact that the only gift is in the direction to pay at a future time may be decisive in favor of the contingency of the gift.[64] In *Armstrong v. Barber*[65] the surrounding circumstances indicated that the fixing of the period of distribution at ten years from the probate of the will was for the convenience of the estate. The personal property was not sufficient to pay debts and it was apparent that the real estate was not to be sacrificed to pay them, but was to be sold from time to time over a period of years. In *O'Hare v. Johnston*[66] it is submitted that the surrounding circumstances showed the postponement to be personal to the legatees, or at least not at all for the convenience of the estate. The trust estate started with no debts and with first class bonds. It was a special trust fund taken out of the entire estate for the special protection of the testator's children and their children. The trust was to last for thirty years from the testator's death and the distribution was to occur at the end of that time. The extrinsic evidence showed that the period of distribution was postponed for the protection of the beneficiaries and hence the payment *in futuro* was personal to them. More recently in *Walker v. Walker*,[67] where the period of distribution was ten years from the testator's death, the court while not finding it necessary so to decide, seems to have been inclined to regard the postponement as personal to the legatee, or at least not for the convenience of the estate.

Topic 4.

Effect on Vesting of the Payment of Interest or Income.

§ 510. Cases where the payment of interest or income has no effect on vesting distinguished from those where it may have such an effect: Where the context, apart from the payment of interest or income, is such that the legacy will be con-

[64] *Ante*, § 500.

[65] 239 Ill. 389, 400. See also, Mettler *v.* Warner, 243 Ill. 600, 610-611.

[66] 273 Ill. 458, 470.

[67] 283 Ill. 11, 19-22.

strued to be vested and not contingent upon the legatee surviving the period of distribution, the payment of income or interest, if it be an independent circumstance in favor of vesting, merely confirms a construction already clear. On the other hand, the legacy may be so uncompromisingly contingent that the payment of the interest or income cannot modify the expressed intent. If the gift is "to A provided he survive the age of twenty-one," or any other period of distribution, it could hardly be claimed that the payment of interest or income in the meantime would dispose of the express contingency of survivorship. So if the gift were to a contingent class—as a gift "to the children of A who attain twenty-one," or "to such children as attain twenty-one,"[68] the contingency is so emphatically expressed that the payment of income in the meantime will not dispose of the express contingency. But where the legacy is "to A ten years after the testator's death,"[69] or to a class at such time,[70] or "to A at the age of twenty-one," or "upon his attaining twenty-one,"[71] or to a class on a contingency—as "to the children of A at twenty-one,"[72] or "on attaining twenty-one,"[73] the context so far fails of explicitness in requiring the gift to be contingent or that the legatee survive the period of distribution, that a direction that interest or income shall be paid in the meantime may become a decisive circumstance in vesting the gift and thus prevent its being construed to be contingent on the legatee surviving the period of distribution.

§ 511. **Principle upon which the payment of interest or income gives rise to an inference in favor of vesting the legacy:** If the interest, dividends or income be the subject of a separate gift no argument for vesting arises. If the interest, dividend or

[68] Theobald on Wills, 7th ed. 582; Dewar *v.* Brooke, 14 Ch. Div. 529 (1880); Wilson *v.* Knox, L. R. 13 Ir. (Ch. Div.) 349; Howe *v.* Hodge, 152 Ill. 252, 276; McCartney *v.* Osburn, 118 Ill. 403, 421.

[69] Armstrong *v.* Barber, 239 Ill. 389.

[70] O'Hare *v.* Johnston, 273 Ill. 458. But see Reid *v.* Voorhees, 216 Ill. 236.

[71] *In re* Williams, L. R. [1907] 1 Ch. 180.

[72] Fox *v.* Fox, L. R. 19 Eq. 286 (1875); Eccles *v.* Birkett, 4 DeG. & S. 105.

[73] *In re* Turney, L. R. [1899] 2 Ch. 739. See also, Eldred *v.* Meek, 183 Ill. 26, 37.

income be given as necessarily following the gift of principal, there is an admission in the context that the gift of principal has been made and an inference in favor of vesting arises. In determining whether the interest or income is the subject of a separate gift or follows the original gift, it is important to observe whether the interest or income given is upon or out of the precise subject of the legacy and whether the whole interest or income till the period of distribution is given. If it is not the inference in favor of vesting will not arise.

It will be found convenient, though not necessarily logical, in determining whether the interest or income is, or is not, the subject of a separate gift, to consider separately the cases where the gift is to named individuals and those where it is to a class.

§ 512. Where the legacy is to a named individual at a future time with interest or income in the meantime: When the only gift to a named individual is contained in a direction to pay at a future time—as "to A at twenty-one," the direction that the legacy bear interest at the legal rate in the meantime is effective to prevent the legacy being contingent on the legatee surviving that age.[74] The legacy is vested at once. The same is true where income from an investment of the amount of the legacy, or interest in the sense of such income, is given in the meantime;[75] or where it is given only for the maintenance of the legatee and payable absolutely,[76] or in such part as the trustees deem wise, the unpaid portion being accumulated and held for the ultimate benefit of the legatee.[77] The difficult case is where the income, or so much thereof as the trustees see fit, is to be paid to a named beneficiary and nothing is said as to what shall be done with the balance.[78] The fair inference is that it is to be accumulated and paid over with the principal, so that the legatee receives it. An inference, therfore, arises in favor of vesting.

In *Bennett v. Bennett*[79] the attempt by the legatee to end

[74] Clobberie's Case, 2 Vent. 342.

[75] Hanson *v.* Graham, 6 Ves. 239.

[76] Hoath *v.* Hoath, 2 Brown, Ch. 3; *In re* Hart's Trusts, 3 De Gex & J. 195.

[77] *In re* Williams, L. R. [1907] 1 Ch. 180.

[78] In Spencer *v.* Spencer, 268 Ill. 332, the only question was as to the effectiveness of a gift over. *Post*, §§ 519 *et seq.*

[79] 217 Ill. 434.

the trust was properly defeated because there was a gift over if the legatee died under forty, and the trustee did not consent to the termination of the trust. So far as the opinion of the court appears to hold that the legacy was for all purposes contingent on the legatee surviving the age of forty, it is difficult to follow. Not only was there a direct gift to the beneficiary with a super-added direction that payment was to be made at his age of forty,[80] but it was provided that the legacy should be held by a trustee and the income paid over to the legatee. This presented a plain case for the vesting of the legacy. The result reached by the court could be rested only upon the effect to be given to the gift over and the refusal of the trustee to terminate the trust.

In *Armstrong v. Barber*[81] one-third of the income was given to each of three named beneficiaries and the principal of the trust fund was given in thirds to each of the same beneficiaries at the period of distribution, which was fixed at ten years from the probate of the will. This was a gift of income on the share of each to each legatee and furnished an inference in favor of vesting the interests at the testator's death, so that the Rule against Perpetuities was not violated.

§ 513. Where the legacy is to a class at a future time with the income in the meantime: Suppose the gift be to a class of children equally at twenty-one. If the income from "each share" is to be paid to each child, clearly the inference in favor of vesting arises. The same is true though the income from "each *presumptive* share" is given to each child[82] and even though it is given for the maintenance of the child only.[83] The inference in favor of vesting still obtains though the income from each presumptive share is given only for maintenance in the discretion of the trustee, the unpaid portion to be accumulated and added to the principal of each share.[84] The difficult case is where the distribution of the income of each presumptive share to each beneficiary is placed wholly or in part in the dis-

[80] *Ante*, § 499.

[81] 239 Ill. 389.

[82] This follows from Fox *v.* Fox, L. R. 19 Eq. 286; Eccles *v.* Birkett, 4 De G. & S. 105; *In re* Turney, L. R. [1899] 2 Ch. 739.

[83] This also follows from Fox *v.* Fox, *supra;* Eccles v. Birkett, *supra; In re* Turney, *supra.*

[84] *In re* Turney, *supra.*

cretion of the trustee and nothing is said about what shall happen to the income not distributed. If the income accumulates and is added to each share, the inference in favor of vesting arises. If it accumulates and is distributed among all the beneficiaries equally the inference in favor of vesting fails. Where the accumulated income goes may depend solely upon whether the gift is vested or not and thus the whole process of reasoning becomes entirely circular. In this dilemma the inclination of the courts in favor of vesting might be used to require the accumulation to be added to the share from which it was derived so that an argument for vesting would arise. This is in accord with the result reached by Jessel, M. R., in *Fox v. Fox*.[85]

The moment, however, that the income from the whole fund is to be applied generally to the maintenance of the class, with power in the trustee to vary the amounts which each shall receive, the gift of income is the subject of a separate gift and does not follow the gift of the principal and no inference in favor of vesting arises.[86] So where the income from "each expectant share," or such part as the trustee determines, is to be paid to the beneficiaries for maintenance and the balance accumulated and added to the principal which is distributable among all the members of the class, the inference in favor of vesting from the payment of income does not arise.[87] So where a gift is made to children and issue at twenty-one with the income payable to the children and issue of a deceased child *per stirpes* but the capital is ultimately to be distributed *per capita*, the gift of income was separate from the gift of principal and no inference in favor of vesting arose.[88] In *O'Hare*

[85] L. R. 19 Eq. 286; Eccles *v.* Birkett, 4 De G. & S. 105; *In re* Williams, L. R. [1907] 1 Ch. 180. But see opinion of North, J., in *In re* Wintle, L. R. [1896] 2 Ch. 711; also Wilson *v.* Knox, L. R. 13 Ir. 349.

[86] *In re* Parker, 16 Ch. Div. 44; *In re* Grimshaw's Trusts, L. R. 11 Ch. Div. 406; *In re* Mervin, [1891] 3 Ch. 197. See also, Andrews *v.* Lincoln, 95 Me. 541; Anderson *v.* Menefee (Tex. Civ. App.), 174 S. W. 904. But see Dohn's Executor *v.* Dohn, 23 Ky. L. R. 356.

[87] Wilson *v.* Knox, L. R. 13 Ir. 349.

[88] Kountz's Estate, 213 Pa. 390, 399. In Moroney *v.* Haas, 277 Ill. 467, the income was payable to children and issue of a deceased child *per capita*, but the principal was to be divided *per stirpes*, the court found no inference in favor of vest-

v. Johnston[89] the testator bequeathed one hundred red bonds and one hundred blue bonds to the trust company on trust to hold for the period of thirty years from the testator's death and to pay one-half of the income arising from the trust fund to each of the testator's two children, William and Hazel. At the end of the thirty year period the trust company was to deliver to William fifty red bonds and fifty blue bonds, or the proceeds thereof, and to Hazel fifty red bonds and fifty blue bonds, or the proceeds thereof. It was pressed upon the court that the gift of income was separate from the principal because, while one-half the total income of the trust estate was given to each child, the distribution was of the particularly described bonds in each trust, or the proceeds thereof. Hence one-half of the whole income paid to each beneficiary might not at all correspond with the income on the actual trust estate belonging to each. This distinction was too fine for the court, which found in the payment of income a strong inference in favor of vesting. The court treated the case as if the income in fact followed the principal and the expectant beneficial interest in the principal at all times.

Suppose a fund as a whole is given to a class equally at twenty-one with the income as a whole to be divided equally among the members of the class. Whether the income is divided without qualification or whether it is specified to be for support and maintenance, the cases are the same so far as any inference in favor of vesting is concerned, because in either case all the income must be divided equally and paid or applied by the trustee. Several of the English equity judges seem to have held that in such cases the gift of income is a subject of gift separate from the principal and that no inference in favor of vesting arose.[90] Jessel, M. R., however, doubted the soundness

ing. In Pitzel *v.* Schneider, 216 Ill. 87, the income given did not correspond to the income on the shares of the principal distributed. In Kingman *v.* Harmon, 131 Ill. 171, the income was for the support of the wife and children and the principal was divided among the children. In Reid *v.* Voorhees, 216 Ill. 236, the income was payable to nephews and nieces and in case any of them died without an heir then to survivors. The principal was to be distributed at the end of thirty years to the nephews and nieces or their heirs, and if no heirs, to be divided equally among the survivors.

[89] 273 Ill. 458.

[90] *In re* Ashmore's Trusts, L. R.

of this course of decision when, in *Fox v. Fox*,[91] he said: "The Vice-Chancellor, in the case of *In re Ashmore's Trusts* [Law Rep. 9 Eq. 99], appears to have thrown out the suggestion that there might be a distinction between a gift of a separate share to each of the children on attaining twenty-one, with a gift of the income in the meantime for maintenance, and a gift of a fund to each of the children on attaining twenty-one, in equal shares, with a gift of interest in the meantime. I can find no such distinction taken in any other case, and it seems to me to be much too fine to be relied on." Clearly our Supreme Court, after its decision in *O'Hare v. Johnston*,[92] must be regarded as approving Jessel's position.

§ 514. Cases (a) where the income is not given during the entire period before distribution, and (b) where all the income is accumulated and given at the period of distribution along with the principal: In both cases alike the payment of income does not give rise to an inference in favor of vesting. Thus, if the interest or income is given only for a portion of the period before the time for distribution, as where the legacy is given at twenty-six, and the income only until the legatee's majority, it is doubtful whether any inference of vesting arises from the payment of income.[93] It has been held that where the income is not given during the period before distribution, but is to be entirely

9 Eq. 99; Kales' Cases on Future Interests, 452; Butcher *v.* Leach (1843) 5 Beav. 392 (income for maintenance); *In re* Morris (1885), 33 Weekly Rep. 895 (income for maintenance). Bacon, V. C., said: "There are here two distinct gifts: one gift to the trustee of the income to be applied for the maintenance and education of two children. But there is no division of the income equally among the two, and no gift of any specified part of the income to either child. There is a gift of the corpus equally between the two children, but only when they shall respectively attain twenty-one; there is, therefore, no gift of the corpus till they attain twenty-one. This case is, therefore, distinguishable from the cases cited by Mr. Stirling where the whole income of a specific fund was directed to be applied towards the maintenance of a particular person. That is not the case here. There must be a declaration that there is a lapse as to a moiety of the residuary estate of this testatrix." *In re* Martin (1887), 57 L. T. R. (N. S.) 471 (income for maintenance); Spencer *v.* Wilson, L. R. 16 Eq. 501 (here the income was to be divided among the members of the class, but was not directed to be for maintenance). See also Eldred *v.* Meek, 183 Ill. 26, 37.

[91] L. R. 19 Eq. 286.

[92] 273 Ill. 458.

[93] Theobald on Wills, 7th ed. 587.

accumulated and given along with the principal at the time of distribution, the gift of income furnishes no inference in favor of vesting.[94]

TOPIC 5.

LEGACIES PAYABLE WHEN THE YOUNGEST OF SEVERAL LEGATEES REACHES A GIVEN AGE.

§ 515. **The rule of Leeming v. Sherratt:** [95] In this case a residuary trust of personalty was contained only in the direction to divide among children when the youngest reached twenty-one, with a gift over in case any child died leaving lawful issue, such issue to take "the share the parent so dying would have been entitled to have." The gift over, it should be observed, gave rise to an inference that the gift was contingent on the children surviving the period of distribution.[96] But the fact that a residue was involved raised an inference the other way. The court held that while each child, to take, must attain twenty-one,[97] yet the gift to each was not contingent on each surviving the time when the youngest child reached twenty-one. This case has been taken as establishing an inference that a gift to several when the youngest reaches a certain age is not contingent on each surviving the period when the youngest reaches the required age, but is only contingent on each one reaching the age which the youngest is required to reach.[98]

In view of the way in which the English Equity Judges handled this special case it is important to observe how far our Supreme Court has departed from or followed it.

[94] Locke *v.* Lamb, 4 Eq. 372; Russell *v.* Russell, L. R. [1903] 1 Ir. 168.

[95] 2 Hare, 14 (1842).

[96] *Post,* § 520.

[97] This was followed in the following cases: Parker *v.* Sowerby, 1 Dr. 488; Lloyd v. Lloyd (1856), 3 K. & J. 20; Ford *v.* Rawlins, 1 S. & St. 329. Accordingly in these cases the children who died before attaining twenty-one never took any interest and their representatives were not entitled.

[98] *Accord:* Parker *v.* Sowerby (1853), 1 Dr. 488 (there were no gifts over); *In re* Smith's Will (1855), 20 Beav. 197; Lloyd v. Lloyd (1856), 3 K. & J. 20.

In the following case, however, only those who actually survived the attainment of the age specified by the particular member of the class were permitted to share: *In re* Hunter's Trusts, L. R. 1 Eq. 295.

In *Ridgeway v. Underwood*[99] there was 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 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 inheritanee, to be divided equally amongst the remainder of the seven." This does not appear to have been the residuary clause of the will, but the gift over did furnish some inference in favor of vesting.[1] Nevertheless, 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. *Leeming v. Sterratt* was overlooked.

In *McCartney v. Osburn*[2] the time fixed for the distribution of the residue was when the "youngest child of Henrietta arrives at the age of twenty-one years." Then the division was to be made between the then living heirs of Henrietta and Harry J. McCartney. It is assumed that Harry had reached twenty-one. It was nevertheless held that Harry's interest was contingent on his surviving the period of distribution because the gift was contained only in the direction to divide at a future time. *Leeming v. Sherratt* was clearly distinguishable because the gift to the heirs of Henrietta who were to take with Harry was expressly made contingent upon their surviving the period of distribution. The case was not strictly one of a gift to several upon the single event of one reaching a given age. The fact that the gift was in a residue was insufficient under the circumstances to overcome the inference in favor of contingency.

In *Kingman v. Harmon*[3] residuary real estate was "reserved for my children," to "be divided equally among them when the youngest attains the age of twenty-one (21) years." The court treated this as a bequest of personalty contained only in the

[99] 67 Ill. 419.

[1] Observe, however, that there was here in the gift over an argument that the gift to the children was vested. *Post*, § 519.

[2] 118 Ill. 403.

[3] 131 Ill. 171. For a further consideration of this case see *ante*, §§ 307, 481.

direction to divide at a future time. Under *Leeming v. Sherratt* the bequest would be contingent at least until each child reached twenty-one. Hence a guardian's sale on behalf of those who were under that age would be void. The court so held. The case is not contrary, therefore, to *Leeming v. Sherratt.* The *dictum* of the court is, however, that the gift was contingent on each child being alive when the youngest reached twenty-one.

In *Schuknecht v. Schultz,*[4] a sum was to be divided among grandchildren when the youngest reached twenty-five. Under *Leeming v. Sherratt* each must reach twenty-five to take. As the class might increase by the birth of those born after the testator's death, the Rule against Perpetuities was violated. The case does not necessarily hold that the gift was contingent upon each child surviving the period when the youngest reached twenty-five.

In *Moroney v. Haas*[5] the limitations after a life estate to A were to pay the income to such of her children and issue of deceased children as may survive her until the youngest living child her surviving shall arrive at the age of twenty-five years, at which time the principal was to be conveyed "to such surviving children of my said niece," and to the issue of any deceased child or children, the latter to take *per stirpes,* and in case no such children or issue of deceased children shall survive her, or in case no surviving child shall attain the age of twenty-five years and all shall die without issue, then the share so held in trust shall be and is hereby given, devised and bequeathed to the testatrix's nephew, James, absolutely. The gift when the youngest child reached twenty-five was held void. Leaving out the effect of the payment of income in the meantime the gift was, in accordance with *Leeming v. Sherratt,* at least contingent on each child reaching twenty-five and that was sufficient to make the gift to the children void for remoteness. It was not necessary to decide, and the court did not decide, that the gift was contingent on all surviving the time when the youngest reached twenty-five.[6]

[4] 212 Ill. 43.

[5] 277 Ill. 467.

[6] In Jones *v.* Miller, 283 Ill. 348, the gift when the youngest child reached twenty-one was to "living" heirs, which was construed as expressly requiring survivorship at the period of distribution.

TOPIC 6.

MISCELLANEOUS GROUNDS OF INFERENCE IN FAVOR OF VESTING.

§ 516. The fact that the legacy is of a residue, or is constituted a trust fund separate from the balance of the estate: In *Armstrong v. Barber*[7] the court mentioned the fact that the legacies and gifts in question were of the residue of the estate, so that if they were contingent there was a possibility of an intestacy. This raised an inference in favor of vesting.[8] From *McCartney v. Osburn*[9] it would be inferred that this inference is not strong enough to overcome the inference, arising from the fact that the only gift is in the direction to pay at a future time, that the gift is contingent.

In *O'Hare v. Johnston*[10] the court found an inference in favor of vesting in the fact that the subject of the gift was placed in a special trust fund separated from the balance of the estate.[11] In *Bennett v. Bennett*[12] the only question was whether the legatee could end the trust before the period of distribution. It was held that he could not. This was correct by reason of the gift over. So far, however, as the court seems to have held that, regardless of the gift over, the trust could not be terminated because the legacy was contingent for all purposes upon the legatee surviving the age of forty, it ignored the fact, among others, that the legacy was placed in a special trust fund and separated from the balance of the estate.

§ 517. Where a charge is placed upon the share of the legatee: In *Nicoll v. Scott*[13] our Supreme Court raises an inference that a gift at a future time is not contingent on the beneficiary surviving the period of distribution, because upon the gift is charged unqualifiedly the payment of a sum of money to another. If the gift were contingent on the beneficiary surviving the period of distribution the money might not, and probably would not, be paid.

§ 518. Effect of references to "shares" or "portions" of legatees to whom the only gift is in a direction to pay or divide at a future time: Only the consideration of each context can

[7] 239 Ill. 389.
[8] Booth *v.* Booth, 4 Ves. Jr. 399.
[9] 118 Ill. 403.
[10] 273 Ill. 458.
[11] See also Saunders *v.* Vautier, 4 Beav. 115; 1 Cr. & Ph. 240.
[12] 217 Ill. 434.
[13] 99 Ill. 529, 539.

determine whether such references will provide an effective argument for vesting or not. In *McCartney v. Osburn* [14] the court was of the opinion that "no special significance is to be attached to the fact that the testator in this connection speaks of the heirs' 'interest in' or 'portion of' the estate. In the connection in which these expressions occur, the testator doubtless means nothing more than the presumptive or prospective interests or portions of the children." On the other hand, in *Armstrong v. Barber* [15] somewhat similar expressions and references were regarded as furnishing a strong inference in favor of vesting.

TOPIC 7.

EFFECT OF GIFTS OVER.

§ 519. Inference in favor of vesting founded upon the presence of a gift over: [16] The effect of the gift over on vesting 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.[17] 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 rational inference in favor of vesting.[18] In the same way, upon a gift to A at twenty-one, with

[14] 118 Ill. 403, 423.

[15] 239 Ill. 389, 401-402.

[16] For the same inference as applied to remainders, see *ante*, §§ 336 *et seq.*

[17] Theobald on Wills, 2nd ed. 416. For the rule *contra* where real estate is involved, see *ante*, § 334.

[18] Theobald on Wills, 2nd ed. 416.

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 reasonable effect upon the assumption that the interest does not vest till the legatee attains twenty-one.[19] If, however, the gift over is upon the death of A under twenty-one and without issue, it may well be argued,[20] that an 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.[21]

§ 519a. Cases where the gift over furnished an argument for vesting: In *Illinois Land and Loan Co. v. Bonner*,[22] 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.

In *Ridgeway v. Underwood*,[23] 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

[19] *Id.* 417.

[20] *Id.* 417.

[21] 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.

[22] 75 Ill. 315.

[23] 67 Ill. 419; *ante*, § 515.

did not require that the preceding interest be regarded as vested. The opinion of the court, therefore, that the preceding interest was contingent simply indicates that the inference in favor of vesting from the gift over was not a strong one, but yielded easily to inferences in favor of contingency.

In *Lunt v. Lunt*,[24] the court seems to have drawn from 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. 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*,[25] 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[26] and the gift over of clause 6 is quite as strong for holding the gift to the children contingent as

[24] 108 Ill. 307.
[25] 67 Ill. 419, *supra*.
[26] *Ante*, § 343.

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 from all the gifts over at least equalize each other.

§ 520. Inference in favor of the gift being contingent, founded upon the presence of a gift over: [27] 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 may be merely out of abundant caution to express 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 would bar A's wife of any share as an heir or next of kin of A.[28]

In *Banta v. Boyd*,[29] *Ebey v. Adams*[30] and *Barnes v. Johnston*,[31] 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 [32] or for both reasons.[33] 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, how-

[27] For the same inference where remainders are involved, see *ante*, §§ 345 *et seq.*

[28] Under Buckworth *v.* Thirkell, 1 Coll. Juris. 322; 3 Bos. & Pul. 652, note; Co. Lit. 241a, Butler's note; 6 Gray's Cases on Prop., 2nd ed. 588; 1 Scribner on Dower, 2nd ed. 302; 10 Am. & Eng. Enc., 2nd ed. 161, perhaps it does not bar her of dower. *Ante*, § 484.

[29] 118 Ill. 186. See also People *v.* Jennings, 44 Ill. 488.

[30] 135 Ill. 80. See also Spengler *v.* Kuhn, 212 Ill. 186, 194; Security Ins. Co. *v.* Kuhn, 207 Ill. 166.

[31] 233 Ill. 620.

[32] Ebey *v.* Adams, 135 Ill. 80, *ante*, § 506; People *v.* Jennings, 44 Ill. 488; Barnes *v.* Johnston, 233 Ill. 620, *ante* §§ 504, 506, 507.

[33] Banta *v.* Boyd, 118 Ill. 186, *ante*, § 505.

ever, that in the above cases this would not overcome the other reasons in favor of vesting.

In *Eldred v. Meek*,[34] the different weight to be attached to the presence of two gifts over was very neatly brought out. 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.[35] 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.[36]

§ 521. Reflecting back a contingency of survivorship from the context of a gift over of what the legatee would have taken if living: In *People v. Byrd*,[37] the limitations were to the wife for life, then to the testator's children, naming them, with a gift over "if either of my said children [naming them] die leaving issue, either before me or before my said wife, then the issue of the child so dying shall take the share which his, her or their parent *would have taken if living at her death.*"

[34] 183 Ill. 26.

[35] 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*, § 519.

[36] See also People *v.* Byrd, 253 Ill. 223, where the gift over furnished some argument for contingency, but the court in holding the gift contingent did not go on the mere fact of the gift over. *Post*, § 521.

In Walker *v.* Walker, 283 Ill. 11, 22, the gift over if any legatee died before the period of distribution, to his heirs, raised an inference of contingency. The same is true of Sherman *v.* Flack, 283 Ill. 457, but in this case other considerations warranted the holding that the gift was not contingent.

[37] 253 Ill. 223.

It was held that the remainder to the children was contingent upon their surviving the life tenant. The court went entirely upon the words of the gift over above italicised—that is to say, "would have taken if living at her death." This operated to reflect back, and by implication insert, in the direct gift to the children the contingency of survivorship. But if "taken" means "taken possession of," or "taken an indefeasible interest in," then the clause does not have any tendency to reflect back a condition precedent of survivorship. It can only have such an effect if "taken" means "taken a remainder vested in interest in." There would seem to be no more reason for annexing to the word "taken" the last set of words than the former expressions. The inference in favor of contingency from the special context of the gift over is, therefore, so slight and speculative that it should hardly have overcome the strong inference in favor of vesting arising from the fact that the gift was direct to the children after a life estate so that the payment at the future time was merely for the convenience of the estate.[38]

Topic 8.

Express Directions as to Vesting.

§ 522. Inference in favor of contingency where there is an express direction as to vesting:[39] 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.[40]

Chapman v. Cheney,[41] 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 in possession or vesting indefeasibly.[42] In that case the question arose

[38] *Ante*, § 503.

[39] For such inferences where remainders of real estate are involved, see *ante*, § 354.

[40] Theobald on Wills, 2nd ed. 407-408. See Spengler *v.* Kuhn, 212 Ill. 186, 194, (207 Ill. 166); Bennett *v.* Bennett, 217 Ill. 434, 443.

[41] 191 Ill. 574.

[42] In the same way the use of the word "vest" in Lunt *v.* Lunt, 108 Ill. 307, as indicating the time

whether the gift to grandchildren in the seventh paragraph [43] 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.[44] 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 holding that vesting referred to indefeasible vesting or vesting in possession.[45] But there was more than this. The interest which it was expressly provided the

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 (*ante*, § 519), 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.

[43] 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."

[44] *Ante*, § 503.

[45] Theobald on Wills, 2nd ed. 209.

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 to refer to an indefeasible interest because 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.[46]

TOPIC 9.

EFFECT OF THE GIFT OR LEGACY BEING TO A CLASS.

§ 523. The general rule is that no inference of contingency arises from the fact that the legacy is to a class: Suppose a gift is made to a class at a future time, as at the death of a life tenant, or upon the death of a first taker under a certain age, or at the end of a term of years after the testator's death. It is clear that the class may open to let in others until the period of distribution or of vesting in possession.[47] To that extent the class is not ascertained until the period of distribution or vesting in possession arrives. The further question, however, frequently arises whether such gifts are *only* to such members of the class as survive the period of distribution or vesting in possession, so that the class is not ascertained until the future time in this sense also.

[46] So much has been said in support of the conclusion reached in this case, because there has appeared a confident assertion in 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.

[47] *Post*, §§ 565, 567.

The English authorities seem to have proceeded on the basis that whether the gift to the class at a future time was contingent upon the members surviving the period of distribution was to be decided as if the gift were to an individual. The fact that the gift was to a class did not, in and of itself, import any argument that the gift was contingent on members of the class surviving the period of distribution. If, therefore, there were no context which in the case of a gift to an individual at the future time would make the gift contingent on survivorship, there would be no contingency that the members of the class must survive the period of distribution.[48] The result was that while the class might open to let in others until the period of distribution (and in this sense the class would not be ascertained till then), yet each member of the class would have an indefeasible interest which on his death before the period of distribution would be transmissible by descent or devise.[49]

There is much in the decisions of our Supreme Court to warrant the belief that this is the proper view in this state today. In *McCartney v. Osburn*[50] the court cited the leading English case of *Middleton v. Messenger*[51] and thus stated the doctrine which that case supports: "Where the gift or devise is to a class, none will be permitted to take except such as are *in esse* at the time of distribution. This principle, however, applies to all gifts to classes, with the qualification, that where the gift or devise is to a class, as tenants in common, with no provision for survivorship, and one or more of the class die after the gift or devise has taken effect in interest, and before the time of distribution, the shares or portions of those so dying will go to their devisees, or, in case of intestacy, to their heirs or next of kin, as the case may be." Again, the court says, "after the estate has once vested in interest except in cases of joint tenancy, or where the right of survivorship is expressly, or by necessary implication, given, the shares of such as die before distribution will not inure to the benefit of the survivors, as

[48] Middleton *v.* Messenger, 5 Ves. Jr. 136; Holland *v.* Wood (1870), L. R. 11 Eq. 91; *post*, § 563.

[49] Middleton *v.* Messenger, 5 Ves. Jr. 136.

[50] 118 Ill. 403, 418-419.

[51] 5 Ves. Jr. 136.

they would do if the estate had not vested in interest before their decease, but will devolve upon the legal representatives of those so dying." The refusal of our Supreme Court to permit the fact that a remainder was limited to a class to be used to render the remainder contingent upon the remainderman surviving the life tenant has already been noted.[52] In the preceding sections of this chapter[53] it is apparent that the fact that the legacy is to a class did not give rise to any special inference in favor of contingency. In *Armstrong v. Barber*[54] the court merely intimated that the rule that a legacy contained only in a direction to pay or divide at a future time was *prima facie* contingent, applied more readily where the gift was to a class than where it was not.

§ 524. **Drury v. Drury:**[55] In this case the court, in holding that where a remainder is limited to a class contingently upon the life tenant dying without leaving issue, the remainder is also contingent on the remainderman surviving the period of distribution, announced in unqualified terms that where "a gift to a class is postponed pending the termination of a life estate, those members of the class, and those only, take who are in existence at the death of the life tenant."[56] In *O'Hare v. Johnston*,[57] therefore, where the question was whether a gift to grandchildren as a class thirty years after the testator's death was contingent on the members of the class surviving the thirty year period, counsel urged upon the court the rule which it had just announced in *Drury v. Drury*. This contention was not, however, noticed by the court in its opinion and the legacy was held to be vested in the grandchildren. This would indicate that whatever the court may have done with regard to construing remainders to a class to be contingent upon the members of the class surviving the life tenant simply because the gift was to a class, it has not committed itself to a similar rule where legacies or gifts of personal property are made to a class.

[52] *Ante*, § 353.
[53] *Ante*, § 513.
[54] 239 Ill. 389, 400.
[55] 271 Ill. 336, *ante*, § 352.
[56] The same view was expressed in Brewick *v.* Anderson, 267 Ill. 169, *ante*, § 353, and Blackstone *v.* Althouse, 278 Ill. 481, *ante*, § 353. See also Betz *v.* Farling, 274 Ill. 107.
[57] 273 Ill. 458.

TOPIC 10.

EFFECT TO BE GIVEN TO THE TESTATOR'S INDUCEMENT.

§ 525. What attention should be paid to inferences in favor of vesting or contingency derived from a probable inducement of the testator: In accordance with the principles of interpretation of writings already announced[58] the testator's inducement should never be used as a subject or standard of interpretation. Nevertheless, courts exhibit from time to time a tendency to build up plausible inducements to justify the results reached. In *Bennett v. Bennett*[59] it is noticeable that the court found an inference in favor of the contingency of the gift from the fact that there was a purpose on the part of the testator to protect the legatee's interest from creditors, but that no express restraints on alienation had been inserted. Hence to effect the purpose as revealed by the extrinsic circumstances, an inference in favor of contingency was indulged in by the court. When, however, counsel attempted this same process in *O'Hare v. Johnston*[60] as an argument for contingency, the court very properly refused to permit it.

In the first opinion in the *O'Hare* case the court said that if the daughter had had two children and one had died before the thirty year period leaving children and the other had outlived the thirty year period, the testator could not have intended the child outliving the thirty year period to take the whole trust estate. The inference was that the gift was vested. In the petition for rehearing counsel arguing in favor of the contingency of the gift replied that if the legacy were vested and the testator's only granddaughter died before she came of an age to make a will or convey, then her father would take the entire trust estate, which was the last thing the testator could have intended. Of course, both arguments were appeals to a plausible inducement. Both were equally improper. Counsel put forward his speculation as to the inducement merely as an answer to the court's speculation as to the inducement. In the opinion of the court as it finally appears it is said (as if counsel had been the first to introduce an argument based upon the

[58] *Ante*, §§ 123, 126.

[59] 217 Ill. 434.

[60] 273 Ill. 458.

inducement) that the supposed intention of the testator against the son-in-law's securing the entire property by descent from the testator's infant granddaughter [a very present and real danger] which would have occurred if the legacy were vested, "seems to us without special merit." At the same time, the consequences of holding the legacy contingent which the court relied upon to show an inducement in favor of vesting, were regarded as still valuable to produce an inference in favor of vesting. The proper view, it is submitted, is that all such speculations concerning the motives and purposes of a testator's inducement should be rigidly excluded.

TOPIC 11.

CASES WHERE NO QUESTION OF VESTING ARISES SHOULD BE CAREFULLY DISTINGUISHED.

§ 526. The cases where there is a gift over if the legatee dies before the period of distribution and where by the happening of the divesting contingency the gift over takes effect, must be distinguished from the cases where the question is whether the future legacy is subject to a condition precedent that the legatee survive the period of distribution: In *People v. Jennings*,[61] *Banta v. Boyd*,[62] *Ebey v. Adams*[63] and *Barnes v. Johnson*,[64] the limitations involved provided substantially for a life estate with a direction to the executor or trustee to sell and convert into personalty after the life tenant's death and to divide the proceeds among the testator's children, with an express gift over if any legatee died before the period of distribution to the legatee's children or heirs.[65] In each case a legatee had died before the life tenant leaving children who were claiming as against the spouse of the deceased legatee. Clearly the only question involved was the validity of the gift over and whether it took effect in the events which had happened. Obviously it was valid and obviously it did take effect in the events which

[61] 44 Ill. 488.
[62] 118 Ill. 186.
[63] 135 Ill. 80.
[64] 233 Ill. 620.
[65] See also Walker *v.* Walker, 283 Ill. 11, where the gift over was if a distributee died before the period of distribution to her heirs, and where she died leaving no children but a husband, and it was held that the gift over took effect in the husband.

had happened. In all four cases it was, therefore, very properly held that the children of a deceased legatee took the whole share of the legatee by virtue of the gift over and thereby cut out the spouse of the legatee and the devisees of the legatee. Nothing could possibly be plainer or more correct.[66] There was no question raised as to whether the gift to the children of the testator standing alone was subject to a condition precedent that they must for all purposes and under all circumstances survive the life tenant in order to take, yet the language of the court in all four cases suggested that the gift was generally contingent upon the legatee surviving the period of distribution.[67] This, it is submitted, is not so.

Suppose, for instance, that a legatee died before the period of distribution leaving children and that such a contingency was not provided for. The gift over could not take effect. But the legatee's next of kin would be disappointed if the legacy was still contingent upon the legatee surviving the life tenant. Here, then, the real question of whether the legacy is subject to a general contingency that the legatee must survive the life tenant is raised. Clearly the postponement was only for the convenience of the estate and the one gift over would not furnish a sufficient inference of contingency to make the legacy generally contingent on the legatee surviving the period of distribution. The legacy should be called vested subject to be divested in the precise events named and no others, and the divesting contingency not having occurred, the legacy would remain in the legatee and pass to his executor or administrator upon his death before the life tenant.

In *Bennett v. Bennett*[68] the legacy was to a trustee for A at forty, with a gift over if A died before he reached forty to his heirs. A before reaching forty sued to end the trust. It was a sufficient answer that there was a gift over to his heirs so that the trustee must maintain the trust in order to serve it. That was the end of the case, yet there is much in the court's opinion to suggest that it was holding the legacy to A contingent on his surviving the period of distribution, wholly apart from any gift

[66] See also Keys *v.* Wohlgemuth, 240 Ill. 586.

[67] The same is true of Walker *v.* Walker, 283 Ill. 11.

[68] 217 Ill. 434.

over. Yet such a holding seems impossible to approve because there was a direct gift to A with a superadded direction to pay at the age of forty. The trust was separated from the rest of the estate and the income on the whole legacy was given in the meantime. The legacy, therefore, was to an individual and not to a class. All of these circumstances give rise to an overwhelming inference in favor of the vesting of the legacy, which is not overcome by anything in the context. The case is likely to be misleading because it seems to hold the legacy contingent in the face of all these elements of context which usually compel a holding that the legacy is vested. As a matter of fact, the result reached by the court is entirely justified by the fact that the existence of the gift over prevents the premature termination of the trusteeship.

In *McNair v. Montague* [69] one-half the real estate and one-half the personalty was devised to A in trust for the benefit of his son Charles "until he shall attain the age of fifty years, when the same shall be invested in the said Charles T. Montague or his legal heirs." It was claimed by Charles that his interest was vested in such a sense that he could terminate the trust and take the property. A decree sustaining this contention was entered finding that Charles' interest was vested. This was very properly reversed. Under the doctrine of *Claflin v. Claflin* [70] the trust, even if the interest were vested and indefeasible, could not be terminated without the consent of the trustee. The gift over prevented any termination of the trust even if the trustee had been willing. There was no question at all as to whether Charles' interest was vested or contingent on his surviving the period of distribution. Charles' interest taken by itself and apart from the gift over, was vested and not contingent upon his surviving the period of distribution. With the gift over it was still vested subject to be divested. The fact that a decree which designated Charles' interest as vested was reversed is likely to be misleading unless it is observed that the decree which was reversed in reality found Charles' interest not only vested but not subject to be divested.

In *Spencer v. Spencer* [71] the testator appointed a trustee to take and hold for Spencer one-seventh of the net proceeds of

[69] 260 Ill. 465.

[70] *Post*, § 732.

[71] 268 Ill. 332.

his estate and when he arrives at lawful age to pay him his share, with a direction in the meantime to use the income, or so much thereof as may be necessary, for the education and care of the legatee, with a gift over in case the legatee died without issue. A decree found that Spencer had an absolute interest to be paid on his becoming twenty-one, apparently ignoring the gift over. This was very properly reversed because the gift over should have been given effect. The court did not have presented to it any issue of whether the legacy was for all purposes contingent on the legatee surviving the period of distribution. In the face of the direct gift with the superadded direction as to payment and the provision for the legatee having the income, the court, it is believed, could not have done otherwise than call the gift vested or immediate, subject only to a postponement as to payment and to a gift over in the event specified, *namely*, if the legatee died without issue before the period of distribution. Clearly, if the legatee had died before the period of distribution leaving issue, the gift over would not have taken effect, and since the legacy was not contingent on the legatee surviving the period of distribution, the legacy would have passed from him by descent or devise.

TOPIC 12.

BALANCING INFERENCES FOR AND AGAINST VESTING.

§ 527. Cases illustrating the manner in which the foregoing considerations, or some of them, must be discovered and balanced against each other in order to obtain a result as to whether or not the legacy is vested or contingent: The leading cases on the subject of the vesting of legacies are examples of this process of balancing conflicting inferences.[72] *O'Hare v. Johnston* [73] is presented as being one of the most interesting. In this case the substance of the gifts in question may thus be stated: The testator bequeath 100 red bonds and 100 blue bonds to the Trust Company upon trust—to invest and keep

[72] Ridgeway *v.* Underwood, 67 Ill. 419, *ante*, § 515; Lunt *v.* Lunt, 108 Ill. 307, *ante*, § 519a; Chapman *v.* Cheney, 191 Ill. 574, *ante*, § 522; Bennett *v.* Bennett, 217 Ill. 434, *ante*, §§ 501, 512; Armstrong *v.* Barber, 239 Ill. 389, *ante*, §§ 509, 512, 518.

[73] 273 Ill. 458.

invested for the period of thirty years from the testator's death; to pay one-half the income arising from the trust fund to each of the testator's two children William and Hazel; at the end of the thirty year period to deliver to William 50 red bonds and 50 blue bonds, or the proceeds thereof; at the end of the thirty year period to deliver to Hazel 50 red bonds and 50 blue bonds, or the proceeds thereof; if either William or Hazel died within the thirty year period leaving no child or children surviving, then to the survivor; if either died within the thirty year period leaving a child or children surviving, then the testator directed that *the income from said trust fund and the principal of said trust fund at the expiration of said period*, hereby given to its or their parent, *be paid to said child or children*. The son William died without issue in the thirty year period, then Hazel died within the thirty year period leaving a child. Was the gift to the child valid? It was conceded that it was not, if the gift to the child was contingent on its surviving the thirty year period. If not so contingent it was valid.

The case was clearly one where the extrinsic circumstances even if proper to be considered,[74] afforded no aid whatever. The problem was as to the existence of a contingency and the inference must have been that there was no actual intent of the inducement. If the court looked at the fact that the holding of the ultimate gift void would throw one-third of the property into the hands of the son's widow it must also have considered that if the ultimate gift over were sustained and the grandchild died under age the daughter's husband would get it all. If it were urged that the holding of the gift contingent would mean that one grandchild might take all as against the children of a deceased grandchild, the answer is that that was a matter upon which the testator's mind never worked, for if it had he would have made his meaning clear.

Coming to the context of the will itself there were the following considerations in favor of the gift being contingent upon the grandchildren surviving the thirty year period:

(1) The gift was of personalty and was contained only in the direction to pay at a future time. This was admittedly

[74] *Ante*, §§ 128 *et seq.*

under the authorities a strong *prima facie* argument in favor of contingency.[75]

(2) The direction to pay at the future time was not to accommodate a prior limited interest and was, therefore, personal to the legatees.[76] This the court denied, insisting that there was at least a fair argument that the postponement was for the convenience of the estate. It was not quite like the case where the payment was to be made to the legatees at a certain age. These counter-considerations tended at least to minimize the argument that the postponement was personal to the legatees.

(3) While the testator had the general spendthrift trust purpose (as the extrinsic circumstances showed) there were no express restraints on alienation so that the protection of the legatees could only be effected by holding the gift contingent.[77] Such an argument was really resorting to the testator's inducement for the purpose of determining the tenor of his individual standard in making the gift, and thus throwing light on an ambiguity. The fact, however, that there was no actual inducement made this whole process artificial and speculative. It was true that in *Bennett v. Bennett,*[78] such an argument had been made where the gift was to the legatee at a certain age, but this case was very properly treated as of only slight, if any, influence in giving force to a similar argument attempted to be made in *O'Hare v. Johnston.*

(4) The gift over *in futuro* was to a class. There had been some recent decisions where the fact that a gift after a life estate was to a class, had been used apparently as the sole basis for holding the gift contingent upon members of the class surviving the life tenant.[79] These are of very doubtful propriety. The fact that the gift is to a class should make no substantial argument in favor of contingency. In spite, therefore, of the very strong decisions just made by the court, the fact that the gift was to a class was properly ignored in *O'Hare v. Johnston* as furnishing any substantial argument in favor of contingency.

(5) The gift was not in a residuary clause. This made a very slight argument against vesting but was more than offset by

[75] *Ante,* § 500.
[76] *Ante,* §§ 502 *et seq.*
[77] *Ante,* § 525.
[78] 217 Ill. 434.
[79] *Ante,* § 524.

the fact that the gift was contained in a special trust separable from the balance of the estate.[80]

(6) The gift to the children of the testator, William and Hazel, was contingent for all the above reasons (except that here the legacies were not to a class but to individuals), and also by reason of the gifts over if either child died leaving children, and the scheme of contingent gifts thus established made an argument for the contingency of the ultimate gift which was part of the plan. The difficulty with this was that the argument for contingency by the gift over if the children died leaving children was offset by the gift over if they died without leaving children. Furthermore, the argument for contingency from gifts over if the legatee dies leaving children is not very strong because it may always be said that the gift over was out of abundant caution and not because the gift to the first taker was contingent on survivorship. Again, the fact that some Illinois cases had somewhat over-emphasized the argument for contingency from the presence of gifts over[81] did not justify the court in a similar over-emphasis of this argument in *O'Hare v. Johnston.*

Against these arguments for contingency were opposed the following:

The principal of the trust fund was to be held intact and divided equally into two shares at the period of distribution, and the income of each share was to be paid to the designated beneficiary until that period of distribution.

In answer to this the fact asserted was denied. It was insisted that since the testator gave 50 red bonds and 50 blue bonds and the proceeds, to each trust fund the trustee must have appropriated such bonds specifically upon the commencement of the trust to each fund and each fund must have been held and distributed at the period of distribution separately from the other, and conceivably each fund would be composed of different securities of different value at the period of distribution. Yet the income directed to be paid was always one-half the income arising from the entire trust estate. Hence, it was contended that the income of each share of the principal was not being paid to the beneficiary of the principal fund

[80] *Ante,* § 516.

[81] *Ante,* §§ 519-521.

and hence the gift of income was separate and distinct from that of the principal and, in accordance with Kountz's Estate,[82] the payment of income furnished no argument against the contingency of the gift. The court, however, declared that the gift was not of separable funds but a gift at the period of distribution of one-half of the entire trust estate.

Then it was insisted that under certain English cases the gift of income from an entire trust fund to a class to whom the principal was given at a future time did not prevent the gift of the principal from being contingent.[83] These the court declined to follow, or perhaps distinguished, because the gift of principal was to children at a certain age.

Then it was contended that the income was not given at all until the end of the thirty year period, or else was so ambiguously given that it could furnish no argument against the contingency of the gift. Both contentions the court denied.

It was then urged that the gift of income was only an argument against contingency and was overcome by other elements of the context which made in favor of the contingency of the gift as, in *Bennett v. Bennett*,[84] where the gift was to an individual at a future time and income was given in the meantime, and where the gift of income did not prevent the holding of the ultimate gift contingent. But that was a case of the gift to an individual at *a given age*, and moreover the only point decided was that the beneficiary could not terminate the trust before the period of distribution. This was proper because of the gift over. It was not clear that the court had meant to hold the gift to the legatee contingent on survivorship for all purposes.

Finally, on behalf of the contingency of the gift, counsel relied upon *Reid v. Voorhees*,[85] where a devise of real estate thirty years after the testator's death, with the rents given in the meantime, was held contingent and void. The answer to this case was that the context involved in the two cases were quite different. In *Reid v. Voorhees* the court could find very easily a separate gift of income and principal, because in that case there was no trust, the subject matter of the devise was

[82] 213 Penn. St. 390, *ante*, § 513.

[83] Spencer *v.* Wilson, L. R. 16 Eq. 501, *ante*, § 513.

[84] 217 Ill. 434.

[85] 216 Ill. 236.

the legal title to land, and the rents were devised quite separately from the principal.

Such is the process of lining up all the contentions and elements of context on both sides, estimating the soundness of each and the weight to be given to each, and striking a balance. In any case where there are so many different considerations on each side to be examined and weighed it is hardly possible that one case can be an authority for the result to be reached in another. The authorities go only to the soundness of particular arguments or considerations and the weight to be given to particular arguments and elements of context. The conclusion which is the result of the balancing of considerations is practically outside the realm of authority.

In contrast to *O'Hare v. Johnston* the recent case of *Walker v. Walker*[86] should be examined. There personal property was bequeathed to trustees to hold and at the end of five years to divide among six named persons, each to receive one-half of his share, if living. At the end of ten years the balance was to be divided among the same persons with a gift over if any died, to his or her heirs-at-law. The only gift was contained in the direction to pay at the future time. Whether the postponement was personal to the legatees or for the convenience of the estate was uncertain.[87] The gift over made an argument for contingency. There was no provision for the payment of income in the meantime. The result of holding the gift contingent was not an intestacy as to the income, because that would accumulate. The gift over at the end of five years was expressly contingent which might or might not raise an inference that the gift at the end of ten years was intended to be the same. Clearly the balance of all considerations was in favor of the position that the legatees must survive the ten year period in order to take. The court so held.

TITLE III.

EQUITABLE INTERESTS IN LAND OR IN A MIXED RESIDUE OF REAL AND PERSONAL PROPERTY.

§ 528. On what basis is the vesting or contingency of the gift of such interests to be decided: There has come into

[86] 283 Ill. 11.

[87] *Ante*, § 509.

favor a form of will which disposes of a mixed residue of real and personal estate to trustees upon trust to hold for a certain number of years from the testator's death, or until some beneficiary reaches a certain age, then to divide and distribute. In such a will it may happen that the only gift is contained in the direction to pay, divide or convey at the termination of the trust. If a devisee dies before the period of distribution and there is no gift over the question arises whether the devise is contingent on the devisee surviving the termination of the trust. If the time of distribution is possibly too remote the question arises whether the gift is immediate, subject to a postponement until the period of distribution. In such cases it is important to determine whether the question presented is to be decided upon the basis of the decisions relating to the vesting of legacies or upon the basis of legal estates in land. If analogous limitations of legal interests had been construed by the English common law courts or by courts in this country and the construction had been settled, it might be urged that a court of equity in passing upon equitable interests of realty should follow the same decisions. Not only, however, are such decisions lacking, but from the nature of the limitations involved the analogy breaks down because the trusteeship is a feature which could not be reproduced for a case dealing with legal interests only. Furthermore, it has been held that where there is a devise of a mixed residue of real and personal property and one rule of construction applies as to real estate and another as to personal property, the rule as to personal property may be applied by a court of equity to determine the construction as it affects the entire mixed fund.[88] It is believed, therefore, that in the principal case now considered the courts may properly handle the question of construction as if it were a trust of personal property alone. This seems to be the position which our Supreme Court has taken.[89] The court appears to have applied the rules re-

[88] *Ante*, § 208.

[89] Lunt *v.* Lunt, 108 Ill. 307; Armstrong *v.* Barber, 239 Ill. 389. But see McCartney *v.* Osburn, 118 Ill. 403, 420, where the court after referring to the distinction between a legacy contained only in a direction to pay at a future time and a direct gift with a superadded direction for distribution, said: "This distinction, however, by the current of authority, has no application to a devise of real estate." And on page 422, the court said: "Waiv-

lating to personal property even where only equitable interests in land were involved.[90]

In *Blanchard v. Maynard*[91] only real estate was involved.

ing the consideration that the distinction between a gift at a specified time, and a gift generally, *to be paid* at a like specified time, has no application to a devise of real property, and applying to the limitation under consideration the most liberal rule in favor of vesting, still we do not think the property in controversy has yet vested in interest.''

[90] Knight *v.* Pottgieser, 176 Ill. 368, 374; Eldred *v.* Meek, 183 Ill. 26, 37; Mettler *v.* Warner, 243 Ill. 600. See also Pitzel *v.* Schneider, 216 Ill. 87.

[91] 103 Ill. 60.

NOTE ON THE PERIOD TO WHICH SURVIVORSHIP IS REFERRED IN GIFTS TO ''SURVIVORS'' OR PERSONS ''SURVIVING:'' Where property is given to a person or persons who shall be ''surviving'' at some period, and several periods are possible, but the exact time is not specified, the question arises whether reference is to the time of the death of the testator or some other period such as the death of a life tenant.

The rule of Cripps *v.* Wolcott, 4 Mad. 11, is this: In bequests of personal property words of survivorship are *prima facie* to be referred to the period of payment or distribution, and not to the death of the testator. While formerly the point was in doubt it is now settled in England that the rule of Cripps *v.* Wolcott applies to devises of real estate: *Re* Gregson's Trust Estate, 2 De G. J. & S. 428. In classifying the Illinois cases no attempt is therefore made to distinguish between those which involve personalty and those involving realty.

If there is no previous interest given then the period of division is the death of the testator and the survivors at his death are entitled.

But if a previous life estate is given and the life tenant survive the testator then the period of division is the death of the life tenant and the survivors at that time are entitled: Temple *v.* Scott, 143 Ill. 290; Jones *v.* Miller, 283 Ill. 348. In the following cases it was made clear by the context that the period to which survivorship referred was the termination 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; Starr *v.* Willoughby, 218 Ill. 485. Where the period of distribution was when a person reached a given age, ''surviving'' meant surviving at that time: Moroney *v.* Haas, 277 Ill. 467.

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 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; Hull *v.* Ensinger, 257 Ill. 160. It is equally true where there has been no previous gift to the

The will in question devised both real and personal property to trustees for ten years. The only gift of lands was in the direction to the trustee "at the end of ten years after my decease, all of my said estate then remaining, and the income thereof, shall be distributed, and shall vest in my three sons" naming them. If the considerations applicable to legal interests in land had been followed the court might well have said that the fact that the only gift was in the direction to divide at a future time did not introduce a contingency of

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.

Where a devise was made to a married woman if she survived her husband, she was entitled if she survived the termination of the marriage, so that upon a divorce the wife's interest vested indefeasibly: Cary *v.* Slead, 220 Ill. 508.

Prior to Cripps *v.* Wolcott the rule seems to have been contrary 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. See also Siddons *v.* Cockrell, 131 Ill. 653; Fishback *v.* Joesting, 183 Ill. 463, 466.

The 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. 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.

survivorship as in the case of legacies; that "vest might mean vest in possession," and even if it meant "vest in interest" that was fulfilled if the interest vested at the end of the ten year period with or without any contingency of survivorship; that the equitable interest in the land was, therefore, a certain executory interest which would descend upon the death of the executory devisee, but the widow would not have dower in it because there was no seisin of the future interest. That would be consistent with the holding of the court. The court, however, said that the executory devisee did not take an interest which was descendible and the inference is that it held the gift at the end of the ten year period contingent on the devisee surviving the termination of that period. If so, the court was clearly applying the rules relating to gifts of personal property.

CHAPTER XXI.

GIFTS OVER UPON THE "DEATH" OF A PREVIOUS TAKER SIMPLICITER OR "WITHOUT CHILDREN," OR "WITHOUT ISSUE," OR "WITHOUT HEIRS."

TITLE I.

TO WHAT PERIOD IS "DEATH" REFERRED.[1]

§ 529. **Limitations by will to A simpliciter followed by a gift "at his decease:"** Here A regularly takes a life estate and "die" means die at any time before or after the testator's death.[2]

§ 530. **Limitations by will to A simpliciter followed by a gift "in case of his death," or some other expression treating A's death as a contingent event:** The extent to which "death" in such cases is referred to death in the lifetime of the testator only, has already been indicated.[3] If, however, it appears that A has a life estate independent of any gift over "in the event of his death," "death" refers to the death of the life tenant whenever that occurs.[4] Where it is clear that death refers only to death in the lifetime of the testator, the question may arise whether death before as well as after the will was executed is referred to. In *Jenne v. Jenne*,[5] where the bequest was to the testator's three half sisters, and "in the event of the death of one or all" to their legal heirs, it was held that death referred to death before as well as after the will was executed.

§ 531. **Where the limitations are by will to A simpliciter with a gift or gifts over on A's death and one or more collateral contingencies:** Whether A takes an absolute interest

[1] See cases cited, *ante*, §§ 162-167.

[2] *Ante*, § 162.

[3] *Ante*, § 163. See also Kohtz *v.* Eldred, 208 Ill. 60, *semble;* Lachenmyer *v.* Gehlbach, 266 Ill. 11, 15, *semble;* Sheley *v.* Sheley, 272 Ill. 95, 97, *semble;* Jenne *v.* Jenne, 271 Ill. 526, *semble.*

[4] Kolb *v.* Landes, 277 Ill. 440.

[5] 271 Ill. 526, *ante*, § 163.

or only a life estate has already been considered.[6] If it be determined that A takes only a life estate then clearly "die" refers to the death of the life tenant whenever that may occur.[7] Even where it is determined that A takes the fee or an absolute interest the settled rule now is that *prima facie* "death" refers to death at any time, either before or after the testator's death.[8]

Where the gift is to several with a gift over if any die without leaving children or issue surviving, to the "survivors," the period to which die refers is complicated with the meaning of "survivors." If "survivors" has its primary meaning and refers to survivors "at the period of distribution," then "die" must have its primary meaning as referring to death at any time, either before or after the testator's death.[9] But if upon any special context, or even without a special context and in contravention of the general rule, it is determined that "survivors" means those who survive the testator, then an inference arises that "die" should be confined to death in the lifetime of the testator.[10]

In *Fishback v. Joesting*[11] the devise was to the testator's wife and child or children, or their heirs who might be living at his death, but if he and his wife and his child or children should all die and there should be no heirs of the children, then it should go to others. Here the special context and partie-

[6] *Ante*, §§ 164-165.

[7] King *v.* King, 215 Ill. 100; Branson *v.* Bailey, 246 Ill. 490.

[8] Blackstone *v.* Althouse, 278 Ill. 481; Ashby *v.* McKinlock, 271 Ill. 254; Wilson *v.* Wilson, 261 Ill. 174; Brenock *v.* Brenock, 230 Ill. 519; Crocker *v.* Van Vlissingen, 230 Ill. 225; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486; Fifer *v.* Allen, 228 Ill. 507; Bradsby *v.* Wallace, 202 Ill. 239; Thomas *v.* Miller, 161 Ill. 60; Smith *v.* Kimbell, 153 Ill. 368; Summers *v.* Smith, 127 Ill. 645.

Where the limitations are created by deed "die" refers to the period after the deed is executed: Buck *v.* Garber, 261 Ill. 378, 380; Robeson *v.* Cochran, 255 Ill. 355.

[9] Wilson *v.* Wilson, 261 Ill. 174; Carpenter *v.* Sangamon Trust Co., 229 Ill. 486; Summers *v.* Smith, 127 Ill. 645.

[10] Arnold *v.* Alden, 173 Ill. 229, 241. In Duryea *v.* Duryea, 85 Ill. 41, it is submitted that "die" was referred to death at any time and "survive" in the gift over to the survivor was referred to the period of distribution after the testator's death. The decree was based upon the fact that there was no survivor when the first taker died without issue and hence the gift over failed and under such circumstances the absolute interest which the first taker had was not divested. See *post*, § 606.

[11] 183 Ill. 463, 466.

ularly the emphasis in the gift to those who were to be living at his death, was sufficient to raise a prevailing inference that "die" referred to death in the lifetime of the testator. *Kohtz v. Eldred* [12] is now only justified upon the special context presented.[13] In *Williamson v. Carnes* [14] a residue was devised to sons and daughters with a gift over if any died before the testator and left a child, to such child, but if any died without children (not saying before the testator) then over. It was held upon the special context that "die" in the clause "die without children" meant die only in the lifetime of the testator.

§ 532. Where the limitations are by will to X for life, then to A simpliciter, with a gift or gifts over on A's death and one or more collateral contingencies—The rule of the English cases: If there is only one gift over, or the gifts over are on contingencies which do not exhaust all the possibilities, "die" refers to death at any time before or after the testator's death and after the death of the life tenant.[15] Where the gifts over are upon contingencies which exhaust all the possibilities so that an inference arises that the first taker, A, has only an estate for life, "die" necessarily refers to death at any time, even after the life tenant's death, for otherwise all the possibilities would not be exhausted.[16] But if the interest of the first taker, A, is created with express words indicating that he is to have a fee or absolute interest, with gifts over which, if they exhausted all the possibilities, would cut down the fee to a life estate, an inference arises that "die" means only die before the period of vesting in possession, so that all the contingencies will not have been provided for and an inconsistency, due to the express direction that A is to have a fee or absolute interest, avoided.[17]

§ 533. The position of our Supreme Court is somewhat in doubt: In *Welch v. Crowe* [18] it was held that where words were used indicating that A was to have a fee simple and the gifts

[12] 208 Ill. 60.

[13] See Mr. Justice Cartwright's explanation of Kohtz *v.* Eldred in Fifer *v.* Allen, 228 Ill. 507, 520.

[14] 284 Ill. 521.

[15] *Ante*, §§ 166, 167; O'Mahoney *v.* Burdett, L. R. 7; Eng. & Ir. App. Cas. 388 (1874), overruling the fourth canon of Edwards *v.* Edwards.

[16] Hawkins on Wills, 2nd ed. by Sanger, 310.

[17] *Id.* 309.

[18] 278 Ill. 244.

over were on contingencies which exhausted all the possibilities, "die" meant, die only prior to the death of the life tenant.[19]

In *Lachenmyer v. Gehlbach*,[20] where the gifts over exhausted all the possibilities the same result was reached although the limitation was to A *simpliciter*. Under our practice and section 13 of the Conveyancing Act, however, it might be regarded as justifiable to take the limitation to A *simpliciter*, as if it were the express creation of a fee simple. *Kleinhans v. Kleinhans*,[21] decided shortly before *Lachenmyer v. Gehlbach* seems inconsistent with it. In *Kleinhans v. Kleinhans* the first gift was to A *simpliciter*, but the court held that "die" meant die at any time, even after the death of the life tenant and hence all the contingencies were provided for and A had only a life estate.

Our Supreme Court has held, in accordance with the English cases, that where the limitations were to A *simpliciter* with a single gift over, "die" meant die at any time before or after the testator's death. In *Gavvin v. Carroll*[22] the devise after the life estate was to an individual with a single gift over "should he die without issue," to the testator's children surviving at the death of the first taker. It was held that "die" meant, die at any time, even after the death of the life tenant. This was deduced from the cases like *Fifer v. Allen*,[23] where there was no preceding life estate. This, of course, followed the English authorities.

Subsequently, however, to *Lachenmyer v. Gehlbach* and before and after *Gavvin v. Carroll*, we have in this State cases where there was only a single gift over and where the court, purporting to follow *Lachenmyer v. Gehlbach*, held that "die" meant, die before the death of the life tenant and that only. Thus, in *Sheley v. Sheley*[24] the remainder after the life estate was to the testator's "children, share and share alike, and if any one or more of them die without an issue, then their share

[19] In Chapin *v.* Crow, 147 Ill. 219, the holding was merely that "die" meant at least, die after the testator's death and before the death of the life tenant, so that the devisee in remainder, who was subject to the gift over, could not in the life of the life tenant give a merchantable title.

[20] 266 Ill. 11.

[21] 253 Ill. 620.

[22] 276 Ill. 478.

[23] *Ante*, § 531.

[24] 272 Ill. 95.

shall revert back to my estate and be divided equally between all the surviving heirs." This was regarded as "in almost the identical language of the devise" involved in *Lachenmyer v. Gehlbach*, and "die" was referred to death prior to the death of the life tenant.

In three still more recent cases where the limitations were to X for life, remainder to A, with a gift over on A's death,[25] or death without issue surviving,[26] "die" was held to mean, die in the lifetime of the life tenant and not afterwards. It is submitted that in *Sheley v. Sheley* and the cases following it, the court overlooked the significance of the fact that in *Lachenmyer v. Gehlbach* there were gifts over which exhausted all the possibilities, and that under the statute an inference arose that A took a fee.

In *Smith v. Dellitt* [27] "die" was held to mean, die only before the death of the life tenant, and this was placed on the special context, as follows: A life estate was devised to the husband, with a remainder in fee to his daughters, with a gift over if either daughter died without a child to the survivor, and should both die without children, the whole estate to go to "the father or his heirs." It was held that the words "or his heirs" should be construed "and his heirs," and that, therefore, the context indicated that the death of the daughters referred to must occur only before the father's death.

§ 534. Some results reached by our Supreme Court are supported by definite special contexts: In some cases the context is explicit that "die" means die before the life tenant.[28] In *Siddons v. Cockrell* [29] and *Northern Trust Co. v. Wheaton* [30] on the special context "death" was held to refer only to death in the testator's lifetime. In *Northern Trust Co. v. Wheaton*, where the gift over was if any devisee should die before the interest "shall vest in them," the court, by interpreting "vest" in the feudal sense of an interest after a particular estate of freehold which stood ready to take effect whenever and however the preceding estate determined, necessarily concluded that vest-

[25] Ames *v.* Smith, 284 Ill. 63 (here the limitations were by deed).

[26] Fulwiler *v.* McClun, 285 Ill. 174; Morris *v.* Phillips, 287 Ill. 635.

[27] 249 Ill. 113.

[28] Barnes *v.* Johnston, 233 Ill. 620; People *v.* Byrd, 253 Ill. 223.

[29] 131 Ill. 653.

[30] 249 Ill. 606, 613-614.

ing occurred at the testator's death and hence death before vesting meant death before the testator and that only.

In *Pirrung v. Pirrung*[31] the limitations were to the widow for life, then to the testator's two sons, and in case either shall not survive the widow, the survivor to take all. One son died before the testator and before the widow leaving children. It was held that "die" meant die only after the testator's death and not before. Therefore, the event which happened was not provided for and hence the gift lapsed and the children of the deceased son took under section 11 of the Statute on Descent. The result was obviously desirable, but the construction rested, it is believed, more on a speculation as to the inducement of the testator than on any context of the will.

In *Abrahams v. Sanders*,[32] where the limitations were to X for life with a remainder to several, and if any died "before this will takes effect" over to others, the court held on the special context that "before this will takes effect" meant before the death of the life tenant and not merely before the testator's death.

§ 535. Where the limitations are to X for life, then to A for life and in case of A's death and on the happening of a collateral contingency over: Here it might be supposed that "die" at least referred to the death of A at any time, because A was only a life tenant.[33] In *Winter v. Dibble*,[34] however, the court, guided by special elements of context, held that "die" referred to death only in the life time of the first life tenant X.

§ 536. Where property is vested in trustees who are directed to distribute at a certain time, so that the trust then determines and the legatees, who are to take upon the death of prior legatees, are to do so through the medium of a conveyance from the same trustees: Here there is *prima facie* a sufficient reason, according to the English authorities, to restrict "death" to death before the time of distribution.[35] This rule has been followed recently by our Supreme Court.[36] But

[31] 228 Ill. 441. To the same effect is Frail *v.* Carstairs, 187 Ill. 310.

[32] 274 Ill. 452.

[33] Kolb *v.* Landes, 277 Ill. 440, *ante*, § 530.

[34] 251 Ill. 200, 217, 218.

[35] Theobald on Wills, 7th ed. 662.

[36] Spencer *v.* Spencer, 268 Ill. 332.

the court seems to have overlooked this consideration in a still more recent case.[37]

§ 537. Limitations by will to A at a period of distribution after the testator's death with a gift over if A dies before the period of distribution: Here it is explicit that "die" refers to death after the testator and before the period of distribution. It is held that "die" also means die before the testator's death, so as to prevent a lapse.[38]

TITLE II.

MEANING OF "WITHOUT" IN GIFTS OVER IF THE FIRST TAKER DIES "WITHOUT CHILDREN."

§ 538. Two possible meanings of "without": It may mean "without ever having had," or "without children surviving" the first taker. Of course, an additional context may make either one of these meanings explicit. It is easy to construe the phrase "without having any child" as equivalent to "without having had any child."[39] On the other hand, if the gift over is upon the death of the first taker "without leaving any child at his death," or "without leaving any child him surviving," "without" cannot mean "without having had."[40] In the absence of explicit contexts controlling the meaning of the word "without" the following important distinctions are to be observed.

§ 539. If there is no independent gift to the children of the first taker, "without" means primarily "without children surviving" the first taker: Where there is a gift to A absolutely and a gift over on his death without "leaving" children, the word "leaving" will cause the gift over to take effect if A dies leaving no children surviving him at his death.[41] The same result is reached if the gift over is upon the first taker's death "without any children."[42] So where a life estate is devised to A with no gift expressly or by implication to A's children, but with a gift over if A "die without children," "without" means primarily "without children surviving" A.[43]

[37] Defrees *v.* Brydon, 275 Ill. 530.
[38] Walker *v.* Walker, 283 Ill. 11.
[39] Theobald on Wills, 7th ed. 707. See Kellett *v.* Shepard, 139 Ill. 433.
[40] Theobald on Wills, 7th ed. 706.
[41] Theobald on Wills, 7th ed. 706-707; Smith *v.* Kimbell, 153 Ill. 368.
[42] Theobald on Wills, 7th ed. 707.
[43] Bond *v.* Moore, 236 Ill. 576.

§ 540. When there is an independent gift to the first taker's children or issue, so that a child upon birth acquires a vested interest, "without" may mean "without ever having had": Thus, if the gift to the first taker is for life and there is an express gift to the children of the life tenant which is vested at once on their birth, or on their reaching twenty-one, or other age or event, the English cases hold that a gift over if the first taker die "without leaving" children or issue, means "without having had" *such* children or issue as have taken a vested interest. This prevents the divesting of an interest once vested in a child.[44] In the case, therefore, where the children take vested interests at birth, the phrase "die without leaving" children or issue will mean "die without ever having had" children or issue, as the case may be.[45] If, however, the children do not take vested interests till they reach twenty-one then "die without leaving children" means "die without having children who have attained twenty-one." In *King v. King*,[46] however, our Supreme Court undertook to hold that even in this case "without" meant "without ever having had" any children at all.

§ 541. Where there is an independent gift to the first taker's children contingent upon their surviving the first taker, a gift over if the first taker "die without children" means die without children surviving the first taker: This was the result reached in *Blakeley v. Mansfield*.[47] It follows the English cases.[48]

TITLE III.

MEANING OF "WITHOUT ISSUE" IN GIFTS OVER IF THE FIRST TAKER DIES WITHOUT ISSUE.

§ 542. There are three possible meanings of the phrase "die without issue": It may mean (a) "die without ever having had issue," or (b) "die without issue surviving the first taker."

[44] Theobald on Wills, 6th ed. 676; 7th ed. 715.

[45] Treharne *v.* Layton, L. R. 10 Q. B. 459 (1875). It is doubtful whether it can be adopted as a primary meaning where the phrase is "without any child." (Thicknesse *v.* Liege, 3 Brown P. Cas. 365.) If it be applicable where the phrase is "die without children," the *dictum* of the court in Field *v.* Peeples, 180 Ill. 376, may be sustained. See also Voris *v.* Sloan, 68 Ill. 588.

[46] 215 Ill. 100.

[47] 274 Ill. 133.

[48] Theobald on Wills, 7th ed. 706.

or (e) "be dead without issue in any generation, however remote." The second is known as a definite failure of issue, and the third as an indefinite failure. Of course, the context may cause any one of these meanings to be explicitly indicated—as where the gift over is on the first taker's death without issue him surviving,[49] or "without issue living at his death," or "without living heirs of his body."[50]

§ 543. Where there is an independent gift to the issue of the first taker which vests an interest in such issue as soon as born: Under such circumstances we may expect to find courts construing "without" as meaning "without ever having had."[51]

§ 544. Suppose, however, there is no independent gift to the issue of the first taker—(1) Results of the English cases and effect of the Wills Act: Where there is no independent gift to the issue of the first taker the English cases found no ground for construing "without" to mean "without ever having had." The choice lay between a definite and an indefinite failure of issue. The determination of which of these is to be taken as the primary meaning is important because of the different results which follow according as one construction or the other is adopted. If the gift be upon a definite failure of issue it is valid. If it be limited after a life estate in land it would be destructible.[52] If it be limited after an absolute interest in realty or personalty it is valid, if created by will, as a shifting executory devise.[53] If limited in a deed it should be equally valid as a shifting use raised by bargain and sale.[54] If, however, the gift be upon an indefinite failure of issue several results obtain. If personal property is involved, it is void for remoteness.[55] If the gift be of real estate, then, whether the first taker has by express words a life estate or a fee simple, he will take a fee tail.[56]

The English cases very early settled it that an indefinite failure of issue was primarily meant.[57] This was an undesirable

[49] Friedman *v.* Steiner, 107 Ill. 125; Koeffler *v.* Koeffler, 185 Ill. 261; Johnson *v.* Buck, 220 Ill. 226.

[50] Glover *v.* Condell, 163 Ill. 566.

[51] *Ante*, § 540.

[52] *Ante*, §§ 310 *et seq.*

[53] *Ante*, §§ 467 *et seq.*

[54] For the doubt thrown upon this result by the Illinois cases, see *ante*, § 445, and especially Palmer *v.* Cook, 159 Ill. 300.

[55] Glover *v.* Condell, 163 Ill. 566, 585, *semble.*

[56] Theobald on Wills, 2nd ed. 324, 563.

[57] Arnold *v.* Alden, 173 Ill. 229,

result in any case. If personalty were involved the gift over was too remote and so wholly void.[58] If realty were in question then the first taker took an estate tail[59] 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.[60] 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. 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.[61] 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.[62] If realty were in question an indefinite failure of issue was indicated.[63] The Wills Act[64] put an end to the rule that "without issue" meant primarily an indefinite failure of issue by providing 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, "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail."

§ 545. (2) The position taken by the Illinois Supreme Court —in general: Our court has recognized and applied, even to limitations of real estate, the English cases which hold, as to personalty, that the special context is sufficient to warrant construing a definite failure of issue. Thus, the court has held a gift over of real estate, if the first taker died "without *leaving*

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.*

[58] Glover *v.* Condell, 163 Ill. 566, 585, *semble.*

[59] Smith *v.* Kimbell, 153 Ill. 368, 376, *semble;* Summers v. Smith, 127 Ill. 645, 650, *semble.*

[60] Smith *v.* Kimbell, 153 Ill. 368, 374, *semble;* Strain v. Sweeny, 163 Ill. 603, 607, *semble.*

[61] Forth *v.* Chapman, 1 P. Wms. 663 (1720).

[62] Hughes *v.* Sayer, 1 P. Wms. 534 (1719).

[63] Chadock *v.* Cowley, Cro. Jac. 695 (1624).

[64] I Vict. Ch. 26, sec. 29.

issue'' to mean a definite failure of issue.[65] So, if the gift over is of real estate in case either one of two devisees die without issue then to the ''survivor,'' a definite failure of issue was held to have been meant.[66]

There are many indications that the Court is prepared to adopt the view of the Wills Act, that a definite failure of issue is *prima facie* meant rather than an indefinite failure.[67] Apart from interests subject to an estate tail [68] our Supreme Court has never yet held that a future interest was limited to take effect upon an indefinite failure of issue. The court has, indeed, in two [69] 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.[70] In two cases,[71] where, however, the position was unnecessary to the decision, it was announced

[65] Smith *v.* Kimbell, 153 Ill. 368; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Metzen *v.* Schopp, 202 Ill. 275; Robeson *v.* Cochran, 255 Ill. 355; Morris *v.* Phillips, 287 Ill. 633.

[66] 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 applied 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 the case must be regarded as overruled. *Ante,* § 470. For some valuable remarks upon this case in this connection, see Mr. Lessing Rosenthal's article in 28 Chicago Legal News, p. 257.

[67] See *post,* § 614, for an instance where on another point the court adopted as the primary rule of construction the meaning required by the Wills Act instead of that approved by the English cases.

[68] *Ante,* §§ 410-411; *post,* § 548.

[69] Strain *v.* Sweeny, 163 Ill. 603; Gannon *v.* Peterson, 193 Ill. 372.

[70] In Strain *v.* Sweeny, 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.

[71] Summers *v.* Smith, 127 Ill. 645, 650-651; Smith *v.* Kimbell, 153 Ill. 368, 376.

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,[72] permitted to exist as such, and they have dropped out of our system of conveyancing, except as a matter of accident. The change, therefore, 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."

§ 546. Stafford v. Read[73] and Kendall v. Taylor:[74] In these two recent cases the court appears to have asserted that "die without issue" might be treated as meaning primarily "die without ever having had issue," even where the first taker took a fee and where there was no independent gift to the issue or children of the first taker.[75] It is believed the court overlooked the distinctions which have been taken, *ante*, §§ 539-541. It relied upon the cases of *Voris v. Sloan*,[76] *Field v. Peeples*[77] and *King v. King*,[78] which are sustainable under the distinctions there made and could hardly be used as the basis for a general rule that "die without issue" primarily means "die without ever having had issue." A number of cases[79] show no disposition to repeat the holding of *Stafford v. Read* and *Kendall v. Taylor*. The presence of *Stafford v. Read* and *Kendall v. Taylor* in our supreme court reports is likely to be a disturbing influence, for it raises the hope that any gift over on the death of the first taker "without issue," or even "without children" for that matter, may be construed "without ever having had children."

[72] *Ante*, § 402.

[73] 244 Ill. 138.

[74] 245 Ill. 617.

[75] See also Blackstone *v.* Althouse, 278 Ill. 481; Muhlke v. Tiedemann, 280 Ill. 534. In Winchell *v.* Winchell, 259 Ill. 471, the court held that "die without issue" introducing a remainder after an estate tail was to be construed as meaning "die without ever having had issue."

[76] 68 Ill. 588, *ante*, § 540.

[77] 180 Ill. 376, *ante*, § 540.

[78] 215 Ill. 100, *ante*, § 540.

[79] Robeson *v.* Cochran, 255 Ill. 355; Wilson *v.* Wilson, 261 Ill. 174; Blakeley *v.* Mansfield, 274 Ill. 133; O'Hare *v.* Johnston, 273 Ill. 458.

It should be observed that the meaning to be placed upon the word "die" has an important bearing upon whether a definite or indefinite failure of issue is meant. If the gift is to A for life and then to the heirs of the body of A, with a gift over if any of the heirs of the body die leaving no issue, and "die" means die prior to the death of the life tenant, "without issue" must mean a definite failure of issue.[80]

§ 547. O'Hare v. Johnston: [81] Here there was a trust of personalty to be divided thirty years after the testator's death. In the meantime the income was to be paid to the testator's children equally. It was provided that upon the death of either child without issue the share of each should go over to the survivor. It was argued that "die without issue" here meant at least, "be dead without issue," at any time within the thirty year period. The court, however, held that it meant "die without issue surviving" any time within the thirty year period.

§ 548. Whether an indefinite failure of issue is meant where "die without issue" introduces a remainder after an estate tail: Such a remainder was regularly introduced by the phrase if the tenant in tail "die without issue." When, therefore, the phrase "die without issue" is used to introduce such a remainder it would seem that it must, even in this State, be construed to mean an indefinite failure of issue. As a matter of the expressed intent no other view would seem possible. Our Supreme Court has taken that position in *Kolmer v. Miles.*[82] Nevertheless, the court has also held that "die without leaving issue," which introduced an interest after an estate tail, meant a definite failure of issue,[83] and that "die without issue," which introduced such a remainder meant "without ever having had" issue.[84] The status of a remainder after an estate tail limited to take effect on an indefinite failure of issue has already been indicated.[85]

§ 549. Results which would follow if our Supreme Court held a future interest, other than a remainder after an expressly created estate tail, to have been limited upon an

[80] Morris *v.* Phillips, 287 Ill. 633, 640.

[81] 273 Ill. 458.

[82] 270 Ill. 20.

[83] Metzen *v.* Schopp, 202 Ill. 275.

[84] Winchell *v.* Winchell, 259 Ill. 471.

[85] *Ante,* §§ 410-411.

indefinite failure of issue: If the interests were in personalty they would be void for remoteness. If they were in land, whether legal or equitable, and created by will, the first question would be whether the gift over on an indefinite failure of issue would turn the first taker's interest (whether expressly limited for life or in fee) into an estate tail upon which the Statute on Entails would operate. If it did then the gift over would be a remainder after an estate tail and the consequences already indicated would follow.[86] If the first taker's interest were not turned into an estate tail then the gift, if an equitable interest, would be too remote. If a legal interest in land were in question and the gift over were a contingent remainder after a life estate it would be destructible and not void for remoteness; but it might, if it became a shifting future interest after a vested remainder in the issue of the life tenant, be destroyed[87] or be void for remoteness.

§ 550. **Ewing v. Barnes**:[88] 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.[89] This may be done if the gift over be treated as a similar gift over of personal property would be, denying the application of the rule of construction of the English cases which would turn the first taker's interest into an estate tail.[90] On the other hand, if the first taker's interest be turned into an estate tail then, by the statute,[91] the limitations would read: A term for years in trustees till A reached twenty-five, and subject thereto to a legal estate to A for life, contingent remainder in fee to children still unborn, and an ultimate interest upon an indefinite failure of issue to B. If, then, the destructibility of contingent remainders is recognized,[92] B's interest, though liable to be defeated or fail, is not void from the beginning for remoteness.[93]

[86] *Id.*

[87] *Ante*, § 411.

[88] 156 Ill. 61, *ante*, § 469.

[89] Mr. Lessing Rosenthal's article in 28 Chicago Legal News, p. 257. If the same attempt had been made to explain Burton *v.* Gagnon, 180 Ill. 345, *ante*, § 482, the remarks of the text would apply.

[90] This seems to have been the assumption of the court.

[91] *Ante*, § 402.

[92] *Ante*, §§ 310 *et seq.*

[93] *Ante*, §§ 410, 411.

TITLE IV.

MEANING OF "ISSUE" IN GIFTS OVER IF THE FIRST TAKER "DIES WITHOUT ISSUE."

§ 551. When construed as meaning "children": If there be no independent gift to the children or issue of the first taker and no special context, it would seem that the word "issue" should have its primary meaning of descendants and the question will arise whether a definite or indefinite failure is meant.[94] But if there is an independent gift to the "children" of the first taker then in a gift over if the first taker "die without issue," "issue" has been held to mean "children."[95] The effect of this is to prevent "die without issue" from meaning an indefinite failure of issue. It would perhaps be a more conventional interpretation to hold that "without issue" meant "without such issue."[96]

TITLE V.

MEANING OF "HEIRS" IN A GIFT OVER IF THE FIRST TAKER "DIES WITHOUT HEIRS."[97]

§ 552. When construed as meaning "heirs of the body" or "children" of the first taker: Where the gift over if the

[94] *Ante*, §§ 542 *et seq.*

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*, § 545. 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.

[95] Blakeley *v.* Mansfield, 274 Ill. 133; O'Hare *v.* Johnston, 273 Ill. 458; Wilson *v.* Wilson, 261 Ill. 174; Stisser *v.* Stisser, 235 Ill. 207.

[96] Where the limitations are to A for life and then to his issue, or his issue surviving him, with a gift over if A dies without issue, "die without issue" may be construed to mean "die without such issue," which will cause it to mean "die without ever having had issue," or "without issue surviving," as the case may be. Theobald on Wills, 7th ed. 711-712. See also Kellett *v.* Shepard, 139 Ill. 433; Healy *v.* Eastlake, 152 Ill. 424; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58.

[97] For the cases generally where "heirs" is construed to mean "children," see *post*, § 574, note.

first taker dies "leaving no heirs" is to the persons, or some of them, who would be the first taker's collateral heirs if he died without heirs of his body, a *prima facie* inference arises that "without heirs" means "without heirs of the body."[98] Our Supreme Court has not, however, been content merely to construe the word "heirs" in such a case as "heirs of the body," but has insisted that "heirs" meant "children," so that an adopted child who was within the meaning of heir "of the body" but not within the meaning of "children" was not included.[99] This is likely to make trouble where the first taker dies leaving no child or children but a grandchild or more remote issue. Then it will probably be held that when "heirs" is construed to mean "children" in the case now under consideration it also includes grandchildren.

[98] Bradsby *v.* Wallace, 202 Ill. 239. In Ahlfield *v.* Curtis, 229 Ill. 139, the gift over was if the first taker died "leaving no heirs of her own," and here "heirs" meant "heirs of the body" or "children." See also Kalies *v.* Ewert, 248 Ill. 612; Wilson *v.* Wilson, 261 Ill. 174; Theobald on Wills, 6th ed. 395; Lee *v.* Lee, 46 Ky. 605; Bryan *v.* Spires, 3 Brewster (Pa.) 580.

[99] In Wallace *v.* Noland, 246 Ill. 535, it was held that it had been decided in Bradsby *v.* Wallace that "heirs" meant "children." See also the language of the court in Ahlfield *v.* Curtis, 229 Ill. 139, 142, to the effect that "heirs" meant "children."

NOTE—(1) *On meaning of "unmarried" in gifts over upon the first taker dying unmarried:* Frail *v.* Carstairs, 187 Ill. 310; Theobald on Wills, 2nd ed. 527-528.

(2) *When a gift over will be implied to be on condition that A dies "without such heirs:"* Young *v.* Harkleroad, 166 Ill. 318.

CHAPTER XXII.

LIMITATIONS TO CLASSES.

TITLE I.

A GIFT TO A CLASS DISTINGUISHED FROM A GIFT TO INDIVIDUALS.

§ 553. **Importance of this question:** If the gift is to a class and one dies before the testator there is no lapse, but the members of the class who are *in esse* at the testator's death take the entire fund.[1] If the gift had been to individuals there would have been the lapse of a share. In applying Section 25 of the Illinois Inheritance Tax Act it may make a difference in the amount of the tax whether the gift is to a class or to individuals.[2] So where the rule is that a gift to a class payable at a future time is contingent on each member of the class surviving the period of distribution, when a gift to individuals in the same terms would not be so contingent,[3] the question will become important whether the gift is to a class or to individuals.

§ 554. **Cases where the class may increase or diminish even after the testator's death:** If a devise is made to persons who are described collectively as "children," "heirs," or "issue," and at the time the will is made the number may diminish or increase up to the time of and after the testator's death, we have the most obvious case of a gift to a class. Thus, where there is a devise to A for life, then to A's children, A's children

[1] McCartney *v.* Osburn, 118 Ill. 403, 418; Lancaster *v.* Lancaster, 187 Ill. 540, 546; Rudolph *v.* Rudloph, 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, *supra.*

[2] People *v.* Byrd, 253 Ill. 223.

[3] *Ante,* § 524; *post,* § 563.

may increase or diminish during the life of the testator and after the death of the testator and before distribution at A's death. So if the devise is to "my nephews and nieces" (their parents being then alive), the number may increase or diminish before the testator's death and afterwards. Even where the gift is to individuals, naming them and also describing them collectively as "A, B and C, children of my sister" (the sister being then alive), or "A, B and C, my nephews and nieces," the designation of the individuals has been held to be overcome by the collective description and the gift has been held to be to a class, so that on the death of one before the testator there was no lapse, but those *in esse* at the testator's death took the whole.[4]

§ 555. **Cases where the class may increase or diminish up to the testator's death but cannot increase afterwards, or may neither increase nor diminish afterwards:** It is not necessary in order to have a gift to a class that the personnel of the class should be able to increase after the testator's death. Thus if the testator devises to his widow for life and then to his children, the gift to the children is to a class though the number of children, while it may diminish, cannot increase after the testator's death.[5] Even when the gift after the widow's death was to "my children A, B and C," our Supreme Court held that the collective designation prevailed over the naming of the individuals, so that the gift was to a class.[6] If the devise were to the testator's children at his death, so that the class cannot increase or diminish after the testator's death and before distribution, yet so long as the designation is collective the gift is to a class and not to individuals.

§ 556. **Suppose the gift is to the "children" of a person deceased at the time the will is executed:** Here the personnel of the class cannot increase. It may, however, diminish during the life of the testator and the designation of those who are to take is exclusively collective. It is held that the gift is to a class.[7] This would seem to indicate that the presence of a col-

[4] Chase v. Peckham, 17 R. I. 385; Roosevelt *v.* Porter, 36 Misc. Rep. 441; 73 N. Y. Supp. 800.

[5] People *v.* Byrd, 253 Ill. 223.

[6] People *v.* Byrd, *supra*. In Ebey *v.* Adams, 135 Ill. 80, the court speaks of a gift to the testator's children (naming six) or their heirs, as if the gift were to a class.

[7] Viner *v.* Francis, 2 Cox 190

lective designation of the devisees is the more important element in determining whether or not the gift is to a class. Certainly the fact that the personnel of the class cannot increase does not prevent the gift being to a class.

A more difficult question arises where the personnel of the class cannot increase after the will is executed and where the objects of the gift are described both collectively and individually, as where the devise is to "A, B and C, the children of my deceased sister." One might guess that the individual designation would override the use of the collective word "children" and that the gift would be to those named, and the collective word "children" would be merely descriptive or for complete identification. Yet when the question arises as to whether there is a lapsed legacy or not courts have repeatedly found the gift to be to a class even in such a case as that put.[8]

In the face of these results the recent case of *Blackstone v. Althouse*[9] requires special notice. There a testatrix whose parents were deceased devised to her "brothers and sisters as follows [naming them]." In another clause she devised a fee to A with a gift over if he died without issue (which happened) to "my brothers and sisters and John Smith Blackstone and Ellen Hartman." As John and Ellen were not within the class of brothers and sisters there is authority that as to them the gift would not be to a class and that on the death of one of them before the testatrix there would be a lapse.[10] The principal question was whether the executory devise to the brothers and sisters was contingent upon their surviving the period of dis-

(1789); Dimond *v.* Bostock, L. R. 10 Ch. App. 358. In Lancaster *v.* Lancaster, 187 Ill. 540, 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. It was held that the gift was to a class so that J. E. L. took the whole.

[8] Springer *v.* Congleton, 30 Ga. 976; Warner's Appeal, 39 Conn. 253; Swallow *v.* Swallow, 166 Mass. 241; Schaffer *v.* Kittell, 14 Allen (Mass.) 528; Hoppock *v.* Tucker, 59 N. Y. 202; Page *v.* Gilbert, 32 Hun. (N. Y.) 301; Bolles *v.* Smith, 39 Conn. 217.

[9] 278 Ill. 481.

[10] *In re* Jackson, L. R. 25 Ch. Div. 162; Theobald on Wills, 7th ed. 788.

tribution, *namely*, when A died without issue. It was urged upon the court (quite improperly, it is submitted) [11] that if the gift were to a class it must, for that reason alone, be regarded as contingent on the members of the class surviving the period of distribution. To meet this the court held that the gift to brothers and sisters was not to a class but to ascertained individuals. The court seems to have been influenced by the fact that the parents of the brothers and sisters were long since dead so that there could be no more brothers and sisters and that the brothers and sisters were particularly named in another clause. If such considerations are to prevail over the collective designation it shakes the holding that the gift is to a class where the gift is "to the children of my deceased sister," [12] and especially where it is to the children (naming them) of a person then deceased.[13] The result reached by the court should rest upon the ground that the executory devise was not expressly made contingent on the members of the class surviving the period of distribution and the fact that the gift was to a class did not furnish a sufficient inference of any such contingency of survivorship.

§ 557. Volunteers of America v. Peirce: [14] Here there was a gift to the Illinois Humane Society of Chicago, the Old People's Home of Chicago, the Home of the Friendless in Chicago, Buchanan Anti-Saloon League of Buchanan, Michigan, the Young Men's Christian Association of Buchanan, Michigan, if it is in existence, and if not to the Young Men's Christian Association of the City of Chicago. It is difficult to see how this could be construed to be a gift to a class of charities. If one made a gift to all the charities in a given town, or all the charities for educational purposes in a given district, the gift might be regarded as a gift to a class of charities, but when specific charities are named having no obviously common characteristic except that they are charities, and where no common characteristic is attempted to be designated it is impossible to say that the gift is to a class of charities. The contention that the gift was to a class of charities and, therefore, when the gift to one failed the remaining charities took the entire fund, was properly denied by the court.

[11] *Ante*, § 523; *post*, § 563.

[12] *Supra*, note 7.

[13] *Supra*, note 8.

[14] 267 Ill. 406.

TITLE II.

VALIDITY OF GIFTS TO A CLASS.

§ 558. Where no interest is limited preceding the gift to the class and subsequently born members of the class are intended to take: If no members of the class are *in esse* at the time of the gift the attempt made is to create a springing future interest. This is valid by devise [15] or by way of equitable interest.[16] It is valid by way of use [17] and even by bargain and sale where the consideration is paid by another.[18]

If one member of the class is *in esse* at the time of the gift the title vests in possession in him, and, so far as the subsequently born members of the class are concerned, the attempt is to create a shifting future interest. This is valid by devise [19] or by way of equitable interest.[20] It is valid also by way of use, and a bargain and sale may be used to create such an interest.[21] In this state it has been erroneously held that where the conveyance is by deed the after-born children cannot take.[22]

§ 559. Where the gift to the class is a remainder—(1) which vests in interest upon the birth of a member of the class, and where it is expressly provided that after-born members of the class are to take: Before the birth of any member of the class the remainder is contingent and follows the rules relating to such remainders. By the birth of a member of the class before the termination of the life estate the remainder vests in a member of the class.[23] Thereafter the question is whether the vested remainder will open to let in other members of the class who are intended to take. That is the same question as whether shifting interests are valid. Where the interests are created by will the after-born children may take. The same result should be reached where the interests are created by way of use. If the interests are equitable or in personal property it is assumed that the intent expressed may be carried out.

§ 560. (2) Where the remainder to the class is subject to a condition precedent in form which may not happen until

[15] *Ante*, § 474.
[16] *Ante*, §§ 472, 478.
[17] *Ante*, § 475.
[18] *Id.*
[19] *Ante*, § 474.
[20] *Ante*, §§ 472, 478.
[21] *Ante*, § 476.
[22] *Id.*
[23] *Ante*, § 477.

after the termination of the life estate: Suppose, for instance, the remainder is limited to such children of the life tenant as reach twenty-one. If none have reached twenty-one when the interests are created the remainder is contingent and subject to the usual rules relating to contingent remainders. The moment, however, one child reaches twenty-one before the termination of the life estate the remainder vests. It will open and let in other children who reach twenty-one before the life estate terminates.[24]

Suppose, now, that some children are *in esse* when the first child reaches twenty-one and the life estate terminates before they reach twenty-one, can they share upon reaching twenty-one? The answer must be in the affirmative if the interests are equitable or in personal property because in such interests there is no rule of destructibility. If, however, the remainder is a legal interest in land created by will or by way of use *inter vivos* and the rule of destructibility of contingent remainders is in force, the English authorities have assumed that the children who reach twenty-one after the termination of the life estate cannot take[25] except in the one case where the remainder is limited to such children as "either before or after" the death of the life tenant reach twenty-one.[26] There is authority in this country, which is believed to be sound, that the children who reach twenty-one after the termination of the life estate will take even when the remainder is limited merely to the children who reach twenty-one, without saying "either before or after" the life tenant's death.[27]

TITLE III.

RULE IN WILD'S CASE.[28]

§ 561. Where a devise is made to "A and his children" and at the time of the devise and of the testator's death A has children: In Wild's Case it is said that A and his children take as joint tenants for life by the common law.[29] Today in this state they would, of course, take as tenants in common in

[24] *Ante*, § 308.
[25] *Ante*, § 101.
[26] *Ante*, § 102.
[27] *Ante*, § 103.
[28] 6 Co. 17 (1599).
[29] Faloon *v.* Simshauser, 130 Ill. 649; Boehm *v.* Baldwin, 221 Ill. 59, 63.

fee.[30] This is what might be expected upon the usual construction of the language used. It can hardly be said to be an application of any special rule. It is not the result of what has been called the Rule in Wild's Case.

§ 562. Where a devise is made to "A and his children" and A has at the time of the devise no children: By the Rule in Wild's Case[31] A takes an estate tail.[32] This rule has been regarded by our Supreme Court as connected with the fact that, if there were no Rule in Wild's Case, A at common law would have taken merely a life estate and A's children, if he had any, would be disappointed. Hence the rule operated to enlarge a life estate into a fee tail which, if the entail were not barred, would operate to pass the property by descent to the heirs of A's body upon his death. If the entail were barred A would take the fee. Under Section 13 of our Conveyancing Act A would take not a life estate but a fee, and hence his children might take by descent from him or he might alien in fee. If the Rule in Wild's Case operated in this state today it would cut down A's fee to a fee tail which the statute would cut down still further to a life estate, and this would give a result quite out of harmony with Section 13 of the Conveyancing Act, which seeks to vest the fee in a grantee unless a less estate is expressly, or by operation of law, limited, and quite out of harmony with the operation of the Rule in Wild's Case which sought to enlarge a life estate into a fee tail. Our Supreme Court has therefore, very properly settled it that the Rule in Wild's Case is not in force in this state.[33]

TITLE IV.

DETERMINATION OF CLASSES.

§ 563. Distinction between the rules for the determination of classes and those which determine whether the gift to the class is contingent upon the members of the class surviving the period of distribution: In determining what members of the class are entitled to share two questions arise: *first,* what is the

[30] *Ante,* §§ 210-211.

[31] 6 Co. 17 (1599); Beacroft *v.* Strawn, 67 Ill. 28, 33; Baker *v.* Scott, 62 Ill. 86.

[32] Hawkins on Wills, 2nd ed. by Sanger, 243.

[33] Davis *v.* Ripley, 194 Ill. 399; Boehm *v.* Baldwin, 221 Ill. 59;

maximum number of the class which may be admitted to share; and *second*, which of those included in this maximum number will be permitted to share. The second of these questions is entirely one of determining whether the gift to the class is contingent upon the members surviving a particular time, usually the period of distribution. Here, whether the gift is vested or contingent, or vested indefeasibly, or defeasible upon death before the period of distribution, is all important. The first question is strictly one of the determination of the class and is subject to certain rules known as rules for the determination of classes. These rules are concerned merely with the total number of those who may possibly be admitted to share—that is to say, with the length of time during which the class may be increased. They have nothing whatever to do with whether the interest is vested or contingent. Thus, if there is 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.[34] Whether the interest is vested or not, while it may be a factor in determining the period of distribution, for the most part only affects the amount which the members of the class will take. If it be vested,[35] 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 can possibly take is fixed; but this may be cut down if other members are added to the class. On the other hand, if the interest is contingent,[36] then, if one dies before the contingency happens, the

Connor *v.* Gardner, 230 Ill. 258, 272; Reed *v.* Welborn, 253 Ill. 338; Way *v.* Geiss, 280 Ill. 152.

[34] *Post*, §§ 564 *et seq.*

[35] 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; Chapman *v.* Cheney, 191 Ill. 574; Flanner *v.* Fellows, 206 Ill. 136.

[36] 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; Blatchford *v.* Newberry, 99 Ill. 11; Bates *v.* Gillett, 132 Ill. 287; Ebey *v.* Adams, 135 Ill. 80; Pitzel *v.* Schneider, 216 Ill. 87.

In Schnuecht *v.* Schultz, 212

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.

The distinction between the determination of what maximum number of the class may be admitted to share, and whether the members of the class, who may be so admitted, must survive the period of distribution in order to take, was recognized by our Supreme Court in *McCartney v. Osburn.*[37] The court said: "where the gift or devise is to a class, none will be permitted to take except such as are *in esse* at the time of distribution." This was intended as an announcement of the rule which allowed the class to increase only until the period of distribution, whether the gift were vested or contingent. If, however, the statement of the court had stopped at this point it would have been inaccurate because it would have required all who took to survive the period of distribution. The court evidently perceived this and therefore added that this general statement was subject to the qualification "that where the gift or devise is to a class, as tenants in common, with no provision for survivorship, and one or more of the class die after the gift or devise has taken effect in interest, and before the time of distribution, the shares or portions of those so dying will go to their devisees, or, in case of intestacy, to their heirs or next of kin, as the case may be." Thus the court clearly recognized the difference between the rule for the determination of the maximum number of the class who might share and the question whether the members of that class must survive the period of distribution in order to take.

Recently, however, the court has announced without qualification, as a rule for the determination of the class, that[38] "the rule is that where the gift is not in terms immediate and so confined and a gift to a class is postponed pending the termination of a life estate, those members of the class, and those

Ill. 43, the future interest was either certain or non-contingent executory or else contingent executory, yet that did not affect the rules for the determination of classes.

[37] 118 Ill. 403, 418, *ante,* § 523.

[38] Drury *v.* Drury, 271 Ill. 336, 341.

only, take who are in existence at the death of the life tenant."[39] Along with this statement the court has shown a tendency to hold that a gift to a class merely as such, made the gift contingent on the members of the class surviving the period of distribution.[40] This, it is submitted, confuses the question of the determination of the class with the question whether the gift was contingent on the members of the class surviving the period of distribution. A rule is stated for the determination of the class which would make every gift to a class contingent on the members of the class surviving the period of distribution. This, it is believed, is erroneous. The rule for the determination of the class is that those born up to the period of distribution are entitled to be considered as members of the class. But whether all of those born before the period of distribution are entitled to share, or only such as survive the period of distribution, is settled by considering whether the gift is to members of a class who survive, so that it is contingent, or whether it is non-contingent and vested, so that upon the death of any member of the class before the period of distribution his interest will pass to his representative. That is a question of construction which should be considered entirely apart from any rule for the determination of the possible maximum number of the class. It is very questionable whether the fact that the gift is to a class is even a circumstance in favor of the gift being held to be contingent upon the members of the class surviving the period of distribution.[41]

In the following sections the rules relating strictly to the determination of classes are dealt with. No attempt at this point is made to consider whether the gift to the class is contingent on the members surviving the period of distribution or not. That difficulty of construction has already been considered elsewhere.[42]

§ 564. Rule when 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

[39] Similar expressions are to be found in Brewick *v.* Anderson, 267 Ill. 169, and Blackstone *v.* Althouse, 278 Ill. 481, 487.

[40] *Ante*, §§ 353, 524.

[41] *Id.*

[42] *Id.*

take and subsequently born children are not let in.[43] 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*,[44] 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."

If, however, the devise is to "A and his children" and none are *in esse* at the testator's death, A alone is entitled.[45]

§ 565. **Rule when the period of distribution is the termination of a life estate:**[46] If no members of the class are in existence at the time the testator dies or the settlement is made, then the class may increase at least till the death of the life tenant, but not beyond that time.[47] 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[48] A at once takes a life estate with a contingent remainder to a class. Under the decisions of our Supreme Court it is now settled that this remainder is the equivalent of a gift to "children."[49] It seems always to have been assumed that all the children born to A at any time will take.[50] 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

[43] 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. So where the conveyance is by deed to A and her children, and one child is then *in esse,* A and that child alone will share: Dick *v.* Ricker, 222 Ill. 413.

[44] 38 Ill. 202.

[45] Davis *v.* Ripley, 194 Ill. 399.

[46] 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 testator'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.

[47] Reed *v.* Welborn, 253 Ill. 338; Way *v.* Geiss, 280 Ill. 152.

[48] *Ante,* § 402.

[49] *Ante,* § 406.

[50] Voris *v.* Sloan, 68 Ill. 588; Kyner *v.* Boll, 182 Ill. 171; Turner *v.* Hause, 199 Ill. 464; Richardson *v.* VanGundy, 271 Ill. 476; Moore *v.* Reddel, 259 Ill. 36.

that the class may increase until the death of the life tenant, but not beyond that time.[51]

Lancaster v. Lancaster,[52] 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 is taken of the limitations, the period for the determination of the class must, according to the general rule, have been the death of the life tenant. It is most clearly so if they are left as they are. It is equally so if the rule in Shelley's case, be first applied and then the Statute on Entails,[53] and if the further assumption be made that under that statute the remainder is substantially to children.[54] In *Lehndorf v. Cope*,[55] for instance, where an estate tail was in terms limited, 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."

§ 566. 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: If there is nothing in the will from which it could be specially inferred that children born up to the time

[51] 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; Schukneeht *v.* Schultz, 212 Ill. 43, 47, 48; Pitzel *v.* Schneider, 216 Ill. 87; Dwyer *v.* Cahill, 228 Ill. 617; Dime Savings Co. *v.* Watson, 254 Ill. 419. 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.

[52] 187 Ill. 540, 546.

[53] *Ante*, § 420.

[54] *Ante*, § 406.

[55] 122 Ill. 317, 330.

of the death of the life tenant, or later, were intended to share, the rule of the English cases [56] would seem to be that only children born at the death of the testator could take.[57] In accordance with this holding the class of grandchildren in *Howe v. Hodge*,[58] 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,[59] that is, when the eldest grandchild reached twenty-five.

§ 567. 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.[60]

§ 568. Where the gift to the class is vested: Suppose 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

[56] Coventry *v.* Coventry, 2 Dr. & Sm. 470; Hill *v.* Chapman, 1 Ves. 405; Hagger *v.* Payne, 23 Beav. 474; Hawkins on Wills, 74-75; Theobald on Wills, 2nd ed. 246; 2 Jarman on Wills, (6th ed. Bigelow), star page 1013.

[57] 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.

[58] 152 Ill. 252.

[59] *Post*, § 568.

[60] 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

itself because it may last too long, the postponement would be valid. It is of course, valid, where *Claflin v. Claflin*,[61] is law. It is equally valid under the English cases[62] 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.[63]

When 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 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.[64] As between the second and third views perhaps a choice may be difficult.[65] The English cases have held that the second is the proper period

nieces as those "*who are* the children" of the testator's brothers and sisters, the class was determined at the testator's death.

[61] 149 Mass. 19, *post*, §§ 732 *et seq.*

[62] Oppenheim *v.* Henry, 10 Hare 441.

[63] *Post*, § 680.

[64] Comments upon Kevern *v.* Williams, 5 Sim. 171 (1832), 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.

[65] 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.

of distribution,[66] except where the whole interest of the legacy is given to the legatee in the meantime.[67] In that case the inference is that the third period is the proper one because it is the earlier, the postponement is purely personal to the legatee,[68] and the actual rights of others to the income or interest are not affected by its adoption.

§ 569. **Where the gift is to the 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.[69] In both cases, however, the court refers to a child born subsequent to

[66] Roden *v.* Smith, Amb. 588 (1744); Maher *v.* Maher, 1 L. R. Ir. 22 (1877).

[67] Roden *v.* Smith, *supra.*

[68] In support of this, see the hint in Claflin *v.* Claflin, 149 Mass. 19, 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. (U. S.) 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 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.

[69] 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.

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.

§ 570. **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 only upon the happening of two events,[70]—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.[71]

TITLE V.

MEANING OF "HEIRS" IN A LIMITATION TO THE TESTATOR'S "HEIRS," OR THE "HEIRS" OF A LIVING PERSON.

§ 571. **Primary meaning of "heirs":** The primary meaning of "heirs," in a gift to the heirs of the testator or of a living person, includes those persons who answer the description of heirs at the testator's or living person's death. It cannot designate anyone prior to that time because a person while alive can have no heirs.[71a] Nor can it be confined to a special class of heirs, such as collateral heirs by blood, so as to exclude an adopted child who is a statutory lineal heir. Thus in *Butterfield v. Sawyer*[71b] where the limitations were by deed to a daughter for life, then to her children, and in default of such children to her "heirs generally," except George (a brother), "heirs"

[70] Pitzel *v.* Schneider, 216 Ill. 87.

[71] *Ante*, § 568.

[71a] 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 Ill. 42, 60; Clark *v.* Shawen, 190 Ill. 47; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 151, 152; Hill *v.* Gianelli, 221 Ill. 286; Carpenter *v.* Hubbard, 263 Ill. 571; People *v.* Camp, 286 Ill. 511; Henkins *v.* Henkins, 287 Ill. 62.

[71b] 187 Ill. 598.

meant those persons whom the statute designated as heirs and the adopted child was included.[72] So far as heirs by blood are concerned the Statute on Descent determines who are included in a gift to heirs. Whether a surviving spouse, or an adopted child, who are heirs by the statute are included, is considered *post*, §§ 573, 574, 584 *et seq.*[73]

The statute also determines the quantity of state which each heir, who is included, takes.[75] Our Supreme Court has recognized and followed [76] the general rule stated by Jarman [77] that if a gift be made to one person and the children of another—as, for instance, to A and the children of B—A and the children of B in such case primarily take *per capita* and not *per stirpes*. But this construction yields to a very faint glimpse of a different intention in the context, which was found by the court in the cases in this state recognizing the general rule. Where, however, the gift is to the "heirs of A" and A leaves as his heirs a child and the children of a deceased child, the children of the deceased child will take only the share their parent would have taken. Hence the distribution is *per stirpes* and not *per capita*.[78] The heirs will, however, take *per capita* if such intention is clearly expressed.[79] It should be observed, however, that the direction to "divide equally among my heirs" is not sufficient to induce a construction that the heirs take *per capita* and not *per stirpes*.[80]

§ 572. Gift to the testator's heirs where a preceding interest is expressly limited to one who is an heir or the sole heir of the testator at his death: Suppose the testator limits a

[72] *Post*, §§ 584 *et seq.*

[73] Whether an illegitimate child, who is heir of its mother, is included, see *ante*, § 140.

[75] 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. But the terms of the will may include a different quantity or distribution, as in Auger *v.* Tatham, 191 Ill. 296.

[76] Pitney *v.* Brown, 44 Ill. 363; McCartney *v.* Osburn, 118 Ill. 403, 424.

[77] 2 Jarman on Wills (6th ed. Bigelow), star pages 1050, 1051.

[78] 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.

[79] Auger *v.* Tatham, 191 Ill. 296.

[80] Kelley *v.* Vigas, 112 Ill. 242; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144.

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 it mean the testator's heirs at the time of his death or those persons who would have been the testator's heirs if he had died at the time of the death of the life tenant? Of course, the primary meaning of "heirs" is heirs of the testator at the time of his death,[81] and this will be the meaning of heirs in the cases put unless something appear to lead to a contrary conclusion.[82] 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 persons who would have been the testator's heirs, if he had died at the time of the life tenant's death or upon 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 several heirs at law of the testator. Following the leading English case of *Holloway v. Holloway* [83] 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.[84] 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. *Johnson v. Askey* [85] took this view and held that "heirs" meant those persons who would have been the testator's heirs if he had died at the time of the death of the life tenant. In *Bond v. Moore*,[86] where the life tenant was the sole heir at law, coun-

[81] 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; Hill *v.* Gianelli, 221 Ill. 286.

[82] Brown *v.* Brown, 253 Ill. 466. 8 Ill. Law Rev. 121, where the primary meaning persisted in spite of a strong special context against it.

[83] 5 Ves. 399.

[84] Kellett *v.* Shepard, 139 Ill. 443; Henkins *v.* Henkins, 287 Ill. 62. See also reasoning of Downing *v.* Grigsby, 251 Ill. 568, 574. Thomas *v.* Miller, 161 Ill. 60, 72, seems *contra.*

[85] 190 Ill. 58.

[86] 236 Ill. 576. See also Messer *v.* Baldwin, 262 Ill. 48.

sel admitted that the same result was proper and the court followed the admission. Recently, however, in *People v. Camp* [87] the court appears to have held that, where two life tenants were the sole heirs at law of the testator, the remainder to "heirs at law" included them and could not by any possibility include a nephew. It is worth noting that the present tendency of the English cases is to retain the primary meaning of "heirs," even where the life tenant is the sole heir of the testator.[88] This position is taken upon the ground that the gift to "heirs" is only put in to fill a gap and prevent an intestacy. There is, therefore, no absurdity in the life tenant taking all. In *Carpenter v. Hubbard* [89] the limitations were of real estate to the testatrix's husband for life, then to the children of the marriage for life, and then to the heirs at law of the husband. It was insisted that heirs meant those persons who would have been the husband's heirs if he had died at the time of the death of the children, thus excluding the children. This was based upon the fact that the children were presumptively the husband's sole heirs at law. This, however, was only a probability and not a certainty and the primary meaning of "heirs at law" prevailed.

Suppose 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 his 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* [90] 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,[91] in spite of the fact that

[87] 286 Ill. 511.

[88] Bird *v.* Luckie, 8 Hare 301; Theobald on Wills, 2nd ed. 280-281; Rawlinson *v.* Wass, 9 Hare 673; Wrightson *v.* Macaulay, 14 M. & W. 214; *Re* Frith; Hindson *v.* Wood, 85 L. T. R. 455; Rand *v.* Butler, 48 Conn. 293; Stokes *v.* VanWyck, 83 Va. 724.

[89] 263 Ill. 571.

[90] 180 Ill. 345.

[91] Why did not the gift to

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.

Where the remainder to "heirs" is to those who are heirs at the testator's death, the remainder is not subject to any condition precedent that such heirs must survive the death of the life tenant.[92] It is, therefore, clearly vested in the feudal sense and not destructible or alienable.

§ 573. Whether a surviving spouse is included in a gift to the deceased spouse's heirs at law—(1) Where no preceding interest is limited—Distributive construction: Where a spouse dies without issue living, the surviving spouse is an heir at law by the statute and entitled to succeed, as such heir at law, to one-half the deceased spouse's real estate.[93] The surviving spouse is entitled to all of the deceased's personal property. Where the devise is to the "heirs" of the deceased spouse, who leaves no issue, and the gift is to take effect immediately upon the testator's death without any intervening estates, it seems regularly to have been held that the surviving spouse was included as an heir at law.[94] If, however, the spouse dying leaves issue, the surviving spouse is not an heir so far as the real estate is concerned, but is entitled as distributee to one-third of the personal estate. In the absence of a special context requiring the contrary, an immediate gift of real estate to the testator's "heirs" will not include the surviving spouse where the deceased spouse leaves issue. In *Gauch v. St. Louis Mutual Life Insurance Co.*[95] it was held that, where the proceeds of an insurance policy were involved the surviving spouse was not included. But in *Walker v. Walker*,[96] where only personal property was devised to the "heirs at law according to the

"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.

[92] Clark *v.* Shawen, 190 Ill. 47; Minot *v.* Tappan, 122 Mass. 535. *Contra,* Forrest v. Porch, 100 Tenn. 391.

[93] Sutherland *v.* Sutherland, 69 Ill. 481; Sutherland *v.* Harrison, 86 Ill. 363.

[94] Rawson *v.* Rawson, 52 Ill. 62; Richards *v.* Miller, 62 Ill. 417; Alexander *v.* Masonic Aid Assn., 126 Ill. 558.

[95] 88 Ill. 251.

[96] 283 Ill. 11. See also Alexander *v.* Masonic Aid Assn., 126 Ill. 558; Clay, etc. *v.* Clay, 63 Ky. 295; Lawton *v.* Corlies, 127 N. Y. 100;

statute of descent in the State of Illinois'' of beneficiaries who predeceased the period of distribution, it was held that the surviving spouse was included even though the deceased spouse left issue. If, however, a blended fund of real and personal property is devised to ''heirs,'' ''heirs'' has usually been refused a distributive construction and has been given the meaning as to the whole fund which it has when applied to real estate alone.[97]

§ 574. **(2) Where a preceding interest for life is limited to the spouse with a gift over to the testator's heirs:** If there are no surviving issue of the marriage and only personalty is involved, the wife is not only life tenant but sole statutory heir and distributee. To avoid, therefore, the incongruity of such spouse taking the whole where only a life estate was expressly limited, the surviving spouse may be excluded.[98] If there is no issue and only realty is involved the situation is more difficult because the spouse surviving takes only one-half the real estate as heir and the incongruity is removed. In *Black v. Jones*[99] the widow was, nevertheless, excluded. If a mixed fund of real and personal property be devised to the wife for life and then to the testator's heirs at law, the problem of construction is especially difficult. If the widow as heir would take only one-half the realty and one-half the personalty she might claim that no incongruity of result would prevent her from being included in the term ''heir.'' If, however, she insists upon a distributive construction so that she would take all the personalty and one-half the realty as heir, there is a substantial approach to an incongruity fatal to her claim. Obviously a very slight special context against the inclusion of the widow will be effective to exclude her.[1]

In re Ashton's Estate, 134 Pa. St. 390; Kendall *v.* Gleason, 152 Mass. 457. (In the last two cases there was a trust for conversion.)

[97] Allison *v.* Allison, 101 Va. 537; Olney *v.* Lovering, 167 Mass. 446; Heard *v.* Read, 169 Mass. 216; Schouler on Wills, 5th ed., secs. 542, 547; 2 Jarman on Wills, 5th Am. ed., star pages 62, 82. Rawson *v.* Rawson, 52 Ill. 62, seems *contra*, but the question here raised does not seem to be particularly mooted or discussed. Furthermore, although a blended fund of real and personal property was involved, yet the report of the case states that there was no real estate.

[98] *Ante*, § 572.

[99] 264 Ill. 548.

[1] Smith *v.* Winsor, 239 Ill. 567; McGinnis *v.* Campbell, 274 Ill. 82.

NOTE on cases where ''heirs'' has been construed to mean ''chil-

TITLE VI.

MEANING OF "ISSUE" IN GIFTS TO "ISSUE."[2]

§ 575. The primary meaning of "issue"—"Issue" as including descendants and as limited to children: If property be limited to the "issue of A," "issue" primarily means the descendants or issue in every generation from A. It includes A's children, grandchildren and great-grandchildren and so on.[3]

dren": 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, 118 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; Dunshee *v.* Dunshee, 251 Ill. 405; Hull *v.* Hull, 286 Ill. 75. See also Hobbie *v.* Ogden, 178 Ill. 357; 72 Ill. App. 242.

Observe the cases, *ante,* § 414, under the Rule in Shelley's Case; also cases, *ante,* § 552, on the meaning of "heirs" when there is a gift over if the first taker dies "without heirs."

For the construction of the word "children" so as to include grandchildren, see Arnold *v.* Alden, 173 Ill. 229; Anderson *v.* Williams, 262 Ill. 308.

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.

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.

See also Schaefer *v.* Schaefer, 141 Ill. 337, 342 where "children" was held equivalent to "heirs" as a word of limitation. *Ante,* § 169.

[2] "Descendants" is co-extensive in meaning with "issue:" Bates *v.* Gillett, 132 Ill. 287, 297.

[3] Cook *v.* Cook, 2 Vern. 545; Davenport *v.* Hanbury, 3 Ves. Jr. 257; Freeman *v.* Parsley, 3 Ves. Jr. 421; Maddock *v.* Legg, 25 Beav. 531; Weldon *v.* Hoyland, 4 De G. F. & J. 564; Hobgen *v.* Neale, 11 Eq. Cas. 48; *In re* Jones' Estate, 47 L. J. Ch. 775; Surridge *v.* Clarkson, 14 W. R. 979; Edyvean *v.* Archer [1903], A. C. 379; Southam *v.* Blake, 2 W. R. 446; Birdsall *v.* York, 5 Jur. N. S. 1237; Gowling *v.* Thompson, 19 L. T. N. S. 242; *In re* Sibley's Trusts, 5 Ch. Div. 494; Wistar *v.* Scott, 105 Pa. St. 200; Pearce *v.* Rickard, 18 R. I. 142; Price *v.* Sisson, 13 N. J. Eq. 168; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475; Soper *v.* Brown, 136 N. Y. 244; Schmidt *v.* Jewett, 195 N. Y. 486; Phelps *v.* Cameron, 96 N. Y. Supp. 1014; Bassett *v.* Wells, 106 N. Y. Supp. 1068; Ridley *v.* McPherson, 100 Tenn. 402; Hall *v.* Hall, 140 Mass. 267; Dexter *v.* Inches, 147 Mass. 324; Hills

Of course, "issue" may be construed to mean children if a special context be present upon which such a construction can be based.[4] A very frequent special context recognized by the English cases as sufficient to turn issue into children is thus indicated in Theobald on Wills:[5] "The generality of the word issue will be restrained if the testator explains that he meant by issue children. This will be the case if the word issue is coupled with father or mother or parent: for instance, if in a substitutional gift to issue, the issue are directed to take their parent's share." This rule rests upon the fact that the word "parent" as used in the substitutionary clause refers solely to the person in whose place the issue are to take. This view of the use of the word parent has been regularly accepted in England but not without criticism.[6] It has been followed in this country in a few cases.[7] But there is a strong tendency here to repudiate it and to give to the word issue its primary meaning as including all descendants, in spite of the use of the express direction that the issue of any deceased legatee shall take the parent's share. The word parent is regarded as used in a recurring or sliding sense, so as to apply to successive generations of issue, so that no descendant can be included in issue who has an ancestor living.[8]

v. Barnard, 152 Mass. 67; Jackson *v.* Jackson, 153 Mass. 374; Gardiner *v.* Savage, 182 Mass. 521; Union Safe Deposit *v.* Dudley, 104 Me. 297; Corbett *v.* Laurens, 26 S. C. Eq. 301.

[4] Arnold *v.* Alden, 173 Ill. 229, 238; Gannon *v.* Peterson, 193 Ill. 372, 379.

[5] 7th ed. 311.

[6] Ralph *v.* Carrick, 5 Ch. Div. 984; 11 Ch. Div. 873.

[7] Coyle *v.* Coyle, 73 N. J. Eq. 528 (a reluctant decision by a single judge); Nice's Estate, 227 Pa. St. 75; Austin *v.* Bristol, 40 Conn. 120; King *v.* Savage, 121 Mass. 303 (now overruled in Massachusetts so far as it recognizes the rule of the English cases that the use of the word parent will be sufficient to turn issue into children). See Arnold *v.* Alden, 173 Ill. 229, 239.

[8] Dexter *v.* Inches, 147 Mass. 324; Hills *v.* Barnard, 152 Mass. 67; Jackson *v.* Jackson, 153 Mass. 374; Union Safe Deposit *v.* Dudley, 104 Me. 308; Robinson *v.* Sykes, 23 Beav. 40. *Post*, §§ 580, 581.

See also Hall *v.* Hall, 140 Mass. 267, where the gift was to "issue or children" and the court held that the word issue enlarged the meaning of children. Holmes, J., said: "If there had been no children, but only grandchildren of the testator's daughter, it would have been hard to persuade any court that there was an intestacy so far

§ 576. **When issue has been held to include all descendants the question arises, does it mean all descendants per capita or does it include only those descendants who have no ancestors living and who stand in the place of their ancestors deceased? —Introductory:** This has sometimes been spoken of as the question whether issue means issue *per capita* or issue *per stirpes*. If issue means issue *per stirpes*, then it cannot include any issue who have an ancestor living, because so long as such an ancestor lives there is no *stirps* for the issue to represent. The refinements in the solution of the question of whether issue means all the descendants *per capita* or only those descendants who have no ancestor living, can best be indicated by a consideration of the following progressive series of cases:

§ 577. (1) **Suppose the gift is direct to issue and not to issue by way of substitution after an ancestor deceased to whom the gift was originally made:** Thus, suppose there is a bequest "to the issue of A" or "to A for life, then to A's issue." Assume that, at the period of distribution, there were two children of A living and each has a child living. Do all take *per capita* each one-fourth or do the children of A each take one-half?

Clearly if the testator had actually put his mind upon the difference in result he would have expressed himself clearly upon the point. He would have said *per capita* or he would have used the expression *per stirpes* or some other phrase which would indicate that the issue were to take only by way of representation. But what is the inference where he does neither? It is that his mind did not work at all upon the situation. He did not consider or view the possibilities of the future. We have a case where the only possible inference is that the testator had no intent about the mode of distribution in the events which actually occurred and where, nevertheless, the words used actually furnish some solution of the difficulty. It is a case where it is futile for the court to guess from the language used what the testator meant since it is obviously apparent that he had no meaning. The only possible function of the court is to adopt and carry out a primary meaning.

as this clause was concerned: yet that would be the result of the interpretations proposed [by which issue was restricted to children]."

What primary meaning then should the courts adopt for the word "issue?"

So far as the scope of the language goes, issue, when it once includes descendants, naturally includes them all. It cannot be said that all are included when all that have ancestors living are excluded. When an attempt is made to give issue a meaning which lets in only those issue who have ancestors who are deceased, an unusual and extremely complex meaning to a single word is being adopted. The word "issue" is being made to stand elliptically for much more than is contained in the word itself. It will usually be conceded as a first principle in the art of construing written instruments, that when the primary meaning of the words used has been determined and there is no special context in the language used upon which a different meaning may be predicated, the greater reasonableness of a different disposition, or a consideration of what it is likely a testator would have wished, cannot be allowed to change the interpretation of the words used.[9] It will equally be conceded that such considerations cannot be made the basis for inserting words not actually used.[10] Courts are usually quick to deny that their habit in construing wills is "to guess from the language used in the particular will what the testator would have meant had he had any meaning, which he had not."[11]

An examination of the cases discloses an overwhelming array of judicial opinion that issue not only includes descendants, but includes all the descendants and that they take *per capita,* even though in so doing they take shares along with their living ancestors.[12]

[9] See Holmes, J., in Hall *v.* Hall, 140 Mass. 267, 270.

[10] Bond *v.* Moore, 236 Ill. 576.

[11] Gray, Nature and Sources of the Law, § 703.

[12] Maddock *v.* Legg, 25 Beav. 531; Cook *v.* Cook, 2 Vern. 545; Edyvean *v.* Archer [1903], A. C. 379; Wistar *v.* Scott, 105 Pa. St. 200; Pearce *v.* Rickard, 18 R. I. 142; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475; Price *v.* Sisson, 13 N. J. Eq. 168; Soper *v.* Brown, 136 N. Y. 244; Schmidt *v.* Jewett, 195 N. Y. 486; Phelps *v.* Cameron, 96 N. Y. Supp. 1014; Bassett *v.* Wells, 106 N. Y. Supp. 1068; Corbett *v.* Laurens, 26 S. C. Eq. 301; Ridley *v.* McPherson, 100 Tenn. 402.

In some of the above cases it was expressed that issue were to take equally share and share alike. But, as has been very justly held in Massachusetts, this expression does not prevent the construction that issue

§ 578. (2) **Suppose the gift is to issue by way of substitution in place of a gift to the ancestor:** Thus, suppose the gift is "to A absolutely, but if A dies before the testator's death or before the period of distribution, then to A's issue. The English cases hold that all the issue take among themselves *per capita,* and that remote issue take though their ancestors are living.[13] No American cases making any distinction between the case where the issue take by way of substitution and where they take directly have been found. It is difficult to see how any sound distinction can be made upon this ground. What difference is there between a gift to A for life and then to his issue and to A absolutely, and if he die after the testator but before the period of distribution, to his issue? In both cases there is in reality a direct gift to issue. In both, the issue take the share set apart for their parent or for that family. So, if the gift is to A absolutely, but if A die before the testator to A's issue, the case is not in the least altered so as to furnish any rational ground for saying that only issue take who had no ancestors living. There is no logic in the point that because issue are originally to take in place of a named ancestor it is expressed that as among the issue themselves they are always to take by representation. What is expressed is that the issue shall take the share of a named ancestor. What is thus expressed does not supply the place of an entirely different idea, *i. e.*, that as among the issue only those shall take who have no ancestor living—which is not expressed. As will be observed hereafter, the Massachusetts cases, which exhibit a tendency to hold that issue primarily means issue who have no ancestors living, make no

are to take *per stirpes.* It is quite proper to provide that "issue shall take equally share and share alike *per stirpes,*" thus causing the shares to be equally divided among different stocks and also to be divided equally among brothers and sisters. Coates *v.* Burton, 191 Mass. 180; Hall *v.* Hall, 140 Mass. 267. Hence the fact that a similar expression is used does not furnish the reason for the holding that issue includes all descendants *per capita.*

[13] Davenport *v.* Hanbury, 3 Ves. Jr. 257; Freeman *v.* Parsley, 3 Ves. Jr. 421; Weldon *v.* Hoyland, 4 De G. F. & J. 564; Hobgen *v.* Neale, 11 Eq. Cas. 48; *In re* Jones' Estate, 47 L. J. Ch. 775; Surridge *v.* Clarkson, 14 W. R. 979; *Re* Flower, 55 L. J. Ch. N. S. 200; Southam *v.* Blake, 2 W. R. 446; Birdsall *v.* York, 5 Jur. N. S. 1237.

difference at all between the case where there is an original gift to issue and one where the gift was by way of substitution.[14]

§ 579. (3) **Suppose the gift is "to the children of A and the issue of any deceased child":** Here, of course, the issue of the deceased child will take only the ancestor's share. They take only in the event that the particular ancestor who is one of the original class is dead. It is, therefore, fairly expressed that they are to take the share which their ancestor, who was a member of the original class, would have taken.[15]

But, as among the issue themselves all descendants take *per capita* the share which the ancestor, who was a member of the class as originally named, would have taken.[16] So far as the division among the issue themselves is concerned, the case is exactly the same as where the gift is to A, B and C and if any one dies before the period of distribution, then to his issue, and where issue includes all descendants *per capita*.[17]

The failure to observe the distinction between the case where issue take *per stirpes* as between them and the brothers and sisters of the ancestor of the issue, and the case where issue take *per stirpes* among themselves the share of the ancestor, is likely to lead to confusion. Thus, where the question is whether parents and their children and grandchildren are all to share equally *per capita* as issue, it is sometimes said that the question is whether issue are to take *per capita* or *per stirpes*. Suppose, then, cases are produced where the issue are held to take *per stirpes*, meaning *per stirpes* as between them and the brothers and sisters of their ancestor. A court overlooking this and not properly discriminating, might take it as meaning that issue as among themselves are to take *per stirpes* and so might be led to

[14] See *post*, § 582.

[15] Congreve *v.* Palmer, 16 Beav. 435; Timins *v.* Stackhouse, 27 Beav. 434; Gowling *v.* Thompson, 19 L. T. 242; 11 Eq. Cas. 366 note; *In re* Sibley's Trusts, 5 Ch. Div. 494; *In re* Battersby's Trusts [1896] 1 Ir. 600; Hall *v.* Hall, 140 Mass. 267; Kilgore *v.* Kilgore, 127 Ind. 276; Wood *v.* Robertson, 113 Ind. 323; Crozier *v.* Cundall, 99 Ky. 202; Gerrish *v.* Hinman, 8 Ore. 348; Lyon *v.* Acker, 33 Conn. 222; Risk's Appeal, 52 Pa. St. 269; Fissel's Appeal, 27 Pa. St. 55; Lockhart *v.* Lockhart, 3 Jones Eq. (N. C.) 205. Compare, however, Pitney *v.* Brown, 44 Ill. 363; McCartney *v.* Osburn, 118 Ill. 403.

[16] Gowling *v.* Thompson, 19 L. T. 242; *In re* Sibley's Trusts, 5 Ch. Div. 494. *Contra:* Robinson *v.* Sykes, 23 Beav. 40.

[17] *Ante*, § 578, note 13.

promulgate a rule that when issue take by way of substitution they take *per stirpes* so that no issue will take who have an ancestor living. No instance, however, of a court of last resort doing this has been found.

§ 580. (4) **Suppose there is a gift "to the children of A and the issue of any deceased child, such issue to take the parent's share" or "to represent and take the parent's share":** We will assume that, in accordance with a tendency in this country, the use of the word "parent" does not cause the word issue to mean children.[18] The question then arises whether descendants take *per capita* or whether those descendants only take who have no ancestors living. Clearly, the latter is the correct view. The very fact that "parent" does not turn issue into children means that "parent" does not refer to the members of the original class who are to take and those alone, but refers to whoever may be a parent of any issue. The word "parent" is thus used in a recurring or sliding sense so as to apply to successive generations of issue. When "parent" is used in this sense, of course, the distribution can only be among those descendants who have no ancestors living and who stand in the place of their ancestors deceased.[19] Such is the precise basis for the holding in a recent case in Maine.[20]

§ 581. (5) **Suppose the gift is of $1,000 "to A, and if A die before the period of distribution then to his issue, said issue to take the share of their parent" or "to represent and take the parent's share;" or suppose the gift is to A for life and then to his issue, "the issue to take the parent's share" or "to represent and take the parent's share":** The same reasoning applies here as applies to the case put in the preceding section. Since "parent" does not turn issue into children, it must be because parent does not refer to A, but is used in a recurring or sliding sense, so as to apply to successive generations of issue. Hence, issue by the actual use of the word "parent" includes only those who have no ancestor living. It should be observed also that the phrase "issue to take the parent's share" is highly superfluous and useless if it only means that issue are to stand

[18] See *ante*, § 575.

[19] Ross *v.* Ross, 20 Beav. 645; *In re* Orton's Trust, 3 Eq. 375.

[20] Union Safe Deposit *v.* Dudley, 104 Me. 297.

in the place of A because it is otherwise explicitly provided that the issue shall stand in the place of A in any event. The fact that the word "parent" would be uselessly used in one sense is an argument for its use in another where that adds something to the meaning of what has gone before.

Thus, in *Dexter v. Inches*,[21] one-eighth of the residue was given in trust for the testator's son, Charles, for life, with a gift over "if said Charles shall leave no widow and shall leave issue, then at his decease the principal or capital sum shall be paid and distributed equally to and among the *issue* of said Charles." The will further provided that "in case of the decease of either or any of my children before the receipt of his or her share, leaving issue him or her surviving, such issue shall represent and take the parent's share." On this language it was held that the intention was expressed that only such issue should take as had no ancestor living. The court clearly relied upon the last quoted phrase containing the word parent. The court also referred to *Ross v. Ross* [22] and *In re Orton's Trust*,[23] where the word "parent" was used in a recurring or sliding sense so as to apply to successive generations of issue. The inference clearly is that, since the word "parent" was not permitted to restrict issue to children, "parent" was used in the recurring or sliding sense and, therefore, only such issue could take as had no ancestor living.

So in *Hills v. Barnard*,[24] the devise was to the testator's son of eight-twelfths of the whole estate, then to nephews and nieces living, "each individual nephew and niece to take an equal share, the issue of any deceased legatee to take its parent's legacy." Here again it was held that in spite of the use of the word "parent," issue included all descendants. The court then assumed without discussion that only such descendants took as had no ancestor living. The explanation is meager, but the inference is inevitable that "parent" was taken in a recurring or sliding sense and the result reached, therefore, followed.

In *Jackson v. Jackson*,[25] the gift was to the testator's son's wife for life and at her death to her husband "if then living,

[21] 147 Mass. 324.
[22] 20 Beav. 645.
[23] 3 Eq. 375.
[24] 152 Mass. 67.
[25] 153 Mass. 374.

and if not, to her issue. And if she should survive her said husband and should leave no issue, I give this $10,000 at her death to all my children then living, and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents.'' The son's wife survived the husband and died leaving children and grandchildren who were children of a living child, and grandchildren who were children of a deceased child. It was urged upon the court[26] in favor of the children that ''parent'' turned issue into children. In furtherance of this position, it was urged that the word ''parent'' qualified not only the word issue, as used in the second sentence of the above quotation, but also issue as used in the first, which was the word ''issue'' actually required to be construed. The court declared that there was some doubt of this grammatically, but then proceeded to assume, for the sake of argument, that the word ''parent'' did qualify issue as used in the first sentence quoted. Then it declined to follow the English cases and declared that in spite of the use of the word ''parent,'' issue would include all descendants. Most of the opinion of the court is taken up with maintaining this position. If the Massachusetts court kept on assuming that parent qualified issue, as used in the first sentence, then ''parent,'' having been held to be used in a recurring or sliding sense, would clearly require a division among only such issue as had no ancestors living. If, however, the court turned about and assumed that ''parent'' did not apply to issue as used in the first sentence, then the case is a decision that issue primarily means all descendants who have no ancestor or ancestors living.[27] It is impossible to tell from the opinion whether the court intended to make such a decision.

§ 582. The present state of the cases in Massachusetts: Before *Jackson v. Jackson*,[28] it had not been actually decided in Massachusetts that there was to be any departure from the general rule that issue would be construed to include all descendants *per capita* in the absence of a special context requiring a different result. The cases where issue had been held to include only

[26] See briefs of counsel in the report of Jackson *v.* Jackson, contained in 11 L. R. A. 305.

[27] *Ante*, § 578.

[28] 153 Mass. 374.

descendants having no ancestor living were clearly explainable upon the special context.[29]

In *Jackson v. Jackson,* however, the court said: "We are of the opinion that, when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living, it is to be presumed that the intention was that the issue should include all lineal descendants, and that they should take *per stirpes,* unless from some other language of the will a contrary intention appears." It is difficult to tell, as indicated in the preceding paragraph, whether this is a dictum merely or an actual decision. The subsequent Massachusetts cases still leave the position of the Massachusetts court in doubt.

Thus, in *Gardiner v. Savage,*[30] the testator left the residue of his property to trustees to divide the income between a son and a daughter "for their sole and individual benefit and use, and at their decease, should they leave issue, to descend in fee to such issue." The daughter died leaving children and grandchildren. It was held that the daughter took a life interest in one-half the property, which at her death passed to her issue *per stirpes.* It is not made clear whether the grandchildren of the daughter were children of living children or deceased children.

In *Coates v. Burton,*[31] the testator provided: "Upon the decease of each of my said daughters, Caroline or Sarah, after the decease of my wife, my trustees hereunder shall pay over a proportion of the principal of the said fund of fifty thousand dollars and said estate on Fort avenue, then in trust hereunder for their benefit equal to the proportion of the income thereof, which such daughter so dying shall at her decease be entitled to receive, *to her lawful issue, share and share alike,* and in case of either or both dying without such issue living at her decease, then to my then heirs-at-law in either and all cases to have and to hold to them, their heirs and assigns, to their own use and behoof forever." The daughter, Sarah, died leaving as her issue seven children and a grandchild, the daughter of one of these living children. It was held that the grandchild would not

[29] See explanation of Dexter *v.* Inches, 147 Mass. 324; Hills *v.* Barnard, 152 Mass. 67 and Jackson *v.* Jackson, 153 Mass. 374, *ante,* § 581.

[30] 182 Mass. 521.

[31] 191 Mass. 180.

share. *Jackson v. Jackson*[32] was referred to as establishing the rule that issue primarily included only such descendants as had no ancestors living. In addition to this, however, the court found from the whole will, which is not given, four paragraphs indicating a scheme that issue should take by right of representation. In two paragraphs it was expressly declared that issue were to take by representation.

It is very difficult, therefore, to say just how far the Massachusetts cases have gone. Suppose, for instance, there came before the Massachusetts court in its simplest form a gift "to A absolutely, but if A die before the period of distribution then to A's issue." It is submitted that it is quite impossible to predict what the court would do.

One thing, however, seems clear. The Massachusetts court does not attempt to draw any distinction between the case of a gift "to A for life, then to A's issue" and the case of a gift "to A absolutely, but, if A die before the period of distribution, to A's issue.".

§ 583. What is meant by the statement that "where the gift to the issue is substitutional they take per stirpes and not per capita": In *Pearce v. Rickard,*[33] the limitations were to A for life, and then to the issue of A alive at her death. It was held that issue meant all descendants and that all took *per capita,* including those who had ancestors living. The court, however, said: "It is doubtless true that where the gift to the issue is substitutional, they take *per stirpes* and not *per capita.* That is to say, where issue are pointed out in the will to take with reference to the share of the parent, they take by way of substitution." Thus, the court seems to say that if it is expressed that "issue shall take the parent's share," using the word "parent," then the issue may take as among themselves *per stirpes,* or as between themselves and the brothers and sisters of their ancestor only the ancestor's share. This meaning to the language of the court is confirmed by the two cases cited: In *Minchell v. Lee,*[34] there was a gift to all the children of A living at A's death, except B, and amongst the issue of any children of A as should be then dead, and also among the issue of B, such issue taking their respective parent's share. It was

[32] 153 Mass. 374.
[33] 18 R. I. 142.
[34] 17 Jur. 727.

held that the issue of B as against the children of A, except B, took *per stirpes* and not *per capita.* This was clear from the phrase "such issue [referring to the issue of B] taking their respective parent's share." The second case cited was *Dexter v. Inches.*[35] Here, as we have already observed,[36] it was held that in the phrase, "such issue shall represent and take the parent's share," the word "parent" was used in a recurring or sliding sense and that, therefore, only such issue could take as had no ancestors living. The statement in *Pearce v. Rickard,* as literally expressed and as explained by the two cases cited, is beyond criticism. Clearly, however, it furnishes no ground for a holding that when the gift is "to A absolutely, but if A dies before the testator's death or before the period of distribution, then to A's issue" or "to the children of A and the issue of any deceased child," only such issue can take as among themselves as have no ancestors living.

In *Ridley v. McPherson,*[37] the limitations were again almost identical with those in *Pearce v. Rickard.* They were to A for life, then to the issue of the life tenant living at her death. It was held that issue included all the descendants *per capita,* even though some had ancestors living. The court, however, in summarizing the holding in *Pearce v. Rickard,* said that the issue might take *per stirpes* if they took in a representative or substitutionary manner. The Tennessee court said: "The gifts, in this case, to the issue of the life tenant cannot be considered as substitutional, so that such issue must take *per stirpes.* A gift to issue is substitutional when the share which the issue are to take is, by a prior clause, given to the parent of such issue, but it is an original gift when not so expressed to be given to the parent of such issue, and the gift in this case falls under the latter head or class." This language is taken from the *American and English Encyclopedia of Law.*[38] The cases, however, cited in support of the passage in the encyclopedia, so far as they in any way relate to the question under discussion, support the proposition that when the gift is to "the children of A and the issue of any deceased child," the issue as between them and the living children of A take *per stirpes.* The only case

[35] 147 Mass. 324.
[36] *Ante,* § 581.
[37] 100 Tenn. 402.
[38] Vol. II, 1st ed. 871, note.

cited in the encyclopedia which involves the question as to how the issue take as amongst themselves is *Dexter v. Inches.*[39] Hence, the only inference that we can draw from the language of the Tennessee case is that when the gift is "to the children of A and the issue of any deceased child," the issue of a deceased child take as between themselves and the children of A *per stirpes;* also that where, as in *Dexter v. Inches,* the gift is "to A for life and then to his issue, the issue to represent and take the parent's share," only such issue will take, as among themselves, as have no ancestors living. Both propositions are clearly correct. No inference is to be drawn, therefore, from *Ridley v. McPherson* that, where the gift is "to the children of A and the issue of a deceased child" or "to A absolutely, but if A dies before the period of distribution, then to A's issue," only such issue will take, as among themselves, as have no ancestors living.

TITLE VII.

ADOPTED CHILDREN[40]—HOW FAR INCLUDED IN GIFTS TO "HEIRS," "ISSUE," OR "CHILDREN" OF THE ADOPTING PARENT.

§ 584. Problem stated and principles to be applied: If it is clear from the special context and admissible extrinsic evidence that the testator or settlor actually meant by the use of the word "heirs," "children" or "issue" to include an adopted person, then such adopted person will be included. It makes no difference, where the word "children" is used, that the adopted person is not given by the adoption statute the legal status of a child.[41] Nor is it material whether the instrument which refers to the children of a designated person is executed by the adopting parent[42] or by a third person.[43] On the other hand, the special context and extrinsic evidence may show a clear expressed intention that "heirs," "children" or "issue" are used in the sense of "heirs," "issue" or "children" by birth alone.

[39] 147 Mass. 324.

[40] As to how far *illegitimate* children may be included in a devise to the children of a named person, see *ante,* § 140.

[41] Martin *v.* Aetna Life Ins. Co., 73 Me. 25.

[42] *Id.*

[43] *In re* Truman, 27 R. I. 209.

The adopted person must, therefore, be excluded, though the adoption act gives the person adopted the status of "heir," "children" or "issue," as the case may be.[44]

The case which presents peculiar difficulties is where there is no special context, and no surrounding circumstances exist, which warrant the inference that the testator or settlor had a real and actual intention concerning the inclusion or exclusion of the adopted child. The typical case of this sort is where the "heirs," "children" or "issue" referred to are to be ascertained at a distant future time, frequently after the testator's death, and there has been no adoption of any child who could claim to be within the class and no act of adoption has been thought of or considered at the time of the execution of the will, settlement, or insurance policy. In this class of cases the only legitimate inference from the context and surrounding circumstances is that the testator or settlor has no actual intention whatever in respect to the difficulty which afterwards arises by the appearance of an adopted child. The very fact that the difficulty has arisen is often the clearest proof that the testator or settlor never thought of the matter at all, for if he had, it is hardly

[44] In Reinders *v.* Koppelman, 94 Mo. 338, there was a devise to the testator's wife for life, then one-half to the testator's adopted daughter A, and "one-half to the nearest and lawful heirs of himself and wife." This will showed a plan to provide one-half for an adopted daughter and the other half to heirs by blood, and the word "nearest" bore out this view. Hence even a subsequently adopted child was not included in the word "heirs."

In Morrison *v.* Session's Estate, 70 Mich. 297, the testator made his will in 1879, leaving the residue of his estate "to his lawful heirs." At that time he had an adopted child, but in 1874 he had attempted to secure the revocation of the adoption decree, and the probate judge had in fact ordered the adoption annulled, and the testator thought it was annulled. This circumstance the court held to be sufficient to show an actual intention that the adopted child was not included in the term "heirs at law."

In Balch *v.* Johnson, 106 Tenn. 249, a deed was executed conveying the property to A for life, and at her death to the "bodily heirs" of A's husband, including Ellen Evers, a stepdaughter of Andrew Johnson, Jr., the son of the life tenant. It was held that an adopted child upon whom the statute conferred "all the privileges of a legimate child," "with capacity to inherit and succeed," was not included in "bodily heirs." Clearly this was justified by the special context, "bodily heirs."

See also Clarkson *v.* Hatton, 143 Mo. 47, and the cases dealt with, *post*, § 592.

possible that he would not have expressed his desires in the clearest terms.

In this class of cases where the testator has no real intention, the person adopted has two steps to take: *First*, he must show that by the adoption act he was given the status of an "heir," or "child" or "issue" by birth of the adopting parent, as the case may be. That is a matter entirely of the *construction of the adoption act*. *Second*, he must then show that the word "heirs," "children" or "issue" as used in the instrument in question, was in its primary meaning so comprehensive as to include any one who obtained the legal status called for, no matter by what means. This is entirely a question of the *interpretation of the instrument*. It is not, however, a question of the actual intention of the testator or settlor, for we have premised that he had none. It is really a question of what intention the law will charge him with. That depends upon what primary meaning the law will give to the language used. Once ascertained, that must be adhered to so long as the case continues to be one where the testator or settlor had no real intention.

§ 585. Analysis of the cases with reference to whether the adoption act can be construed to give the adopted person the status of an "heir," "child" or "issue": In a number of states the adoption act has been so limited in scope that it gave to the person adopted the status of an "heir" only and denied to him the status of a child by birth. Thus in *Russell v. Russell*[45] it was held that a person adopted could not take as coming within the meaning of "children" in the will of the adopter. This was placed solely upon the ground that the statute permitting the adoption by a declaration in writing had only the effect "to make such child capable of inheriting." In *Commonwealth v. Nancrede*[46] the adopted person was held not to come within the exemption given to a child under the inheritance tax law. In *Schafer v. Eneu*[47] the adopted person did not come within the meaning of "child" in a will. The last two cases went frankly upon the ground that the adoption statute was so narrow in scope that it gave only the right of inheritance and did not undertake to confer upon the person adopted the status of a

[45] 84 Ala. 48.
[46] 32 Pa. St. 389.
[47] 54 Pa. St. 304.

child by birth. The opinions of the Pennsylvania court in both cases, so far as they assert that an adopted child is not a child, must be read in the light of such a statute. They are entirely out of place and useless as authorities where the adoption act is broad enough to give the adopted person the status of a child by birth. In *Cochran v. Cochran* [48] a testator gave a portion to one of his sons for life, and "if he dies without lawful children," then over to two grandchildren named. This will was executed in 1895 while a general adoption act was in force in Texas. Between 1901 and 1903 the son adopted a child under the law of Texas, and died leaving the adopted child surviving. It was held that the gift over took effect. This result proceeded solely on the ground that the Texas statute in force at the time of the adoption did not make the person adopted a "child" at all, but only an "heir." The Texas statute [49] provides that the party so adopted "shall have the rights and privileges, both in law and equity, of a *legal heir* of the party so adopting him." All through the statute the person adopted is spoken of as the "legal heir"—never even as a "child." [50]

Section 5 of the Illinois act of 1874 provides, however, that "A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." This act in common with many other adoption statutes, gives the adopted person the status of an heir.[51] The Massachusetts

[48] 43 Tex. Civ. App. 259.

[49] Sayles' Tex. Civ. Stats. 1898, p. 2.

[50] It is the doctrine of the Texas Supreme Court, as announced in Eckford *v.* Knox, 67 Tex. 200, 204, that the Texas Statute "gives to the adopted party the position of a child, only so far as to make him the heir of his adopter, but does not constitute him a member of the latter's family, with such duties and privileges as that relation would imply. * * * The statute did no more than allow the adoption, and said nothing as to whether it was to constitute the adopted party a child of the adopters or what relation she was to bear toward them."

Observe also that the Missouri Adoption Act involved in Clarkson *v.* Hatton, 143 Mo. 47, was so meager that it did not give the person adopted the status of a "child."

[51] Butterfield *v.* Sawyer, 187 Ill. 598; Johnson's Appeal, 88 Pa. St. 346. See also McGunnigle *v.* Mc-

act, from which section 5 of the Illinois act of 1874 is taken, the Rhode Island act, also copied from the Massachusetts act, and the Indiana statute, have all been held to give the adopted person the status of a child by birth or issue of the adopting parent.[52] The same effect must be given to the Illinois act.

It is true that in *Wallace v. Noland*[53] "children" was held not to include an adopted child. But this went upon the ground that by the proper construction of the word "children" as used, it referred only to such as could have acquired the legal status of a child when the will was executed. At that time there was no general adoption act in force. Hence the children adopted were not included.

There are, however, some general expressions in the *Noland* case not at all necessary to the decision, to the effect that "in other respects than the right of inheriting from the adopting parent the adopted child is unlike children by birth." This obviously means "in *some* other respects than the right of inheriting from the adopting parent," and the court cites the holding that the adopted child cannot inherit from the ancestors or collaterals of the adopting parent. This, however, is only because by the proper construction of our statute this right of inheritance is expressly excepted. The fact is that in all other respects not expressly excepted the adopted child acquires the status of a child of the parent as if born in lawful wedlock, and the Illinois statute on adoption so declares in the most comprehensive language. Again the court, in *Wallace v. Noland*, said: "It has been said in a number of cases that an adopted child is regarded, in law, as a child only for the purpose of inheritance from the adopting parent." For this is cited principally the cases of *Schafer v. Eneu*[54] and *Commonwealth v. Nancrede*.[55] These cases support the passage quoted. The

Kee, 77 Pa. St. 81, where legitimating statute gave a bastard the status of an heir.

[52] Sewall *v.* Roberts, 115 Mass. 262; Tirrell *v.* Bacon, 3 Fed. 62 (U. S. Cir. Ct., Mass.); Hartwell *v.* Tefft, 19 R. I. 644; Bray *v.* Miles, 23 Ind. App. 432 (Indiana act provided that "after the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education and every other way responsible as a natural father or mother").

[53] 246 Ill. 535.

[54] 54 Pa. St. 304.

[55] 32 Pa. St. 389.

trouble with their use in the state of Illinois is that the statement made in them and quoted by the court was founded upon the fact that the Pennsylvania statute was so narrow in scope that it only made the person adopted the *legal heir* by adoption and did not undertake to give the person adopted the status of a *child*.

§ 586. Analysis of the cases with reference to whether the language of a will, settlement or insurance policy is to be interpreted as including all persons who acquire the status of "heirs," "children" or "issue," no matter in what manner—(a) The construction given to the word "heirs": There seems to be a general agreement that when the word "heirs" is used in a will devising to the "heirs" of any person, the word is used to describe not merely heirs by blood, but whoever acquires the status of an heir according to law. Hence, an adopted child is included whether the word be used in a will or settlement of an adopting parent or of a third person.[56] The word "heirs" also is regularly held to refer to those who have acquired the status of heir at the time when the class is determined—for instance, usually at the death of the ancestor. Hence the fact that when the will or settlement was executed and took effect there was no adoption act in force, did not prevent a person subsequently adopted and acquiring the status of an heir from being included.[57]

§ 587. (b) As to the construction of the words "children" or "issue"[58] in a will, settlement or insurance policy—The words "children" or "issue" in a will, settlement or insurance policy executed when a general adoption act was in force and by, or procured by, the adopting parent, primarily and in the absence of a special context to the contrary, includes a person who obtained by adoption the status of a child: When the adopting parent, while a general adoption act is in force, but long before any adoption is thought of, procures an insurance policy for the benefit of his children, or makes a will, or executes a settlement in favor of his children, the word "chil-

[56] Butterfield *v.* Sawyer, 187 Ill. 598; McGunnigle *v.* McKee, 77 Pa. St. 81; Johnson's Appeal, 88 Pa. St. 346.

[57] *Id.*

[58] In Virgin *v.* Marwick, 97 Me. 578, it was intimated that "the term child has a broader significance than issue."

dren'' is regularly taken as referring primarily to those who acquire that status at any time in the future before the class is determined. Hence a subsequent adoption which confers the status of a child upon the person adopted operates to include the adopted person as a beneficiary under the insurance policy or the will.[59]

§ 588. The words ''children'' or ''issue'' in a will, settlement or insurance policy executed while a general adoption act was in force, and even though the same be executed or procured by one other than the adopting parent, primarily and in the absence of a special context to the contrary, includes a person who obtains by adoption the legal status of a ''child'' or ''issue'': The case where the word ''children'' or ''issue'' is used in the will or settlement of a person other than the adopting parent does not really present a different case from that of the preceding paragraph, where the insurance was procured by the adopting parent in favor of children generally at a time long before the insured had any idea of adopting a child. In both cases alike the mind of the adopting parent and the stranger is in the same state. In both the word ''children'' is used to include a class and to include all who secure the legal status of children. If, when the adopting parent uses the word long before he has any adoption in mind, he is held to include all who acquire the status even though it be by adoption, then logically the stranger should be held to the same use of the same word. To this a very respectable line of authorities agree.[60]

[59] Virgin *v.* Marwick, 97 Me. 578; Von Beek *v.* Thomsen, 44 App. Div. N. Y. 373 (affirmed, 167 N. Y. 601). In Russell *v.* Russell, 84 Ala. 48, the adopted child was not included. But this was placed solely upon the ground that the Alabama statute gave to the person adopted only the status of an heir and not the status of a child. The dictum of the court is clear that if the statute had given to the person adopted the status of a child he would have been included in the word ''child'' as used in the adopting parent's will.

[60] Sewall *v.* Roberts, 115 Mass. 262; Tirrell *v.* Bacon, 3 Fed. 62 (U. S. Cir. Ct. of Mass.); Hartwell *v.* Tefft, 19 R I. 644; Bray *v.* Miles, 23 Ind. App. 432. It is no doubt true that Sewall *v.* Roberts, *supra*, is a case where the property of the adopting parent was settled upon himself for life and then to his children. Nevertheless, the actual words of the settlement used are not those of the adopting parent. For some reason he did not himself have anything to do with the settlement. It was done for him by trustees. The only reason the case is one of a settlement of

§ 589. The proposition of § 588 is not controverted by the exception in the adoption act providing that the adopted child "shall not take property expressly limited to the heirs of the body or bodies of the parents by adoption": [61] This exception covers the case where the adopting parents, or one of them, would by the common law, take an estate tail. The Massachusetts and Rhode Island decisions have both declared that the exception in the adoption act is confined strictly to a limitation to "heirs of the body or bodies" of the parents by adoption; that these words have a technical meaning and that the exception does not cover a limitation to the issue or children of the adopting parents.[62]

§ 590. The proposition of § 588, so far from being controverted, is rather strengthened by the Massachusetts act of 1876, which expressly excludes the adopted child from taking under the designation of "children" in the will or settlement of one other than the adopting parent, unless there is an express intention that such child shall be included: In *Wyeth v. Stone* [63] the testator devised the residue of his estate to his adopted daughter E, but if the said E shall die without issue before the decease of my said wife, then I give, bequeath and devise said remainder "to the heirs at law of my said wife." E died without issue. The testator's widow subsequently died having had no children by birth, but having adopted H, who sur-

his own property upon himself is that in equity the subject-matter of the settlement belonged to him. The adopting parent was himself entirely divorced from any connection with the language actually employed in the settlement. In the other cases, *supra,* Sewall *v.* Roberts, is treated as a direct authority for the case where the will or settlement was made by one other than the adopting parent and subsequently the legislature of Massachusetts amended the adoption act so as to provide in terms what should be done where the word "heirs," "issue" or "children" was used in the will or settlement of one other than the adopting parent. This statute was passed in view of what was regarded as the holding in Sewall *v.* Roberts, and, therefore, shows the authoritative acceptance of Sewall *v.* Roberts, as a case announcing a rule where the settlement was made by one other than the adopting parent.

[61] See Supplement to the Gen. Stats. of Mass., Vol. 1, 1860-1872, ch. 310.

[62] Sewall *v.* Roberts, 115 Mass. 262; Tirrell *v.* Bacon, 3 Fed. 62 (U. S. Cir. Ct. of Mass.); Hartwell *v.* Tefft, 19 R. I. 644.

[63] 144 Mass. 441.

vived her. The court seems to admit that under the Massachusetts act as it stood in 1871 and prior to 1876, and in view of the case of *Sewall v. Roberts*[64] the adopted child H would have taken. The result reached against the adopted child in *Wyeth v. Stone* was due wholly to the amendment of 1876. There never has been added to the Illinois act what was added to the Massachusetts act by the amendment of 1876. Therefore, the Illinois act stands as the Massachusetts act stood before 1876, and the case of *Wyeth v. Stone*, therefore, has no application in Illinois except to prove that apart from the special statutory provision which does not exist, the adopted child must be included. In *Blodgett v. Stowell*[65] the testator devised to his son Lemuel for life and after his death to his "issue," but if he left no "issue," then to those of his "heirs who shall then be living, in equal shares, by right of representation." Lemuel died leaving him surviving only an adopted daughter, who was adopted in 1891. The question was whether the adopted child came within "issue" or "heirs." The Massachusetts court held that under the adoption act as it stood since 1876, the adopted child could not come under either designation, but it again intimated its opinion that under *Sewall v. Roberts*, the result must have been otherwise and that the amendment of 1876 made a material change in the law with regard to the rights of adopted children and probably was passed in consequence of the decision in *Sewall v. Roberts*.

§ 591. The proposition of § 588 is not controverted by those cases where the adopted child was excluded because the will or settlement was executed long before there was any adoption act in force: Even where "children" or "issue" in a will or settlement refers to those who acquire the status of "child" or "issue," yet it is possible to say that the status referred to is such as may be acquired under the law as it stands at the time the will or settlement is executed. Hence, if no general adoption act be then in force, the child adopted under a subsequent act will not be included in those designated. Some cases so hold.[66] Whether this is the better view will be considered hereafter, *post*, § 595. It is enough at this point to indicate that the cases

[64] 115 Mass. 262.

[65] 189 Mass. 142.

[66] Wallace *v.* Noland, 246 Ill. 535. See also Jenkins *v.* Jenkins, 64 N. H. 407; Schafer *v.* Eneu, 54 Pa. St. 304.

so holding do not necessarily interfere with the proposition that the adopted child is included when at the time of the execution of the will or settlement there is in force a general adoption act giving to the person adopted the status of a child or issue.

§ 592. **The proposition of § 588 is not controverted by cases where the special context of the instrument shows that "children" or "issue" meant a class composed of those who obtained their status by actual birth only:** [67] *In Freeman's Estate* [68] there was a trust to pay the income to the testator's sons and daughters and then to pay the share of income of each "to such person or persons of kin, to such son or daughter," as he or she may by will appoint, and in default of such appointment, to the child or children of such son or daughter. It was held that as a result of the words "of kin" the power to appoint did not include the power to appoint to an adopted child and that the gift over in default of appointment to the child or children by natural inference also required that they be of kin—that is, of the blood of the testator. As a matter of fact the opinion of the court hardly takes up the contention of the adopted child.

In *New York Life Ins. Co. v. Viele* [69] the testatrix devised to her daughter Emily for life, then to her "then living lawful issue." If no such issue, then the share to be held in trust for my ten grandchildren hereinafter named. Emily married and had no children by birth, but had a child adopted under the law of Saxony, which gave her the status of a child or issue. The adopted child was, however, excluded on the ground that the special context of the instrument showed clearly that "issue" was used as including only descendants by blood and not children by adoption.[70] No purpose would be served by analyzing the special context. It is sufficient to say that the special context was so strong that the court remarked in conclusion: "It would be difficult to conceive of a clearer indication of the purpose of the testatrix to transmit the whole estate to her own descendants." [71]

[67] See cases cited *ante*, 584, where "heirs" by the special context was held to mean only heirs by birth, and so the adopted child was excluded.

[68] 40 Pa. Sup. Ct. 41.

[69] 161 N. Y. 11.

[70] The court analyzes the special context, pp. 20-22.

[71] The court also placed its decision upon the ground that "if Olga had been adopted under the

§ 593. The proposition of § 588 is controverted by two cases —one from Maine and the other from Wisconsin. In *Woodcock's Appeal*[72] the testatrix, making a will in 1890, eight years after her son Horatio had adopted a child, devised a share to Horatio, and in case he died before the death of the life tenant (which event happened), then over to "the child or children of said deceased child." Horatio died leaving only the adopted child. It was held that she was not entitled. This could not go on the ground that the child did not have the status of a child under the Maine adoption act, for it had been already determined in several cases, and among others *Virgin v. Marwick*,[73] that the person adopted did acquire the status of a child. The Woodcock case, then, goes solely upon the ground that the testatrix must be held to have used the word "children" when acquired the status of children, but only those who were children by birth. The court said: "When in a will provision is made for 'a child or children' of some other person than the testator, an adopted child is not included unless other language in the will makes it clear that he was intended to be included, which is not the case here."[74] Nevertheless, the court in *Virgin v. Marwick*, had just held that "children" as used in an insurance policy obtained by the adopting parent long before any adoption was contemplated was on a different footing and did refer to all who acquired the legal status of child, even though it were by adoption. Nor does the court find any difference in the mind of the insured or the testator between the case where the testator or the insured provides for his children long before any adoption is thought of and the case where somebody else provides for his children. Plainly there is none. With reference to possible future adoptions the mind of each is exactly the same. In most cases probably neither the third party nor the person who subsequently becomes the adopting parent thinks of the inclusion or exclusion of an adopted child at all. They merely use general words in a general way to indicate the class of persons who obtain a certain status. The Maine court finds its only basis for

statutes of this state, she would be precluded from taking anything under this will by the express words of the law regulating domestic relations (§ 64) * * *."

[72] 103 Me. 214.
[73] 97 Me. 578.
[74] 103 Me. 214, 217.

making a difference between the insurance policy of the adopting parent, obtained long before any adoption, and the will of a third party, in the fact that: "Where one makes provision for his own 'child or children' by that designation, he should be held to have included an adopted child, since he is under obligation in morals if not in law to make provision for such child." This is an interesting proposition. The court gives the words used a primary meaning different in the two cases, because it believes the moral duty in one differs from the moral duty in the other. For authority the Maine court rests upon *Russell v. Russell*,[75] and *Schafer v. Eneu*,[76] both of which went off on the ground that the adoption act in force was too meager to give the person adopted the status of a child. *Schafer v. Eneu*, also went off on the ground that when the will was made there was no adoption act in force and vested interests were created under the law as it stood before any adoption act, and those vested interests could not under the constitution be interfered with by any adoption occurring under a subsequent act of the legislature. In *Russell v. Russell* the court expressly declared that had the statute been as broad as the Maine act in giving the person adopted the status of a child by birth, the adopted child would have been included.

In *Lichter v. Thiers*[77] a testator made his will after the passage of a general adoption act, which, so far as the rights and status of the adopted child are concerned, is like the statute in force in Massachusetts in 1874, and like the Rhode Island and Illinois acts. The testator's will, however, was made long before any adoption had occurred or was thought of. The testator devised to Mary for life and then to her children living at her death, with a gift over if she had no such children, to whomsoever she should appoint, and in default of appointment to a nephew in England. The testator died before any adoption occurred. Mary died leaving only an adopted child. It was held that the adopted child did not take. This, of course, could not go upon the ground that the adopted child did not acquire the status of a child in whatever manner, but only those who language of the opinion[78] shows that the court inclined to a

[75] 84 Ala. 48.
[76] 54 Pa. St. 304.
[77] 139 Wis. 481.
[78] *Id.* 487.

rather narrow construction of the statute in this respect. Nevertheless, it is submitted that the terms of the statute are too broad and clear to prevent the conclusion that the adopted person obtained the status of a child by birth. The basis for the decision in the Wisconsin case was that according to the proper construction of the will in question the word "children" included in the first instance and primarily, not those who acquire the status of a child in whatever manner, but only those who were children by actual blood relationship. The court, however, refuses to make any such distinction as was made in the Maine case. It insists upon the primary meaning of "children" as including only children by birth, whether the word is used in the will of the adopting parent or in the will of a third person, provided always it be used long prior to any adoption. The court speaks of the *Woodcock* case as adopting a "pretty arbitrary rule of construction" in making a distinction between the will of the adopting parent and the will of a third person. The weakest aspect of the opinion in the Wisconsin case is the line of cases cited as "directly in point." They are *Schafer v. Eneu*,[79] *Woodcock's Appeal*,[80] *Wyeth v. Stone*,[81] *Blodgett v. Stowell*.[82] *Schafer v. Eneu*, proceeded, as has already been several times indicated,[83] principally upon the ground that the Pennsylvania statute was not sufficiently broad to give the person adopted the status of a child at all. The *Woodcock* case, the Wisconsin court itself speaks slightingly of, and refuses to adopt the distinction which it draws. The Wisconsin court's special reliance upon *Wyeth v. Stone* and *Blodgett v. Stowell*, is quite incomprehensible. These cases, it declares, are "significantly in point since they are from Massachusetts, the state from which it is supposed our statute was borrowed, and were decided long subsequent to *Sewall v. Roberts*,[84] upon which counsel for appellant rely with confidence." But these two later Massachusetts cases went off on the special statutory provision enacted in Massachusetts two years after *Sewall v. Roberts* was decided and in express terms covering the very point which the Wisconsin case had before it, so as to exclude the

[79] 54 Pa. St. 304.
[80] 103 Me. 214.
[81] 144 Mass. 441.
[82] 189 Mass. 142.
[83] *Ante*, § 585.
[84] 115 Mass. 262.

adopted child. One could hardly think of a circumstance that could make the later Massachusetts cases of less value in aiding the Wisconsin court in its conclusion.

§ 594. In the primary meaning to be placed upon "children" or "issue" in a will, settlement or insurance policy, no distinction is to be made between the instrument executed or procured by the adopting parent and one executed or procured by a stranger: *Tirrell v. Bacon*,[85] *Hartwell v. Tefft*,[86] and *Bray v. Miles*,[87] all hold that the words "children" or "issue" in the will of one other than the adopting parent are sufficient to include a person acquiring by an adoption act the status of a child. These same cases have regarded the leading case of *Sewall v. Roberts*[88] as necessarily supporting the same result. So also has the Massachusetts legislature.[89] These cases, therefore, most clearly deny any distinction in the primary meaning of "children" based upon whether "children" is used in a will or settlement of one other than the adopting parent or the will or settlement of the adopting parent. In *Lichter v. Thiers*,[90] although "children" in the will of a third party excluded an adopted child, yet the court insisted that no difference was to be made between that case and the case of the will of an adopting parent, executed long before any adoption was in contemplation. Only the *Woodcock* case[91] suggests that a difference be made. If our Supreme Court had had any intention of making a distinction founded upon the fact that the will or settlement was executed by one other than the adopting parent, it certainly should have done so in *Butterfield v. Sawyer*.[92] In that case the court had before it the deed of a third party made long before any general adoption act, and there was a strong special context in favor of "heirs generally," meaning "heirs collateral by blood," and the question was so close that two judges dissented. Clearly it was a case where the fact that the deed was made by one other than the adopting parent, if it were to be given any effect, ought to have defeated the adopted child. Yet the adopted

[85] 3 Fed. 62 (U. S. Cir. Ct. of Mass.).
[86] 19 R. I. 644.
[87] 23 Ind. App. 432.
[88] 115 Mass. 262.
[89] *Ante*, § 589.
[90] 139 Wis. 481.
[91] 103 Me. 214.
[92] 187 Ill. 598.

child was included and no suggestion was made by this court that the question was any different because the deed was executed by one other than the adopting parent than it would have been if the deed had been executed by the adopting parent long before any adoption was in contemplation. *Butterfield v. Sawyer* at least indicates that in Illinois no great stress can be laid upon the fact that the deed or will is that of a person other than the adopting parent.

§ 595. Quaere whether the fact that when the will, settlement or insurance policy is executed there is no general adoption act in force will prevent the word "children" from including a person adopted under a subsequent adoption act: Where "heirs" is used in a will or settlement, it seems regularly to have been taken as meaning all who acquire the legal status of heir at the time when the class is determined—namely, at the death of the ancestor. Hence, it is immaterial whether when the will or settlement is executed there is a general adoption act in force or not.[93] Logically the same line of reasoning should be followed when "children" or "issue" is used, as referring to a class of persons who secure the status of "child" or "issue" at a future time. Whoever obtains the status when the class is finally determined should be included. Hence it should make no difference that when the will or settlement was executed no general adoption act was in force. Such is the precise holding of a number of cases.[94]

Wallace v. Noland[95] seems directly *contra,* the exclusion of the adopted person being in that case properly based only upon the ground that no adoption act was in force when the will was executed.[96] *Butterfield v. Sawyer*[97] is distinguished

[93] Butterfield *v.* Sawyer, 187 Ill. 598; Johnson's Appeal, 88 Pa. St. 346; McGunnigle *v.* McKee, 77 Pa. St. 81.

[94] Sewall *v.* Roberts, 115 Mass. 262; Tirrell *v.* Bacon, 3 Fed. 62 (U. S. Cir. Ct. of Mass.). In Hartwell *v.* Tefft, 19 R. I. 644, there was no Adoption Act in force, but the will was confirmed after a general Adoption Act had been passed.

[95] 246 Ill. 535.

[96] See also Clarkson *v.* Hatton, 143 Mo. 47, where one reason for not allowing an adopted child to take a statutory remainder to "children" which was substituted in place of an estate tail, was that when the Statute on Entails was passed there was no general Adoption Act. There were, however, other reasons for the result reached.

[97] 187 Ill. 598.

because there the word "heirs" in the deed was coupled with the word "generally." This the court thought presented a special context sufficient to hold that "heirs" included all who had acquired the status at the time when the class was finally determined. This suggests that if the will contained a devise to the "*lawful*" children of A living at his death, it might be held to include the adopted child, though no adoption act was in force when the will was executed.

In *Schafer v. Eneu*[98] a testator died in 1851, devising a life estate to his wife, remainder in fee to *her* children and the residue to the testator's children in fee. After the adoption act of 1855 the wife adopted children in conformity with the act, and died in 1861. The adopted children were excluded. This proceeded primarily upon the ground that the adoption act did not give them the status of children, but only the status of heirs. The court, however, did say that the testator's children had a vested interest at his death and that it could not be divested by an adoption under the act of 1855. This really involves the question whether the word "children" meant those who acquired the status at any time before the wife's death, when the class closed. If it did, then there was no objection to the divesting of a vested interest pursuant to the actual meaning of the testator's language. If, on the other hand, "her [referring to the wife] children" meant only children by actual birth, then the subsequent adoption act was ineffectual to confer any benefit on a person adopted, even though it conferred the status of a child upon the person adopted. The court in declaring the act of 1855 ineffectual to divest a vested interest, must have had in mind a construction of "children" of the wife which restricted those who could take to such as were able to acquire the status of children at the time the will was executed. In this view it presents the same conclusion as *Wallace v. Noland.*

In *Jenkins v. Jenkins*[99] a testator in 1830, long before there was any general adoption act, died leaving a will devising to his son William, absolutely, and if the said William should die "leaving no issue," then over to a brother. William died in 1886 leaving only an illegitimate child. A year later a decree

[98] 54 Pa. St. 304.

[99] 64 N. H. 407.

of adoption of his illegitimate daughter upon the joint petition of himself and his wife was entered. It was held that the adopted child was not included in the term "issue." It would seem that this result might have gone upon the ground that the adoption decree was not entered until after the death of William. Hence the adoption proceedings must have abated so far as William was concerned and the child was, therefore, only the adopted child of the mother. The court, however, actually put its decision upon the ground that the word "issue," when the will was executed and the testator died, had a statutory meaning which included all the lawful lineal descendents, and as such it could not include the bastard or an adopted child, and any attempt of an adoption act subsequent to the testator's death to alter the meaning of the word "issue" must be unconstitutional and void. The soundness of this last may well be doubted.[99a] In any event, however, the reasoning of the case does not controvert the general proposition that "children" or "issue" in a will or settlement of one other than the adopting parent, executed long before any general adoption act is in force, primarily includes those who secure by adoption before the class is determined, the status of "children" or "issue."

[99a] Butterfield *v.* Sawyer, 187 Ill. 598, *semble*. See also Miller's Appeal, 52 Pa. St. 113.

CHAPTER XXIII.

DIVESTING CONTINGENCIES AND CONDITIONS PRECEDENT TO THE TAKING EFFECT OF EXECUTORY DEVISES AND BEQUESTS—ACCELERATION.

§ 596. **Interests are not divested unless the event upon which the divesting is to occur strictly happens:** [1] This is the application of a general rule that the courts lean against a construction which will divest an interest already vested.[2] When, however, there is a divesting clause and the event happens, it must be given effect. Nevertheless, there are several cases in our Supreme Court reports where, upon grounds not perceived by the writer, the gift over, which might possibly have taken effect, was ignored and the first taker decreed to have an absolute and indefeasible interest discharged of the gift over.

In *Pearson v. Hanson*,[3] where a residue was given in trust to pay the income for ten years to named persons, with an express gift over if any died within the ten year period, to such deceased person's heirs-at-law, the court held that each beneficiary took an absolute and indefeasible interest which on his death within the ten year period, passed to his devisee and that his heir-at-law had no claim. This was in effect a holding that there was no gift over at all. In *Rissman v. Wierth* [4] there was a devise to the wife "and to her heirs and assigns forever," with a gift over after her death. It was held that she took a fee and the gift over was apparently ignored.[5]

§ 597. **Effect of the failure of a gift over upon the preceding interest:** Where the gift over is to persons described as "living" at the first taker's death, or to persons who may

[1] Henderson *v.* Harness, 176 Ill. 302; McFarland *v.* McFarland, 177 Ill. 208, 217; Myers *v.* Warren County Library Assn., 186 Ill. 214.

[2] *Ante*, § 540.

[3] 230 Ill. 610.

[4] 220 Ill. 181.

[5] Ortmayer *v.* Elcock, 225 Ill. 342, *ante*, § 173. See also Bigelow *v.* Cady, 171 Ill. 229, *post*, § 661.

come into being, the quality of surviving or the existence of the persons designated has been held to be a part of the divesting contingency. If, therefore, there are no survivors, or the persons designated do not come into existence, the first taker's interest will not be divested.[6] *Duryea v. Duryea*[7] is a case of this sort. There the gift over was to the survivor if the first taker died without leaving issue. "Survivor" did not mean "other"[8] but literally "survivor." Hence, when, upon the death of the first taker without issue, there was no survivor, the first taker's interest was not divested.[9]

If the gift over fails because it is in excess of a power or because of illegality under the Mortmain Acts (as distinguished from illegality for remoteness), but the divesting contingency literally happens, it has been held that the first taker's interest is divested.[10] The mere taking effect of the gift over was not part of the divesting contingency. But if the gift over is void for remoteness then if any other gift, whether by the testator or due to descent upon an intestacy, were given effect, it would equally offend the Rule against Perpetuities. No divesting of the first taker's interest by the happening of the divesting condition is, therefore, permitted to occur.[11]

Suppose the gift over fails because of lapse where the gift

[6] Harrison *v.* Foreman, 5 Ves. 207 (1800); Jackson *v.* Noble, 2 Keen 590 (1838).

[7] 85 Ill. 41.

[8] *Post*, § 606.

[9] See also South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, where there was a provision of forfeiture if any beneficiary contested the will, with a gift over to those who did not contest. All contested, so there could be no gift over. There, nevertheless, was held to be an intestacy.

[10] Doe *v.* Eyre, 5 Com. Bench. 713 (1848); Robinson *v.* Wood, 27 Law J. Ch. 726 (1858). See also Hurst *v.* Hurst, 21 Ch. Div. 278, 284-286, 290, 293, 294 (1882).

Mr. Gray strongly disapproved of Robinson *v.* Wood (Rule against Perpetuities, 2nd ed. § 786), but he only suggests that the decision is inexplicable to him because it is "against the marked policy of the law for not readily divesting vested estates." That policy, however, is only one of the aids to interpretation. When, however, the court finds a clearly expressed divesting contingency which has happened and where the person is *in esse*, but the gift fails because of a rule of law defeating expressed intent, the policy of the law against divesting interests would seem to have no logical bearing on the question of interpretation of the language used.

[11] See *post*, §§ 705-709 for a full discussion of the effect on prior interests of the failure of subsequent interests because of remoteness.

over is to A *simpliciter* if the first taker dies without leaving issue. This is not quite the same as where the gift over is to A if he survives the first taker; nor is it quite the same as where the gift over fails for illegality (other than for remoteness). In *O'Mahoney v. Burdett* [12] the first taker's interest was divested. In a New Jersey case [13] it was not.

If the divesting contingency happens and the gift over is only for life, the interest of the first taker is not wholly divested but only divested *pro tanto* to serve the life estate.[14]

§ 598. Effect upon an executory devise of the failure of the prior gift: Usually the gift over takes effect upon some event which divests the preceding interest. Occasionally the case arises where the prior gift fails for a reason which raises a question whether or not the event has happened upon which the gift over is to take effect.

Suppose the first gift is to a class—such as the children of A—with a gift over if they die under twenty-one to B. If no members of the class ever come into being B will, nevertheless, take.[15] If a member of the class does come into existence, but dies under twenty-one after the testator's death, clearly the gift over will take effect.[16] If a member of the class comes into being and dies under twenty-one in the life of the testator the gift over takes effect [17] because, following the general rule [18] "die" means "die either before or after the testator's death." [19] If a member of the class comes into being and survives twenty-

[12] L. R. 7 Eng. & Ir. App. Cas. 388 (1874).

[13] Drummond's Ex'rs *v.* Drummond, 26 N. J. Eq. (11 C. E. Green) 234.

[14] Gatenby *v.* Morgan, 1 Q. B. Div. 685 (1876); Brown *v.* Brown, 247 Ill. 528. But see Doe *v.* Dill, 1 Houst. 398 (Del. 1857), (three judges to two).

[15] Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245, pl. 10 (1711).

[16] Subject, of course, where the interests are legal and in land, and the first taker has a life estate, to the question of destructibility, discussed *ante*, § 105.

[17] Willing *v.* Blaine, 3 P. Wms. 113 (1731).

[18] *Ante*, §§ 531, 532.

[19] This was overlooked by our Supreme Court in Frail *v.* Carstairs, 187 Ill. 310. In that case there was a devise to James, the son of the testator, in fee, but if James died unmarried then over to other children. James died unmarried in the life of the testator. It was held that section 11 of the Statute on Descent applied and there was an intestacy. That section, however, by its terms applied only in case the will itself did not provide for a lapse. But if "die" meant "die either before or

one and dies in the lifetime of the testator, it has been held that the gift over does not take effect although the first gift fails.[20] In this State a lapse not having been provided for, by the will, the requirement of section 11 of the Act on Descent, which causes that section to apply when a lapse has not been provided for, must be complied with.

Suppose the first gift is of an absolute interest to A, with a gift over on the intestacy of the first taker to B, and A dies in the lifetime of the testator intestate. In *Hughes v. Ellis*[21] it was held that the gift over failed. Two grounds have been suggested for this: *First*, the artificial rule that because the gift over would have been void if the first taker had survived the testator, it must be void if he did not survive. So far as *Hughes v. Ellis* rests upon such a rule it has been doubted in England.[22] Furthermore, actual results do not support such a rule. 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. If, therefore, *Hughes v. Ellis* be followed, it must be void if A dies in the testator's lifetime. There seems, however, every reason to believe that under the English authorities the gift to B would not fail.[23] The *second* ground upon which *Hughes v. Ellis* is to be supported is this: "Die" means "die, only after the testator's death," because A was a married woman and could not do otherwise than die intestate during coverture with the testator. Whether married or not, however, A could only die intestate as to the property devised after the testator's death. If such a construction be accepted the result reached is sound. In this State a similar construction would result in section 11 of the Statute on Descent applying if A were a child of the testator.

Mills v. Newberry[24] is very like *Hughes v. Ellis*. In that case the testatrix devised to her mother upon a condition pre-

after the testator's death," the will did provide for the case of a lapse and section 11 would have no application.

[20] Doo *v.* Brabant, 4 Term. R. 706 (1792); Tarbuck *v.* Tarbuck, 4 L. J. [N. S.] Ch. 129 (1835).

[21] 20 Beav. 193 (1855).

[22] Per James, L. J., in *In re* Stainger's Estate, 6 Ch. Div. 1, 14, 15 (1877).

[23] 1 Jarman, 5th ed. 321; 5 Gray's Cases on Prop., 2nd ed. 173.

[24] 112 Ill. 123.

cedent that the latter make 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.[25] 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[26] or upon intestacy.[27] The result reached should not be sustained upon any such rule as that a gift over, void if the first taker survived the testator, would be void if the first taker died before the testator. We are brought, therefore, to the question: What is meant by the phrase, "what remained undisposed of and unspent." When the first taker renounced she could not spend or dispose of any of the subject-matter of the gift and this situation existed retroactively from the testatrix's death. Why, therefore, as to the entire fund was not the condition fulfilled upon which the charity was to take; and why was not the subject of the gift definite in amount and valid?

§ 599. **Acceleration of future interests:** If a gift be made to A for life with a gift over to B to take effect whenever and however the preceding estate determines, then, of course, no matter how A's life estate is terminated B's interest will at once take effect in possession. If the interests created are to A for life and "*at A's death*" then to B, by a long course of construction already referred to,[28] "at A's death" means "at the termination of A's life estate, whenever and however that may occur." The case is precisely the same as that first put and B's interest takes effect whenever and however A's life estate is terminated. In both cases alike it is often said that B's interest is vested (in the feudal sense) and, therefore, it is accelerated upon the termination of A's life estate, however that

[25] *Id.* 132-134.
[26] *Post,* § 719.
[27] *Post,* §§ 720 *et seq.*
[28] *Ante,* § 330.

may occur.[29] These results have been reached by our Supreme Court.[30]

Suppose the interests created are to the widow for life, with a direction to the executor to sell "at her death" and divide the proceeds between A and B. "At the widow's death" here means only "at the termination of the widow's life estate, whenever and however that occurs," so that, if the widow renounces, the executor must sell at once and divide. Acceleration, therefore, occurs.[31] Suppose, however the direction is that the executors in the case last put shall sell and divide the proceeds between B and C, "or their heirs." If the widow renounces there is an acceleration of B's and C's interest. The executor would hold for them and they would be entitled to the immediate equitable interest. But would they be entitled indefeasibly? That depends upon whether "or their heirs" effects a gift over if B and C die before the actual *death* of the life tenant or before the termination, whenever and however that occurs, of the life estate. The context being indecisive, either construction may be adopted. The policy of courts to vest interests indefeasibly at the earliest moment would seem to warrant the latter construction. Our Supreme Court has so held.[32]

Suppose the gift over after the life estate is to persons who may "be living" at the life tenant's death, or who may "survive" the life tenant. The long settled construction of gifts to persons who survive the life tenant is that they must literally survive the person named [33]—not that they must merely survive the termination of the life estate. If, therefore, the life estate is terminated prematurely by renunciation or otherwise there can be no acceleration of the gift over.[34] The same reasoning controls the result reached in *Blatchford v. Newberry*.[35] There,

[29] Eavestaff *v.* Austin, 19 Beav. 591 (1854); Jull *v.* Jacobs, 3 Ch. Div. 703 (1876); Cook's Estate, 10 Pa. Co. Ct. Rep. 465; Craven *v.* Brady, L. R. 4 Eq. 209; L. R. 4 Ch. App. 296.

[30] Marvin *v.* Ledwith, 111 Ill. 144; Northern Trust Co. *v.* Wheaton, 249 Ill. 606, 614.

[31] Slocum *v.* Hagaman, 176 Ill. 533. But see Dale *v.* Bartley, 58 Ind. 101.

[32] Sherman *v.* Flack, 283 Ill. 457. See also Coover's Appeal, 74 Pa. 143.

[33] *Ante*, § 309.

[34] Wakefield *v.* Wakefield, 256 Ill. 298; Fowler *v.* Samuel, 257 Ill. 30.

[35] 99 Ill. 11.

after an annuity to the widow, the daughters took life estates with gifts over to their children and a further gift over if they died without leaving children (which happened), then, if the widow survived, after her death "to the lawful surviving descendants of my brothers." "Surviving" here, according to the usual rule, meant surviving the actual death of the person referred to and not merely the termination of her interest. Hence, though the widow renounced and the daughters died without leaving issue, there could be no distribution till the death of the widow. Only at that time could the surviving descendants be ascertained.

CHAPTER XXIV.

CROSS LIMITATIONS.

TITLE I.

IMPLICATION OF CROSS LIMITATIONS.

§ 600. 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 cross remainders were not implied, 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. Our Supreme Court there quotes Jarman's summary [3] of 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

[1] 1 Taunt. 234 (1808).

[2] 173 Ill. 396, 409-411.

[3] 2 Jarman on Wills (R. & T. ed.), 552.

[4] Maden v. Taylor, 45 L. J. N. S. 569 (1876).

ultimate future interest will come in. The existence of this gap into which the heirs come for a short period only, 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]

§ 601. Cheney v. Teese[9] and Addicks v. Addicks:[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.

In *Addicks v. Addicks* the limitations were to the testator's sons during their lives and after the death of both, over to the testator's grandchildren. This presented, in effect, the same situation as *Cheney v. Teese*. It was held that cross remainders would be implied according to the general rule. *Cheney v. Teese*

[5] Scott *v.* Bargeman, 2 P. Wms. 68, (1722); Armstrong *v.* Eldridge, 3 Bro. C. C. 215 (1791).

[6] Fearne, Contingent Remainders, 310, 311.

[7] *Ante,* § 97.

[8] Ashley *v.* Ashley, 6 Sim. 358, (1833).

[9] 108 Ill. 473.

[10] 266 Ill. 349.

was distinguished because there "the question of an estate by implication or cross-remainders * * * was not raised or passed upon."

TITLE II.

"SURVIVOR" CONSTRUED "OTHER."

§ 602. The typical case where "survivor" is construed "other": "Survivor" is regularly construed "other" where lands or personalty are devised with the following limitations: To several for their lives, with a gift over to the issue of each tenant for life, with a further gift over on the death of any tenant for life without leaving issue to the surviving tenants for life for their lives respectively, and at their death to their issue, with an ultimate gift over on the death of all the tenants for life without leaving issue.[11] The case is the same and the result is the same if in place of the limitation "to the surviving tenants for life for their lives respectively and at their death to their issue," the limitations read, "to the surviving tenants for life in like manner as their original shares were given."[12] The reason for construing "survivor," "other," under these circumstances are as follows: *First*, there is a possible incongruity of result unless survivor be construed other. For instance, when the first life tenant dies leaving issue and the second life tenant dies without issue, if "survivor" be taken literally, there will be an intestacy as to the share of the life tenant dying last. This is incongruous in view of the fact that the testator has provided for all the possible contingencies that can happen except this one. Furthermore, the intestacy is especially incongruous in view of the ultimate gift over if all the life tenants die without leaving issue. *Second*, the fact that the gifts over are to the

[11] Harman *v.* Dickenson, 1 Brown, Ch. Cas. 91 (1781). Cases where realty involved: Cole *v.* Sewell, 4 D. & War. 1; 2 H. L. C. 186; Askew *v.* Askew, 57 L. J. Ch. 629. Cases where personalty involved: Lowe *v.* Land, 1 Jur. 377; *In re* Keep's Will, 32 Beav. 122; Badger *v.* Gregory, 8 Eq. 78; Waite *v.* Littlewood, 8 Ch. App. 70; Wake *v.* Varah, 2 Ch. Div. 348; Garland *v.* Smyth [1904] 1 Ir. 35; Cooper *v.* Cooper, 7 Houst. (Del.) 488.

[12] Cases where real estate involved: *In re* Tharp's Estate, 1 DeG. J. & S. 453; *In re* Row's Estate, 43 L. J. Ch. 347. Cases where personalty involved: Holland *v.* Allsop, 29 Beav. 498; Hurry *v.* Morgan, 3 Eq. 152; *In re* Palmer's Trusts, 19 Eq. 320 (ultimate gift over not mentioned).

survivor for life and then to his issue in the same manner that the original shares to the life tenants were limited for life and then to their issue, makes it incongruous that the issue of parents should take or not, depending upon whether the parents actually survive or not. The survivorship of the parents is obviously irrelevant in any question as to whether the issue of either of the children should take. *Third,* the real difficulty is in construing "other" as a secondary meaning of "survivor." The two words are obviously very different. No dictionary probably gives "other" as a secondary meaning of "survivor." The secondary meaning is forced by authority.

§ 603. Suppose in the typical case given the ultimate gift over on the death of all the tenants for life without leaving issue be eliminated: The authorities are in conflict as to whether in such a case "survivor" shall be construed "other." Taking the English cases chronologically the principal holdings have been as follows: *Milsom v. Awdry,*[13] (1800), held that "survivor" should be taken literally. *Hodge v. Foot,*[14] (1865), and *In re Beck's Trusts,*[15] (1867), reached an opposite result though purporting to justify it on special elements of context. *In re Arnold's Trusts,*[16] (1870), insisted that "survivor" should be construed "other." *Beckwith v. Beckwith,*[17] (1876), followed *Milsom v. Awdry. In re Walker's Estate,*[18] (1879), and *In re Bowman,*[19] (1889), followed *In re Arnold's Trusts,* while *In re Horner's Estate,*[20] (1881), and *In re Benn,*[21] (1885), followed *Beckwith v. Beckwith.* Then the whole matter seems to have been settled by the Court of Appeal in *Harrison v. Harrison*[22] (1901), which held that "survivor" must be taken literally. The American cases, as far as they have gone, seem to have followed *In re Arnold's Trusts* and held that "survivor" meant "other."[23]

At one time Kay, J., in *In re Bowman,* said that if the gift to

[13] 5 Ves. 465; 5 Rev. Rep. 102.
[14] 34 Beav. 349.
[15] 16 Weekly Rep. 189.
[16] L. R. 10 Eq. 252.
[17] 46 L. J. (Ch.) 97; 25 Weekly Rep. 282.
[18] 12 Ch. D. 205.
[19] 41 Ch. D. 525.
[20] 19 Ch. D. 186.
[21] 29 Ch. D. 841.
[22] [1901] 2 Ch. 136.
[23] Balch *v.* Pickering, 154 Mass. 363 (decided before Harrison *v.* Harrison and now rather doubted in Lawrence *v.* Phillips, 186 Mass. 320); Fox's Estate, 222 Pa. 108; Carter *v.* Bloodgood's Exr's, 3 Sandf. Ch. (N. Y.) 293.

the survivor was to the survivor for life and then to the survivor's children, only children of the survivors literally could take the gift over, but if the gift over were to survivor "in the same manner as they took their original shares," then "survivor" meant "other." This distinction was repudiated in *Harrison v. Harrison.*

§ 604. Suppose, while the original gifts are to individuals for life and then to their issue, the gift over is to the survivor absolutely and not merely to the survivor for life and then to the survivor's issue: If there is no ultimate gift over in case all the life tenants die without leaving issue, there can be no ground for construing "survivor," "other." The two principal reasons given for such a result, *ante*, § 602, are lacking.[24]

Suppose, however, there is a gift over if all the life tenants die without leaving issue, and suppose also that there were original gifts to at least three persons for life. In such a case all the contingencies except one are provided for. It is incongruous that there should be a possible intestacy as to part which would occur if "survivor" were taken literally. That reason, then, exists for construing "survivor," "other." On the other hand, since the gift over to the survivor is absolute there is lacking the incongruity of the issue of one dying first, taking or not, according as its parent survived or not. There is, furthermore, a possible incongruity in construing "survivor," "other." For instance, A might die without issue, B die with issue, and then C die without issue. In that case the gift over could not take effect and if "survivor" be construed "other" the representatives of A, who died without issue, would be entitled to share in the portion of C, who died without issue. Furthermore, if A died without issue, his share would go to the survivors B and C. Then B, if he died leaving issue, would keep his share. Then when C died without issue, his original share would go to the

[24] Lee *v.* Stone, 1 Exch. 674 (1848). *Accord:* Twist *v.* Herbert, 28 L. T. N. S. 489 (where there was in addition an ultimate gift over in case all the life tenants died without leaving lawful issue surviving them); Maden *v.* Taylor, 45 L. J. Ch. 569; King *v.* Frost, 15 App. Cas. 548; *Re* Corbett's Trusts, H. R. V. Johns, 591 (as to the residue); Lawrence *v.* Phillips, 186 Mass. 320. See also Ferguson *v.* Dunbar, 3 Bro. Ch. 469, note. *Contra:* Aiton *v.* Brooks, 7 Sim. 204; *In re* Cary's Estate, 81 Vt. 112.

representatives of A as well as those of B, but the accrued share which C took from A would not go over but would pass to C's representatives. Weighing incongruity against incongruity makes it difficult to say which result should prevail. In *Twist v. Herbert*[25] "survivor" was taken literally, but in *Lombard v. Witbeck*[26] our Supreme Court seems to have construed it "other."

Suppose there are only gifts to two persons, A and B, for life and to their issue, and if either die without leaving issue, to the survivor, with a gift over if both die without issue. Here the incongruity of taking "survivor" to mean "other," which has just been referred to, is not present. Shall a difference, therefore, be made in this case so that "survivor" will be regularly construed "other"?

§ 605. Suppose the first gift to A and B is absolute (instead of being for their lives with remainders to their issue), with a gift over if either die without leaving issue, to the survivor: If there is no further gift over in case both die without leaving issue, then, of course, "survivor" must be taken literally.[27]

Suppose, however, there is a gift over if both die without leaving issue. In favor of "survivor" meaning "other," it might be said that the issue were evidently to take if at all through the parent. To this it may be replied that since the parents take absolutely they can dispose of the property as they please and there is no assurance that their issue would take. It may be urged that all but one contingency is provided for and that if that is provided for by construing "survivor," "other," then the issue of one dying first, leaving issue, may take from their parent. Again, however, this is by no means certain to happen, because the parent could have devised his gift over to a stranger or to charity. There may be, furthermore, considerable incongruity in taking "survivor" as "other." If there be three devisees, A, B and C, and A died without issue, B died leaving issue, and then C died without issue, and if "survivor" be construed "other," then the share of C, dying without issue, will go one-half to B's representatives and one-half to the representatives of A who also died without issue,

[25] 28 L. T. N. S. 489. But see *post*, § 606.

[26] 173 Ill. 396.

[27] Crowder *v.* Stone, 3 Russ. 217 (1829). *Contra:* Lapsley *v.* Lapsley, 9 Pa. 130.

and there would be left in the hands of C's representatives one-half of the share of A, who died without issue.

§ 606. Suppose the limitations are to sons absolutely at twenty-one, and to daughters for life, and then to their issue, but if either sons or daughters die before the period of distribution without issue, then to the survivors: If there is no gift over, it seems clear that "survivor" must be taken literally.[28]

Suppose, however, the gift to the survivors is to them "in the same manner and for the same estates as their original shares," with a gift over if all die without issue. Here the sons' shares are absolute and not "settled," and the daughters' shares are said to be "settled."

The first question which arises is whether "survivor" shall be construed to include the children of life tenants who have predeceased a daughter who dies without issue. In *Lucena v. Lucena*[29] it was agreed by all the judges that this should be done. The fact that some of the shares were settled brought the case precisely within the typical case dealt with *ante*, § 602, and the construing of "survivor" as "other" was not prevented by the fact that some of the shares were not settled.[30]

The second question is whether "survivor" should be put back into "other" so that "other" would mean "others who survived or whose stock survived" the death of the daughter dying without issue. In *Lucena v. Lucena*, Jessel held that "survivor" must be put back into "other," and that while the children of pre-deceased daughters who survived the death of the daughter dying without issue, took, the children of a son who, having reached twenty-one, died before the death of the daughter who died without issue, were not entitled. In short, "survivors" meant "others who survived or whose stock survived" only where the issue was mentioned as taking after the parent's life estate. This was reversed by the Court of Appeal, which held that "survivor" meant "other" literally. "Survivor" was not put back into "other." The Court of Appeal declared rather pointedly that even though the gift over to a "survivor," so far as it referred to the sons, was absolute,

[28] Duryea *v.* Duryea, 85 Ill. 41.

[29] 7 Ch. Div. 255 (1877).

[30] See also Jackson *v.* Sparks, 38 L. J. Ch. (N. S.) 75.

yet that did not prevent "survivor" meaning "other" as applied to the sons.[31]

§ 607. Suppose all the shares are "settled" on daughters, as in the typical case stated ante, § 602, and suppose one daughter dies leaving issue and then her issue all die; subsequently another daughter dies without issue; do the representatives of the issue of the first daughter take a share of the interest of the daughter dying without issue? In other words, is "survivor" to be put back into "other" or not? It is believed that this question was logically settled by *Lucena v. Lucena*.[32] The fact that in that case some shares were settled and some were not is no basis for making a distinction between that case and a case where all the shares are settled. The fact that some shares are settled and some are not is material on the question of whether "survivor" should be construed as "other." It is not material after it has been determined to construe "survivor," "other," on the question of whether "survivor" shall be put back into "other" or not. *In re Bilham*,[33] which holds that only the issue of the pre-deceased daughter who survived the daughter dying without issue could take, is difficult to support. *In re Friend's Settlement*[34] is, it is submitted, in fact *contra* and the attempted distinction between the limitations in question in that case and in *In re Bilham* is too fine. When the courts have once construed "survivor," "other," refinements as to when the issue must survive where the shares are "settled," while other legatees do not have to survive because the shares are not settled, produces a complication of distinctions which are out of place when all that is desired is a definite rule, easily and certainly applicable, to cover a situation which the testator has obviously neglected to provide for.

TITLE III.

ACCRUED SHARES.

§ 608. Accrued shares: In *Lombard v. Witbeck*[35] there was a devise to trustees for the benefit of three grandchildren

[31] Compare this with the decision in Twist *v.* Herbert, 28 L. T. N. S. 489, *ante* § 604.

[32] 7 Ch. Div. 255 (1877).

[33] [1901] 2 Ch. 169.

[34] [1906] 1 Ch. D. 47.

[35] 173 Ill. 396.

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 no 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.[36] This rests upon the same argument against intestacy which is set out in § 602.

[36] *Id.* p. 411. The reasoning upon which this is based is given at page 409.

CHAPTER XXV.

POWERS.

TITLE I.

CLASSIFICATION, VALIDITY AND EXTINGUISHMENT OF POWERS—APPOINTMENT IN FRAUD OF POWERS.

§ 609. **Classification of powers:** Powers have been classified[1] as powers appendant, powers in gross or collateral, reserved powers in gross, and powers simply collateral. A power appendant is one which, when exercised, operates to cut short the donee's own estate—as where the donee having a fee also has power to appoint.[2] Where the donee has a life estate with power to appoint a remainder the power is said to be in gross or collateral. Where the donee has no interest in the property but has himself created the power—as where one conveying a fee, reserves to himself a power to appoint or revoke—the power is called a power in gross or collateral, but may for the purpose of distinguishing it from the second class of powers be called a "reserved power in gross." When the donee has no interest in the property and has not created the power it is called a power simply collateral.[3]

These powers may be general or special. They are general when the donee may appoint to anyone, including himself.

Powers, whether general or special, may be exercisable by deed or will or by deed only, or will only.

§ 610. **Validity of legal interests 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

[1] Gray, "Release and Discharge of Powers," 24 Harv. Law. Rev. 511.

[2] McFall *v.* Kirkpatrick, 236 Ill. 281; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238. See also, Goodrich *v.* Goodrich, 219 Ill. 426, *post*, § 637.

[3] For instance, powers of sale by executors who have no title to the real estate subject to the power.

a deed [4] or by will.[5] The appointee under the power takes title from the donor and not from the donee of the power.[6] The exercise of the power, therefore, results in the creation of a springing or shifting future interest.[7] Thus, we have instances where the exercise of a power by an executor [8] or a life tenant [9] cuts short the interest which has descended to the heirs at law, so that a springing future interest is created. We have, also, cases where the executor's,[10] or life tenant's,[11] exercise of a power cuts short the interest of the devisees under the will so that a shifting future interest is created.[12] The legal estate appointed must, then, be valid because the conveyance creating

[4] Butler *v.* Huestis, 68 Ill. 594; Morrison *v.* Kelly, 22 Ill. 610.

[5] See cases cited *infra* notes 8-12. 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, § 89 (1 A. & D. R. E. S. 466); R. S. 1845, ch. 85 p. 426, § 93 (1 A. & D. R. E. S. p. 514); Laws 1872, p. 77, § 97 (1 A. & D. R. E. S. p. 570); R. S. 1874, ch. 3, § 97.

[6] See Christy *v.* Pulliam, 17 Ill. 59, where Roach *v.* Wadham, 6 East, 289, 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.

[7] *Ante*, §§ 73, 444, 452, 467.

[8] 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*.

[9] Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59; Pulliam *v.* Christy, 19 Ill. 331; Markillie *v.* Ragland, 77 Ill. 98; Crozier *v.* Hoyt, 97 Ill. 23. See also Lomax *v.* Shinn, 162 Ill. 124.

[10] 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*.

[11] Funk *v.* Eggleston, 92 Ill. 515; Kaufman *v.* Breckenridge, 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.

[12] 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

the power operates under the Statutes of Uses or Wills,[13] or under modern Acts providing for the transfer of interests by deed.

§ 611. Extinguishment of powers: A power which by the terms of its creation must be exercised within a certain time cannot be exercised after that time.[14]

A power appendant, whether general or special, is releasable. It is in fact released where the donee conveys the fee to which the power is appendant.[15] But if the donee be a life tenant with a general power to appoint in derogation of the life estate as well as the remainder, then the transfer by the donee of his life estate will extinguish the power only so far as the life estate is concerned. The power may still be exercised over the remainder.[16] If, however, the life estate be taken on execution the power is not discharged in any respect.[17] A power in gross or collateral in a life tenant to appoint the remainder becomes a power appendant when the life tenant secures the remainder in himself. In that event the donee may extinguish the power by a release or conveyance of the fee even though the power is special.[18]

If the power is simply collateral it may be general, but it is always construed as special unless the contrary intention expressly appear—that is to say, the power is always construed as preventing an appointment by the donee to himself. Hence, powers simply collateral are practically all special. A special power simply collateral is not releasable. The donee occupies a fiduciary relation to the object of the power and the release would be in breach of that fiduciary obligation.

The difficult problem arises where an attempt is made to re-

of 1879 (Laws 1879 p. 211) such powers in instruments executed after that date are void.

[13] *Ante*, § 73.

[14] Smyth *v.* Taylor, 21 Ill. 296. See also Ely *v.* Dix, 118 Ill. 477, 482.

[15] McFall *v.* Kirkpatrick, 236 Ill. 281.

[16] Jones *v.* Winwood, 3 Mees. & W. 653 (1838).

[17] Doe *v.* Jones, 10 Barn. & C. 459 (1830).

[18] *In re* Radcliffe, L. R. [1892] 1 Ch. 227 (1891). Mr. Gray, however, suggests that if the remainder were obtained merely for the purpose of extinguishing the special power, the transaction would be in fraud of the power and the extinguishment of the power would fail: "Release and Discharge of Powers," 24 Harv. Law. Rev. 511, 533.

lease a special power in gross or collateral. If the limitations are to the donee for life with power to appoint the remainder to such one or more of his children as he sees fit, and in default of appointment to the children equally, a release to the children may be supported as an appointment. It is, therefore, unobjectionable.[19] But suppose the gift in default of appointment is to others than the objects of the power. Is the release to them valid? Clearly the donee, while he does not have to exercise the power, is under a fiduciary obligation to keep himself in a position where he can exercise it as long as he lives. His attempted release is in breach of that obligation and should be held void. Such is Mr. Gray's view [20] and it should be followed where a court is at liberty to do so. The English cases, however, permit the release. The reason for this is peculiar. It became settled for reasons applicable to tortious conveyances, that a tortious conveyance by feoffment, fine or recovery by the life tenant extinguished the power.[21] Then, illogically it is believed, the English courts permitted the same result where the life tenant simply released.[22]

Suppose the power in gross or collateral is general, but exercisable by will only. The English cases are clear that it may be released.[23] This is sound. There is no fiduciary obligation because there are no objects of the power to whom such an obligation can run. The fact that the donee intended the donee's exercise of the power, or opportunity to exercise the power, to be ambulatory during his lifetime has reference only to the character of the power while it exists. It is not intended, if, indeed, it be in the power of the donor, to force upon the donee the retention of a power in which the donee alone is interested.

[19] Smith *v.* Plummer, 17 Law J. Ch. [N. S.] 145 (1848).

[20] "Release and Discharge of Powers," 24 Harv. Law. Rev. 511, 517-523.

[21] West *v.* Berney, 1 Russ. & M. 431 (1819); Smith *v.* Death, 5 Mad. 371 (1820).

[22] Horner v. Swann, Turn. & R. 430 (1823). This case, though unsatisfactory, seems to have been accepted by English writers, though not without protest. Gray, "Release and Discharge of Powers," 24 Harv. Law Rev. 511, 520.

[23] Barton *v.* Briscoe, Jac. 603, 607; Page *v.* Soper, 11 Hare, 321 (1853). Mr. Gray, however, condemns the rule which permits the release of such powers: "Release and Discharge of Powers," 24 Harv. Law Rev. 511, 523-531.

§ 612. Appointment in fraud of powers: Equity, of course, will set aside the execution of a special power where the donee attempts to derive a personal benefit out of the exercise of the power for himself, or where he attempts by the exercise of his power to secure a benefit for objects not included within the power.[24]

Where the power is special and testamentary a covenant to appoint in a particular way is a breach of the fiduciary obligation and not enforceable against the estate of the covenantor.[25] Suppose, however, the donee of a special testamentary power covenants to exercise it by will in favor of certain objects of the power and then does so. Clearly there was a fiduciary obligation to the objects of the power to retain, during the life of the donee, the power untrammeled by the personal liability on the part of the donee for the breach of any covenants relating to its exercise. The covenant and the exercise of the power pursuant to it constitute a breach of that obligation and should be set aside. English judges have admitted that such is the proper result to be reached upon principle.[26] But because it had been settled, as a matter of authority, that the power in gross or collateral and special was releasable by the donee [27] in spite of the fiduciary obligation to the objects of the power, the English courts felt bound by authority to hold that an appointment pursuant to a covenant must be sustained.[28]

Suppose the power is testamentary and general and there is a covenant *inter vivos* to appoint. Here there is no breach of any fiduciary obligation because the power is general. The covenantor is liable in damages for the breach of the covenant.[29] But equity will not give specific performance of the covenant against a different appointee for the reason that to do so would, in effect, be to turn the power into a power to appoint *inter vivos* which was against the expressed intention of the donor.[30] It follows, however, from the fact that there is no breach of any

[24] Leake, Digest of Land Law, 2nd ed. 311-313; Sayer *v.* Humphrey, 216 Ill. 426.

[25] *In re* Bradshaw, L. R. [1902] 1 Ch. 436.

[26] Coffin *v.* Cooper, 2 Drew. & S. 365 (1865); Palmer *v.* Locke, 15 Ch. Div. 294 (1880).

[27] *Ante*, § 611, note 21.

[28] Coffin *v.* Cooper, *supra;* Palmer *v.* Locke, *supra.*

[29] *In re* Parkin, L. R. [1892] 3 Ch. 510.

[30] *Id.*

fiduciary obligation that if the donee does appoint pursuant to the covenant, the appointment will not be set aside.[31]

§ 613. Special restrictions upon the capacity to be a donee of a power or to exercise a power attempted to be conferred: In *Morrison v. Kelly*[32] 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 *Leman v. Sherman*[33] 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.

Statutes[34] 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.[35]

An amendment of 1872[36] 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[37] 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."

TITLE II.

ILLUSORY APPOINTMENTS AND NON-EXCLUSIVE POWERS.

§ 614. Illusory appointments: The recent Illinois case of *Hawthorn v. Ulrich*,[38] has disposed of the doctrine of illusory

[31] Beyfus *v.* Lawley, L. R. App. Cas. 411 (1903).

[32] 22 Ill. 610.

[33] 117 Ill. 657.

[34] Laws 1887, p. 144 and Laws 1889, p. 99; Laws 1871-2, p. 296, § 26 (R. S. 1874, ch. 32, § 26).

[35] Pennsylvania Co. *v.* Bauerle, 143 Ill. 459.

[36] Laws 1871-2, p. 292, § 34 (R. S. 1874, ch. 30, § 34). This Act was further amended by Laws 1879, p. 80.

[37] Laws 1857, p. 39 (1 A. & D. R. E. S. p. 191). See also Pennsylvania Co. *v.* Bauerle, 143 Ill. 459, 468.

[38] 207 Ill. 430.

appointments in 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 doctrine of illusory appointments, making the law in Illinois substantially what it is in England under the act of 1 Wm. IV c. 46.

§ 615. 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 the rule as to illusory appointments. As soon as it is said that the donee must appoint something to each member of the class, but that he can cut any member off with only a cent, practically the power becomes exclusive. By requiring an appointment of something to each member of the class, a pitfall for testators remains. Accordingly, a later English statute[39] has abolished non-exclusive powers.

§ 616. Partial appointments and the hotchpot clause: Where appointments are made to some of the objects of a special power, but the whole property subject to the power is not exhausted, the unappointed part is divided equally among those who take in default of appointment, which is usually among the objects of the special power.[40] This may result rather unfairly. Of five children among whom five thousand dollars is to be appointed, four may receive one thousand dollars each and then one thousand dollars may remain to be divided equally among

[39] 37 and 38 Vict., c. 37.

[40] Wilson *v.* Piggott, 2 Ves. Jr. 351 (1794).

all five. So, where appointments by different instruments are made to some of the objects of a non-exclusive power and the whole fund is exhausted, the last appointment would be void and the amount so attempted to be appointed must usually be divided among all the objects of the power equally.[41] To remedy the unfairness resulting from the application of these rules the so-called hotchpot clause was invented. This provided in substance that "no one who takes by appointment shall (in the absence of an expressed direction in the appointment to the contrary) share in the unappointed part without bringing his appointed share into the general fund to be distributed as in default of appointment." Such a clause operated as follows: If ten thousand dollars were to be appointed among five children and the donee appointed three thousand to A, one thousand to B, one thousand to C, and five thousand to D, the last appointment of five thousand was void and that sum was distributed as in default of appointment, but only among those who first brought their appointed shares into the fund. A would naturally refuse to bring his into the fund because he would then be worse off. B and C would bring their amounts into the fund. That would make seven thousand to be divided equally between B, C, D and E.

TITLE III.

SURVIVAL OF POWERS.

§ 617. **Introductory**: At the beginning of the 17th century it was stated that if a power were given to several individuals and one dies, the power could not be exercised. It was said that the power does not survive.[42] This rule has been broken in upon extensively in three ways: *First*, by statutes relating to the survival of powers in executors; *second*, where the power was actually lost equity under certain circumstances made those tak-

[41] Young *v.* Waterpark, 13 Sim. 199 (1842).

[42] Atwaters *v.* Birt, 2 Cro. Eliz. 856 (43-44 Eliz., 1603). So where a power is conferred upon several it cannot be exercised by less than all: Wallace *v.* Wallace, 82 Ill. 530; Wilson *v.* Mason, 158 Ill. 304.

It follows that where a power is given to several, all who are *in esse* must join in its exercise unless a contrary direction is made: Coleman *v.* Connolly, 242 Ill. 574; Dingman *v.* Boyle, 285 Ill. 144.

ing in default of appointment constructive trustees for those interested in the exercise of the power; and *third*, courts have strained to construe the power as exerciseable by whoever occupied the office of executor or trustee where the power was conferred upon persons discharging such offices.

TOPIC 1.

POWERS SURVIVING PURSUANT TO STATUTES.

§ 618. Survival in case of the death of one of several executors: Since 1829 we have had in the statutes of this state a provision[43] that where "one or more executors shall depart 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."[44] 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.[45]

§ 619. Survival in case one of several executors refuses to act: The statute mentioned in § 618 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,[46] 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*,[47] and *Pahlman v. Smith*[48] it was held that under a general act, in force in this state since 1807[49] adopting the common law of England, this

[43] Laws 1829, p. 191, § 89; R. S. 1845, ch. 109, § 93; Laws 1871-2, p. 775, § 97; R. S. 1874, ch. 3, § 97; Hurd's R. S. (1903), ch. 3, § 97 (1 A. & D. R. E. S. pp. 514, 570).

[44] 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.

[45] Ely *v.* Dix, 118 Ill. 477.

[46] 5 Gray's Cases on Prop., 2nd ed. 314.

[47] 16 Ill. 329, 334.

[48] 23 Ill. 448, 452. See also Ely *v.* Dix, 118 Ill. 477, 481.

[49] Except from March 30, 1818, to Feb. 4, 1819: Laws 1807, Pope's Compilation of 1815, p. 34; Laws 1819, approved Feb. 4, 1819, R. L. 1833, p. 425 (1 A. & D. R. E. S. 913; 2 A. & D. R. E. S. 1668); R. S. 1845, ch. 62, § 1, p. 333; R. S. 1874, ch. 28; Hurd's R. S. (1903) ch. 28, p. 435.

act was in force in Illinois. Since 1872 the substance of the statute of Hen. VIII has been embodied in our laws in terms.[50] In *Pahlman v. Smith*,[51] and *Ely v. Dix*,[52] 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.[53]

Is there any rule as to how the executor's refusal to act must appear? In *Clinefelter v. Ayres*,[54] and *Wardwell v. McDowell*,[55] it is 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* and *Ely v. Dix*. The actual holding of the court in *Ayres v. Clinefelter*,[55a] and *Wardwell v. McDowell*, 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.

§ 620. Survival in case one of several executors fails to qualify: If the statute of Hen. VIII [56] is construed 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*,[57] 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 condition until July 1st, 1872, when by an act of that year,[58] the statute in force since 1829 was

[50] Laws 1872, p. 77, § 97 (1 A. & D. R. E. S. 570); R S. 1874, ch. 3, § 97; Hurd's R. S. (1903) ch. 3, § 97.

[51] 23 Ill. 448.

[52] 118 Ill. 477.

[53] Wardwell *v.* McDowell, 31 Ill. 364, 376; Ely *v.* Dix, 118 Ill. 477.

[54] 16 Ill. 329, 337.

[55] 31 Ill. 364, 369 *et seq.*

[55a] 20 Ill. 465.

[56] *Ante*, § 619.

[57] 16 Ill. 329. See also Wardwell *v.* McDowell, 31 Ill. 364, 369, *accord*. But *quære* about Wisdom *v.* Becker, 52 Ill. 342.

[58] Laws 1872, p. 77, § 97 (1 A. & D. R. E. S. 570); R. S. 1874, ch.

amended (by adding the words italicized),[59] so as to read "where one or more executors *shall fail or refuse to qualify* or depart this life" the survivor or survivors may 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.[60]

§ 621. 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*,[61] 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[62] 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,[63] and still operative,[64] 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 per-

3, § 97; Hurd's R. S. (1903) ch. 3, § 97.

[59] Ely *v.* Dix, 118 Ill. 477, 481.

[60] Ely *v.* Dix, *supra*, does 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.

[61] 7 Ill. 176 (two judges out of seven dissenting).

[62] R. S. 1845, p. 540, § 19.

[63] Laws 1871-2, p. 77; R. S. 1874, ch. 3, § 37.

[64] Hurd's R. S. (1903) ch. 3, § 37.

formed 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.''[65]

It would seem, however, that since 1879 a power of sale 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,[66] of R. S. 1874, ch. 30, sec. 34.

It seems to have been intimated that an administrator with the will annexed may file a bill to have a trustee appointed to exercise a power.[67] The principal authority for this is *Stoff v. McGinn*.[68] On examination, however, this case will not be found to hold that such a proceeding is proper where a real power 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.

Topic 2.

Exercise of the Power Which Did Not Survive Supplied by Holding as Constructive Trustees Those Who Take in Default of Appointment.

§ 622. Where the power is in executors to sell real estate to pay debts or legacies, or both: Suppose the power in such case does not survive—as where all the executors die and an administrator with the will annexed is appointed. It is clear that the heir at law or devisee takes the legal title to the real estate and the power as such is extinguished. Nevertheless,

[65] Nicoll *v.* Scott, 99 Ill. 529, 536 537. Bigelow *v.* Cady, 171 Ill. 229, and Stoff *v.* McGinn, 178 Ill. 46, *semble, accord.*

[66] Laws 1879, p. 80.

[67] Wenner *v.* Thornton, 98 Ill. 156; Stoff *v.* McGinn, 178 Ill. 46.

[68] 178 Ill. 46.

equity, from an early period, turned the devisee or the heir at law into a constructive trustee for the creditors and legatees and upon a bill filed by one of them, or by the administrator with the will annexed, the trust could be enforced and the land sold to pay debts and legacies.[69] The reason for this is plain. The devisee or heir at law was in express terms postponed to the creditors and legatees. There was no discretion to exercise the power or not as the executor pleased, with a gift in default of appointment which would give the party taking in default of appointment an equal standing with the objects of the power. In the case of the power to sell to pay debts and legacies the objects of the power were preferred to the heir or devisee. The executors ought to have sold and were under a fiduciary obligation to sell to pay the debts and legacies. The heir at law or devisee would therefore take, if at all, as a result of the failure by the executors to perform their fiduciary obligation. Receiving a title in that way was unfair and inequitable and resulted in an unjust enrichment. Upon that ground the heir or devisee was turned into a constructive trustee in favor of the legatees and creditors.

§ 623. Suppose the power is given to executors to sell real estate and distribute the proceeds to those who would take the real estate if it were not sold: This is a power in aid of the administration of the estate merely. There is no ground upon which to raise any constructive trust.

TOPIC 3.

POWERS IN EXECUTORS AND TRUSTEES CONSTRUED AS EXERCISABLE BY WHOEVER FOR THE TIME BEING HOLDS THE OFFICE.

§ 624. Distinction between real and spurious powers.[70] A real power is exercised when the appointee, as a result of the appointment takes a title, not from the donee of the power, but from the donor.[71] A real power operates to permit the creation

[69] Yates *v.* Compton, 2 P. Wms. 308 (1725); Co. Lit. 113a, Hargraves' Note, Kales' Cases on Future Interests, 713, note 5.

[70] Smith *v.* Hunter, 241 Ill. 514 (question whether executor with a power, who was a party to a suit, represented those who held the beneficial interests).

[71] Drake *v.* Steele, 242 Ill. 301; Emmerson *v.* Merritt, 249 Ill. 538 (executor with a power merely and no title, could not maintain a bill to quiet title).

by appointment of a future interest, as if it were originally created by the donor of the power in the instrument creating the power. The donee of the power may have a title in himself. It may even be a fee simple. Usually, however, the donee has no title co-extensive with that which he has power to appoint. Such real powers are to be distinguished from the so-called or spurious power which a trustee is given to deal with the trust estate of which he holds the fee or absolute interest. When the trustee exercises the so-called or spurious power to transfer the trust estate he transfers the legal title which he has. The existence of the expressed power merely prevents the transfer from being in breach of trust and protects the purchaser or transferee from all claims of the *cestui*. This so-called power is not a true power at all. Yet, as a matter of practical convenience, the survival of both real and spurious powers will be dealt with in the subsequent sections.

§ 625. **Problem wholly one of expressed intent:** Where a real or a spurious power is created in A and B individually, or as executors or as trustees, and one dies or refuses to act, or resigns, can the power be exercised by the other? There can be no doubt but that the donor of the power or the creator of the trust may restrict the exercise of the power to the particular donees or trustees named, or he may extend the power to the donees and the survivor of them, and the heirs of the last survivor, or to the trustee or trustees for the time being. The real question in every case is what has the donor of the power or the creator of the trust estate done? How has he by his express language designated who may exercise the power?

No difficulty would arise if the instrument creating the power or the trust contained explicit language upon which this question might be answered. The difficulty which arises is a common one, because instruments do not make the answer to the above question explicit. The courts, therefore, have been forced to make decisions on the effect of incomplete language, and these, constantly followed, have developed certain rules of construction.

§ 626. **Cases where the power is given to trustees who take an absolute interest in the trust estate:** It seems clearly settled that when property is conveyed absolutely to trustees upon certain trusts and then powers are given to the trustees which

are in aid of the administration of the estate while the trust continues (most usually a power to sell real estate), the powers are regarded as expressed to be in those who are trustees for the time being.[72] Little attention, it is believed, is now paid to such differences in phraseology as "my trustees," "my said trustees," "A and B, my trustees," or "my trustees, A and B," or to the fact that, where the power is given to trustees in the plural number, the one trustee for the time being is attempting to exercise the power. The reliance of the creator of the trusts upon the individual rather than the holder of the office for the time being must be explicitly expressed to receive certain recognition in the courts.

It is sometimes said that the power is an incident to the office. This means no more than that there is an expressed intent that whoever is trustee for the time being shall have the power. It states a conclusion and not a reason. Sometimes it is said that the power is coupled with an interest because the trustees have the fee or absolute interest in the trust estate. But this is a vacuous way of calling attention to the fact that the trustees' taking the fee or absolute interest upon trust furnishes a rational basis for finding an expressed intent that the trustee for the time being shall have the power. But the fact that the trustees take the fee or absolute interest is not even, it is believed, the principal element in determining that the power survives. The additional elements practically always present where the trustees take the fee or the absolute interest upon trust,—*viz.*: that there are trusts to be administered and that the power is a convenient aid to the administration of the trust estate so long as the trusts last,—are the essential elements making for the construction that the power is conferred upon any trustee or trustees for the time being.

Of course the result, required by the rule, yields to a context indicating that the power is to be exercised only by the

[72] Lane *v.* Debenham, 11 Hare 188; *In re* Bacon, [1907] 1 Ch. 475; Faulkner *v.* Lowe, 2 Exch. 581, 594; Hind *v.* Poole, 1 Kay & J. 383; Eaton *v.* Smith, 2 Beav. 236; Reid *v.* Reid, 8 Jur. N. S. 499; Attorney General *v.* Gleg, 1 Atk. 356; *In re* Cookes' Contract, 4 Ch. Div. 454; Golder *v.* Bressler, 105 Ill. 419; Wallace *v.* Foxwell, 250 Ill. 616, 623; Gray *v.* Lynch, 8 Gill. (Md) 403; Gutman *v.* Buckler, 69 Md. 7; Bradford *v.* Monks, 132 Mass. 405; Putnam *v.* Fisher, 30 Me. 523; Gaines *v.* Fender, 82 Mo. 497, 506.

individuals named as trustees. Nice considerations are involved in determining whether a special context is sufficient to achieve this result.

It has been held that it made no difference that the instrument creating the trust provided for the filling of vacancies among the trustees and that the new trustees were given all the powers of the old trustees. In such case, therefore, the sole surviving trustee could exercise the power of sale though the vacancies had not been filled.[73]

Suppose the power in the trustees is to appoint in the discretion of the trustees, or distribute in a manner different from that prescribed by the testator or settlor. Here the nature of the power at once raises an inference that it was to be exercised only by the particular trustees named. The power to alter a distribution is one which would naturally be entrusted to particular individuals, and only to the discretion of all the individuals named. In a number of instances of this sort, courts have held the power, though given to the trustees generally, was exercisable only by all of those named, so that upon the death of one the power could not be exercised.[74] But even in this class of cases no dogmatic rule applies, and where the power was given to my "said trustees" to sell and apply the principal for the wife, who took a life estate, it was held that it could be exercised by any trustee for the time being.[75]

[73] Belmont *v.* O'Brien, 12 N. Y. 394; Parker *v.* Sears, 117 Mass. 513. But see O'Brien *v.* Battle, 98 Ga. 766.

[74] Cole *v.* Wade, 16 Ves. Jr. 27 (devise to relations in such portions as executors should determine); Hadley *v.* Hadley, 147 Ind. 423 (I will that A, B and C take charge as trustees of my real estate and devote the same if thought practicable to the creation and maintenance of an institution, etc., if that deemed practicable by said trustees. Then gift over.); Dillard *v.* Dillard, 97 Va. 434 (trustees had power in their discretion to divert gift in fee or for life to one person and to that extent divesting the interest of another who would otherwise have it).

In Maryland, where the *cy pres* doctrine regarding charitable gifts does not obtain (Gray, Rule against Perpetuities, § 611), a power to trustees to select charities as beneficiaries is in fact a power to divert the estate from the next of kin or the heir at law or the residuary devisee, to charity. In accordance with the above cases the power was, therefore, construed as personal to the trustees named: Gambell *v.* Trippe, 75 Md. 252.

[75] *In re* Smith, [1904] 1 Ch. 139. See also Delany *v.* Delany, 15 L. R. Ir. 55.

Suppose that the power is given to trustees to use their discretion in dividing among charities. The trust estate is devoted to charity, so that charity must have it. Hence the exercise of the power does not deprive any beneficiary. It merely designates the particular beneficiary. If the trustees named do not exercise the power the court itself will do so. In short, since the power is to be exercised in any event, it may fairly be argued that the power is to be exercised by any trustee for the time being.[76]

Sometimes a real power is given to be exercised only with the consent of the "trustees" or the "undersigned trustees." Again, it is all a matter of construction as to whether the assent of the particular trustees named is required, or whether the assent of the trustees for the time being is enough. Much depends upon the subject matter of the power and the special context. There are no precise rules. The English equity judges seem to have adopted an attitude strongly favoring a construction which requires the assent of the trustee or trustees for the time being.[77]

The position of our Supreme Court in *Pennsylvania v. Bauerle*[78] is worthy of special notice. There the power of sale was given to four trustees. All qualified in Pennsylvania, the domicile of the testator. One trustee was, however, a Pennsylvania corporation, which did not comply with the laws of this state and therefore could not, under the laws of this state, act in the sale of Illinois land with the other trustees. Our Supreme Court seems to have insisted that the Pennsylvania corporation, by reason of its attempted acceptance of the trusts, was a trustee of the Illinois lands, so that it must join in a deed conveying them, and at the same time to have held that be-

[76] Crawford *v.* Forshaw, L. R. [1891] 2 Ch. 261 (power in "executor herein named" to divide among charities); Lorings *v.* Marsh, 6 Wall (U. S.) 337 (power to trustees or successors); Murphy's Estate, 184 Pa. St. 310 (power in "executors or successors").

The reasoning of the text, of course, can have no application in a state where the *cy pres* doctrine with respect to gifts to charities is not in force: Gambell *v.* Trippe, 75 Md. 252.

[77] Byam *v.* Byam, 19 Beav. 58 (power in tenant for life to withdraw fund from the settlement with the assent of the "undersigned trustees" approved in *In re* Smith, [1904] 1 Ch. 139).

[78] 143 Ill. 459.

cause the Pennsylvania corporation had not complied with the Illinois statute it had not qualified as a trustee of the Illinois lands, and so could not join in the deed to the purchaser. Hence, in a bill for specific performance by the trustees against the purchaser, the purchaser's defense was complete.

§ 627. Cases where the beneficial interest is in A and where B and C have power to divert the beneficial interest by appointment to D: It is clear that no intent is expressed that the survivor of B and C can exercise the power. Furthermore, it is proper that A's beneficial interest, which is vested, should not be divested unless the power was exercised strictly as indicated. In support of a rule that the power, in the case put, did not survive, it has been said that a naked or bare power would not survive.[79] The phrase is somewhat unfortunate, as it tends to indicate a hard and fast rule and also causes the discussion to turn upon whether a power is a naked or bare power, or a power coupled with an interest. These phrases conceal rather than aid the real inquiry. The discussion should always turn upon the essential elements of the situation, which furnish the rational ground for an expressed intent.

§ 628. Cases where a real power is given to executors to sell to pay debts or legacies or both: This is a real power, because the executors have no estate in the land. It is like a bare or naked power in that when the executors exercise the power they divest the legal title of the heir or residuary devisee in favor of the creditors or legatees. At common law neither had a right to come down on the real estate in the absence of a specific charge and to-day it is generally true that the legatees have no right to satisfaction out of the realty unless the legacies are charged upon the realty. On the other hand, the power to sell to pay debts or legacies in equity charges the land with their payment, and equity, in any event, would decree the land sold to satisfy the debts or legacies, so that the land is in fact lost to the heir or residuary devisee if it is necessary to pay debts or legacies. Hence, there is no reason for a strict

[79] Sugden on Powers, 3d Am. ed. 205, first rule; Hargrave's Note, Co. Lit. 113a; Farwell on Powers, 2nd ed. 454; Atwaters *v.* Birt, 2 Cro. Eliz. 856; Danne *v.* Annas, Dyer (part II) 219a; Montefiore *v.* Browne, 7 H. L. C. 241; Hawkins *v.* Kemp, 3 East 410; Glover *v.* Stillson, 56 Conn. 316 (power of sale in life tenants).

adherence to the language used in order to prevent the divesting of the estate of the heir or residuary devisee. Furthermore, the executor, though having no legal estate upon trust, has this power in trust for the creditors and legatees and that power is clearly in aid of the administration of the estate and the discharge of the executor's trust. Hence, the essential features of the case where the trustee has the absolute interest, with a power in aid of administration of the trust, are in fact present. Hence, the power in the case put is construed as being expressly limited to those persons who may for the time being be executors. If some resign or die or fail to qualify, the remaining ones may, even apart from statute, act.[80] The power is sometimes said to be coupled with an interest or to be a power in trust, or to attach to the office and not the person. Whatever phrase be used simply means that the predominant characteristics of the situation and context are sufficient to warrant the court in reaching a conclusion that there is an expressed intent that the executor for the time being may exercise the power. There is a distinct inaccuracy in saying that the power attaches to the office of executor. That statement, if pressed to its logical conclusion, would enable the administrator with the will annexed to exercise the power, for he succeeds to the office of the executor. It has been generally held that in the absence of statute, the administrator with the will annexed, cannot exercise the power,[81] but that a sale must be directed by a decree of a court of chancery. These cases make it clear that the courts go no farther than to hold that the language used gives power only to the persons named as executors who may be executors for the time being and to no others.

[80] Houell *v.* Barnes, Cro. Car. 382; Brassey *v.* Chalmers, 4 De G. M. & G. 528, 536, reversing 16 Beav. 223, 231; Forbes *v.* Peacock, 11 Mees. & W. 630; Peter *v.* Beverly, 10 Pet. (U. S.) 532, 564; Osgood *v.* Franklin, 2 Johns Ch. 1; 14 Johns 527 (N. Y.); Wardwell *v.* McDowell, 31 Ill. 364; Warden *v.* Richards, 11 Gray (Mass.) 277; Muldrow's Heirs *v.* Fox's Heirs, 2 Dana (Ky.) 74; Weimar *v.* Fath, 43 N. J. L. 1; Berrien *v.* Berrien, 4 N. J. Eq. 37; White *v.* Taylor, 1 Yeates (Pa.) 422; Bredenburg *v.* Bardin, 36 S. C. 197; Dick *v.* Harby, 48 S. C. 516; Fitzgerald *v.* Standish, 102 Tenn. 383; Robertson *v.* Gaines, 2 Humph. (Tenn.) 367; Davis *v.* Christian, 15 Gratt. (Va.) 11, 38; Wolfe *v.* Hines, 93 Ga. 329.

[81] Conklin *v.* Egerton's Adm., 21 Wend. (N. Y.) 430; Yates *v.* Compton, 2 P. Wms. 308; Compton *v.* McMahan, 19 Mo. App. 494; Tainter *v.* Clark, 13 Metc. (Mass.) 220.

Where the power is in the executors to sell to pay debts or legacies it would seem that it can make no difference that some discretion is imposed upon the executors, provided the language charges debts and legacies upon the land. Nor does it make any difference that the power is given to "my executors" or to "A and B, my executors," or to "my executors, A and B," or to "my said executors," referring to A and B, already appointed executors, or to "my executors hereinafter named." Nor does it make any difference that of several executors originally appointed only one is executor for the time being.

§ 629. Cases where the power in executors is one not only to sell to pay debts or legacies, or both, but also to sell for the convenience of the estate and hold the proceeds for the one entitled to the land: It would seem that if there is no separating of the two purposes of the power so that one formula of language is used to cover both situations, then, since the power must be construed to be in the executors for the time being for the payment of debts and legacies, it must be construed to be in the executors for the time being for all purposes. The same language cannot well be given different meanings depending upon whether the same power is used for one purpose or another.[82]

§ 630. Cases where there is a power in executors to sell, not, however, to pay debts or legacies, but to hold the proceeds for the benefit of those entitled to the land in place of the land: Here the power is a real power, for its exercise divests the title of the heir or devisee. It does not, however, take away any beneficial ownership from the heir or devisee and transfer it to another. It only changes the beneficial ownership of the heir or devisee from a legal interest in the land to an equitable interest in the proceeds. Hence, there is no reason for a strict adherence to any literal meaning of the language used in order to prevent the divesting of a vested interest. Clearly the power is like a power in a trustee who has the legal estate. It operates for the convenience of the estate by vesting in some person of trusted discretion an opportunity to deal with the legal title. This is especially so where the legal title is outstanding in an infant. The mere fact that the executor has no legal title in fee

[82] Zebach *v.* Smith, 3 Binney (Pa.) 69.

does not militate against the inference that the power is given to those who may, for the time being, be executor or executors. Hence, the power given to the executors should be construed to be to such as may, for the time being, be acting. There is some authority in favor of this position.[83] But for the most part the cases seem to be against it. The courts refuse to extend the rule that the power in executors survives beyond the case where the power is to pay debts or legacies, or both.[84] This is especially true where the language creating the power reposes a personal confidence and discretion in the executors.[85]

§ 631. Cases where the executors have a discretionary power to sell and apply the proceeds in a way which changes the beneficial interests: Here the exercise of the power operates to divest a beneficial interest already vested. Hence, the power is like the bare or naked power dealt with *ante*, § 627, and the tendency ought to be to adopt a construction which would not permit a surviving executor to exercise the power.[86]

[83] Farrar *v.* McCue, 89 N. Y. 139; Dick *v.* Harby, 48 S. C. 516. See also Parrott *v.* Edmonson, 64 Ga. 332; Gould *v.* Mather, 104 Mass. 283.

[84] Clinefelter *v.* Ayers, 16 Ill. 329; Woolridge's Heirs *v.* Watkins, 3 Bibb. (Ky.) 349; Shelton *v.* Homer, 5 Mete. (Mass.) 462; Chambers *v.* Tulane, 9 N. J. Eq. 146, 156; Clay *v.* Hart, 7 Dana (Ky.) 1; Tarver *v.* Haines, 55 Ala. 503; Robinson *v.* Allison, 74 Ala. 254.

[85] Tarver *v.* Haines, 55 Ala. 503; Chambers *v.* Tulane, 9 N. J. Eq. 146; Clay *v.* Hart, 7 Dana (Ky.) 1; Robinson *v.* Allison, 74 Ala. 254.

In Wardwell *v.* McDowell, 31 Ill. 364, it was evidently argued against the survival of the power *under the Statute of 21 Hen. VIII, Ch. 4*, that a distinction must be taken between a *direction* to sell and a *discretion* to sell. It was evidently argued that the statute of Henry VIII did not apply where there was a discretionary power to sell, but only applied where there was a direction to executors to sell. This the court very properly repudiated. (See p. 376 of opinion.) The statute of Henry VIII made no such distinction and clearly should not be held to make such a distinction. But that is not holding that apart from the statute such a distinction was of no consequence. Apart from statute the rule of the common law was that even where the executors were directed to sell and given no discretion as to whether they would sell or not, the power would not survive. That was precisely the case in Clinefelter *v.* Ayers, 16 Ill. 329. *A fortiori*, where the executors were given a discretion to sell and there was no question of the application of any statute the argument was all the stronger that the power could not survive.

[86] This was the attitude taken in the following cases: Ferre *v.* American Board, 53 Vt. 162; Madden *v.*

§ 632. Suppose that trustees have only a term for years or a life estate and a power to sell the fee and hold the proceeds for the devisee of the legal estate in fee after the term or the life estate: Clearly the case is like that dealt with *ante*, § 626, except that the trustees do not have the fee or any absolute interest in the trust estate. On the other hand, the case is also like that dealt with *ante*, § 630, except that the power is in the trustees who have an estate for years or for life. Even assuming that the position of the majority of courts as to the case put *ante*, § 630, that the power does not survive, is to be adhered to, it would seem safe to predict that today courts would hold on analogy to the result reached in the case put *ante*, § 626, that the power would survive.[87] It would be incongruous to make a distinction between the case where the trustee has an absolute estate and where he has only a life estate or term for years. The latter fact only makes the difference between a real and a spurious power. But that difference alone furnishes no logical ground for a difference as to the meaning of the testator or settlor in a particular case. The result reached by a majority of the courts with regard to the case put *ante*, § 630, rests at the present day rather upon authority than upon sound reasoning applicable to the situation, and hence should not be extended.

§ 633. Treatment of the subject of survival of powers by distinguished English writers: Distinguished writers in England have tended to make much turn upon the form of the words. Is the power given to the "executors," or to "A and B, my executors," or to "A and B?" In the first case the power is said to survive.[88] In the next it is said to be doubtful,[89] or to depend upon the intention in the particular case.[90] Sug-

Madden, 23 L. R. Ir. 167. Compare cases referred to *ante*, § 627.

Observe however, that where the power is created by implication it extends to the survivor of two executors: Chandler *v.* Rider, 102 Mass. 268.

Observe the general rule that where the power is given executors by implication it survives: Farwell on Powers, 2nd ed. p. 461; Conklin *v.* Egerton's Adm., 21 Wend. 430, 442, 443.

[87] See Gould *v.* Mather, 104 Mass. 283; Parrott *v.* Edmondson, 64 Ga. 332.

[88] Sugden on Powers, 8th ed. 128, Rule 3; Farwell on Powers, 2nd ed. 457.

[89] Sugden on Powers, 8th ed. 128, Rule 4.

[90] Farwell on Powers, 2nd ed. 457.

den makes the difference between a power given to "executors" and a power given to "A and B, my executors." The former, he says, will survive; in the latter case it is doubtful.[91] Farwell puts it a little differently. He agrees that the power in the former case survives, but in the latter he says it is a question of intent whether the power is annexed to the person or to the office.[92] The cases taken as a whole indicate that the courts pay very little, if any, attention to the form of the language used, upon which Sugden and Farwell rest so heavily. They show, also, that the courts obtain their results by the consideration of the special context and certain circumstances, which furnish a rational basis for an inference in favor of the power not surviving, or in favor of its surviving. The distinctions made in the foregoing sections not only reconcile the cases, but, it is believed, do so upon more solid and rational grounds than could be found in the mere form of words or derived from such illusive phrases as power coupled with an interest, or power *ratione officii*.

TITLE IV.

POWERS IN TRUST AND GIFTS IN DEFAULT OF APPOINTMENT.

§ 634. **The problem stated:** It not infrequently happens that in creating a special power it is not precisely stated, or not stated at all, who are to take in default of appointment. The question then arises whether the objects of the power can take in that event.

§ 635. **Where there is a devise to trustees upon trust to transfer to certain persons, with power in the trustees to make a selection or exercise a power to appoint among the beneficiaries:** In such a case there is created a beneficial interest with the power added. There is in fact an express gift in default of appointment. Instead of being introduced with the usual formula, "in default of appointment," the form of it consists in a direct devise to certain objects and then the creation of a power in some person or persons to appoint among these objects. In such cases it is regularly held that in default of appointment the objects of the trust are entitled.[93]

The troublesome question in this class of cases is whether the

[91] Sugden on Powers, 8th ed. 128, Rules 3 and 4.

[92] Farwell on Powers, 2nd ed. 457.

[93] Doyley *v.* Attorney-General, 4

beneficiaries living at the testator's death take or only those who survive some subsequent period. If the appointment may be made by the trustee at any time, there is an inference that those *in esse* at the testator's death are entitled and that there is no contingency of survivorship.[94] If the power is only exercisable by the trustees at the death of the life tenant and the subject matter of the gift is personal property, it has been held that a *prima facie* inference arises that only those are to take who survive the life tenant.[95] So where the gift is of personalty to a class and is contained only in the direction to divide *in futuro*, in the event of the first taker dying without leaving issue, the direct gift has been held to be to those only who survive that event.[96]

§ 636. Where there is no gift to trustees but only a real power, there may still be sufficient language from which the court can properly find a direct gift to the objects of the power: There are a number of examples of this sort among the English cases.[97] The objects of the direct gift, of course, are entitled in default of appointment. Again, however, the question arises whether they must survive the period of appointment. Again, if the power is to appoint in the life of the life tenant or at his death, a *prima facie* inference arises that all *in esse* at the testator's death are entitled.[98] If the power is to appoint only at the life tenant's death and personalty is involved, it may be assumed that an inference would arise that only those objects of the gift take who survive the life tenant's death.[99] This, however, rests upon the rules relating to the vesting of legacies.[1] Where legal or equitable interests in land are involved the refusal of the common law courts

Vin. Abr. 485, pl. 16 (1735); Harding *v.* Glyn, 1 Atk. 469 (1739); Brown *v.* Higgs, 4 Ves. 708 (1799), 5 Ves. 495 (1800); 8 Ves. 561 (1803); *In re* Phene's Trusts, L. R. 5 Eq. 346 (1868); Wetmore *v.* Henry, 259 Ill. 80.

[94] Harding *v.* Glyn, *supra.*

[95] *In re* Phene's Trusts, *supra.*

[96] Doyley *v.* Attorney-General, *supra.*

[97] Casterton *v.* Sutherland, 9 Ves. 445 (1804); Faulkner *v.* Wynford, 15 L. J. N. S. 8 (1845); Burrough *v.* Philcox, 5 Mylne & C. 72 (1840); Lambert *v.* Thwaites, L. R. 2 Eq. 151 (1866); Wilson *v.* Duguid, 24 Ch. D. 244 (1883).

[98] Casterton *v.* Sutherland, *supra;* Faulkner *v.* Wynford, *supra;* Wilson *v.* Duguid, *supra.*

[99] *In re* Phene's Trusts, L. R. 5 Eq. 346 (1868).

[1] *Ante,* § 500.

in case of legal titles, and the refusal of courts of equity which follow the common law courts, to find a condition precedent of survivorship [2] seems to have been strong enough to justify a holding that those took who were *in esse* at the testator's death.[3]

§ 637. Suppose there is merely a power to appoint to special objects and no express gift in default of appointment, and no basis in the language used for any direct gift to such objects: If the inference from the entire context is that the objects were, as against all others, to receive the property or, as the phrase is, that the donee held the power in trust solely for the objects of the power, it is settled that those objects are entitled in default of appointment.[4]

Two theories have been advanced to support this result. The first is that a gift in default of appointment may be implied. This is strongly supported by Mr. Gray.[5] The difficulty with this view is that in the latter half of the 19th century the implication of gifts in wills has found no favor. Unless, therefore, a doctrine of implication has been firmly settled in a particular case it is in a precarious position today. That is true also in this state.[6] The recent case of *In re Weekes' Settlement* [7] indicates the danger of relying upon a theory of implication to support a gift in default of appointment. The other theory upon which the objects of the power are entitled is that a constructive trust arises. Equity requires those who take in default of appointment to hold their title as constructive trustees for the objects of the power. The facts necessary to raise the constructive trust are that the objects of the power were preferred to all the world; that the donee was charged with a fiduciary obligation to make the appointment; that his failure to do so is a breach of that obligation and that those who profit by that breach will not be permitted by a court of equity thus unjustly to enrich themselves. This is precisely the same reasoning upon which equity at the beginning of the 17th century raised a constructive

[2] *Ante*, §§ 329, 356, 496.

[3] Lambert *v.* Thwaites, *supra*.

[4] Kennedy *v.* Kingston, 2 Jac. & W. 431 (1821); Moore *v.* Ffolliot, 19 L. R. Ir. 499 (1887); Walsh *v.* Wallinger, 2 R. & Myl. 78 (1830); Freeland *v.* Pearson, L. R. 3 Eq. 658 (1867).

[5] "Powers in Trust and Gifts Implied in Default of Appointment," by John Chipman Gray, 25 Harv. Law Rev. 1.

[6] *Ante*, § 151.

[7] L. R. [1897] 1 Ch. 289.

trust against heirs or devisees, requiring them to sell real estate to pay debts and legacies when a power to sell real estate to pay debts and legacies was reposed in the executors and failed by reason of the death of all of the executors.[8]

There is no difference in result between these two theories on the question of what objects of the power are entitled. Under both theories alike where the appointment is by will only, an inference arises that those only will take who survive the donee. A difference in result might arise where a *bona fide* purchaser took from those who had the legal or equitable title and against whom the constructive trust must be raised. There might be a difference of procedure. If a constructive trust must be relied upon the remedy is always in equity. If a gift by implication exists there would be an action at law based upon a legal title.

No difference exists between the two theories where there is an express gift over in default of appointment. In that case no gift could be implied and no constructive trust raised. This is the basis for the result reached by our Supreme Court in *Goodrich v. Goodrich*.[9] In that case there was a devise to the widow with power to appoint among the children as she saw fit. During the life of the widow the children were not entitled to partition. This must have proceeded upon the ground that the widow was not a trustee but took the whole beneficial interest in the property devised, with a power appendant to appoint. Under such circumstances she had in effect a gift in default of and until appointment and the children had no interest legal or equitable to be partitioned.[10]

Suppose a testator devised to A a life estate with power to appoint among A's children, adding a declaration that he did not

[8] *Ante*, § 622.

[9] 219 Ill. 426.

[10] It should be observed, however, that a mere residuary gift does not stand on the same footing in this connection as a gift in default of appointment. The residue is simply that which has not been disposed of. Whether there has been an intent expressed that the objects of the power shall take as against all the world or not must be ascertained before the effect of the word residue can be calculated. In other words, the residuary clause is not a gift in default of appointment until you have decided the very point at issue. Hence it must be excluded for the purpose of reaching the point at issue. See cases in Gray's article entitled "Powers in Trust and Gifts Implied in Default of Appointment," 25 Harv. Law Rev. 1, 11-12.

care for A's children but was fond of A; and suppose there were no gift in default of appointment. In other words, suppose A is given a power to appoint among his children without anything from which it may be inferred that an intent has been expressed to prefer the children to all the world. On the theory of implication as a rule of construction supplying an intent not expressed, the gift might be implied. On the constructive trust theory the objects of the power could not take. Their position is merely equal, and not superior to that of those who take by operation of law in default of appointment. Hence equity would let the title stay where it fell. This is the true explanation of Lord Hardwicke's conclusion in *Duke of Marlborough v. Lord Godolphin*.[11] In *Carberry v. M'Carthy* [12] the testator devised to his wife for life with power to appoint among the children and especially declared that he made no further provision for the children. This last was taken to mean that if the children did not take by appointment in the wife's discretion no other provision was made for them. This is substantially a context putting the children and whoever was entitled in default of appointment on the same footing and no gift was implied to the children in default of appointment and no constructive trust could be raised in their favor.

Suppose that A has a testamentary power and there is an express gift over to X in default of A's appointment. A appoints to B for life with power in B to appoint to his children, but there is no gift in default of appointment by B. Mr. Gray insisted that on the theory that a gift in default of appointment might be implied, it must have been implied here in B's children.[13] If the constructive trust theory be adopted there is nothing in the context of A's appointment which indicates that B's children are to be preferred to those who take in default of appointment and hence if the title comes in default of appointment to X, no constructive trust will be raised. In *In re Weekes' Settlement* [14] the court denied any theory of implication. It did not advert to the constructive trust theory as available for B's children.

[11] 2 Ves. Sr. 61 (1750).

[12] 7 L. R. Ir. 328 (1881).

[13] "Powers in Trust and Gifts Implied in Default of Appointment," by John Chipman Gray, 25 Harv. Law Rev. 1.

[14] L. R. [1897] 1 Ch. 289.

TITLE V.

APPOINTED PROPERTY AS ASSETS.

§ 638. The usual rule in force in Illinois: *Gilman v. Bell*,[15] recognized the doctrine of *Holmes v. Coghill*,[16] 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*,[17] 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.[18]

Skinner v. McDowell,[19] 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.

TITLE VI.

DEFECTIVE EXECUTION.

§ 639. Suggestions by our Supreme Court in favor of the usual doctrine: In *Gilman v. Bell*,[20] 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.[21] In *Breit v. Yeaton*,[22] the court refused 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

[15] 99 Ill. 144.

[16] 7 Ves. 499.

[17] 2 Atk. 172.

[18] Observe that the court in Gilman *v.* Bell, *supra*, 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.

[19] 169 Ill. 365.

[20] 99 Ill. 144, 149.

[21] See also the language of Breit *v.* Yeaton, 101 Ill. 242, 263.

[22] 101 Ill. 242, 263.

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. In *Goodrich v. Goodrich* [23] a widow having power to appoint among her children, contracted to appoint to her son whenever he requested a conveyance. The son died without having made any request. It was held that for that reason there was no substantial execution which could be aided by a court of equity.

TITLE VII.

WHAT WORDS EXERCISE A POWER.

§ 640. 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.[24] Careful conveyancing should not be satisfied with less than this.

§ 641. 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 [25] 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.[26]

[23] 219 Ill. 426.

[24] 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.

[25] 6 Co. 17b.

[26] 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,

(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.

The English courts, before the Wills Act,[27] administered this very rigid rule: General words of conveyance which might apply to the property of the transferor over which he had 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*,[28] it distinctly held that the general residuary clause of the will of the donee would not oper-

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 Pulliam *v.* Christy, 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*, § 730.) 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*.

[27] 7 Wm. IV and 1 Viet., c. 26, s. 27.

[28] 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 Pulliam *v.* Christy, 19 Ill. 331, *supra*, note 26.

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.

ate as a valid appointment. According to the English cases under the Wills Act, the result would have been otherwise.[29] 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.[30] In the same way the attitude of the English cases before the Wills Act seems to have been directly repudiated in this state.[31]

The rule as administered in Illinois lies somewhere between the extremes. It is this: The instrument of appointment must still affirmatively show an express intent on the part of the donee to exercise the power;[32] but any circumstances, actually indicating that intent and appearing upon the face of such instrument, are sufficient. Thus, in *Funk v. Eggleston*,[33] 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*,[34] the power was held to have been well exercised by a quitclaim 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."[35] So, in *Foster v. Grey*,[36] the donee bequeathed legacies three times in excess of

[29] Spooner's Trust, 2 Sim. N. S. 129; Clifford *v.* Clifford, 9 Hare, 675; Attorney General *v.* Brackenbury, 1 Hurl. & C. 782; *In re* Wilkinson, L. R. 4 Ch. App. 587; Theobald on Wills (2nd ed.), 178.

[30] Boyes *v.* Cook, 14 Ch. Div. 53; Theobald on Wills, 2nd ed. 179.

[31] Funk *v.* Eggleston, 92 Ill. 515. See, also, cases cited *infra*, notes 34-36.

[32] Coffing *v.* Taylor, 16 Ill. 457, 474; Davenport *v.* Young, 16 Ill. 548, 552.

[33] 92 Ill. 515.

[34] 190 Ill. 200.

[35] 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."

[36] 96 Ill. App. 38.

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. In *Bevans v. Murray* [37] a quit-claim deed was held to be a sufficient exercise of a power by a life tenant having power to convey the fee. This, however, went upon the ground that the adverse party alleged in his bill that such an effect should be given to the deed. In *Riemenschneider v. Tortoriello* [38] a life tenant with power to convey the fee, who had contracted to make a conveyance, offered a warranty deed which contained no reference to the power. The court intimated that this would have conveyed only the life estate so that the vendor was in default in the carrying out of the contract.

TITLE VIII.

EFFECT OF EXCESSIVE EXECUTION.

§ 642. Usual rule followed in Illinois: In *Hopkinson v. Swaim* [39] the life tenant had power to appoint a trustee for the remainderman, but no power to alter the beneficial interests. He appointed the trustee but attempted to make gifts over in certain events. The latter were in excess of the power, but were held to be so far separable from the provision appointing the trustee that the appointment was void only as to the excess and the entire appointment did not fail.

TITLE IX.

EXISTENCE AND SCOPE OF POWERS OF SALE AND LEASE.[40]

§ 643. Power in executors and trustees to sell and dispose of the fee of real estate—Existence of the power: [41] When the power to sell real estate is directly given to executors or

[37] 251 Ill. 603, 621-622.

[38] 287 Ill. 482.

[39] 284 Ill. 11, 21.

[40] 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.

[41] Observe the jurisdiction of a

trustees,[42] the only difficulty is the *extent* of that power.[43] When the power is not directly expressed, nice questions arise as to when one may with certainty say that it is found expressed by interpretation. One line of reasoning at least by which a power may be thus expressed 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,[44] or, if the mixed fund be directed to be loaned out at the highest rate of interest obtainable,[45] or invested "in good bonds or mortgages,"[46] and even where the trust estate is designated as a "fund."[47] 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 settlor's family, and to *pay over* the fund to persons named, it was held that a power of sale of real estate was given.[48] 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.[49]

court of equity to break in upon trusts and order a sale where no power is expressed: Longwith *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.

[42] White *v.* Glover, 59 Ill. 459.

[43] *Post,* § 644.

[44] Poulter *v.* Poulter, 193 Ill. 641. See also Brown *v.* Miner, 261 Ill. 543.

[45] Davenport *v.* Kirkland, 156 Ill. 169.

[46] Flanner *v.* Fellows, 206 Ill. 136, 137.

[47] Ill. Mission Soc. *v.* Am. Mission Soc., 277 Ill. 193.

[48] 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,* § 644.

[49] 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 di-

§ 644. The extent of the power: The questions here are rather miscellaneous, since they arise from the special contexts of particular instruments.[50] The following cases stand out as decisions of general utility. In *White v. Glover*,[51] 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*,[52] 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."[53] Sometimes the question arises as to whom an express power is given;[54] or whether the power is in an individual as executor or trustee,[55] or as executor or life tenant.[56]

§ 645. Power in trustees to make leases—When the trustee has a legal estate in fee simple: The trustee can, of course, actually transfer the legal title to any term of years, however long. If the lessee were a *bona fide* purchaser for value he would be protected in any event. Practically, however, the lessee always has notice of the trusts and the important ques-

rection to divide equally, and upon the allegation of the complainant that no such division could be 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.

[50] 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.

[51] 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.

[52] 131 Ill. 376, 383.

[53] Dickson *v.* New York Biscuit Co., 211 Ill. 468, 487, 488 and cases there cited, *accord*.

[54] Rankin *v.* Rankin, 36 Ill. 293; Lash *v.* Lash, 209 Ill. 595, 602.

[55] Pahlman *v.* Smith, 23 Ill. 448.

[56] Clark *v.* Clark, 172 Ill. 355.

tion is what leases can the trustee make which will not be in breach of trust.

Suppose there is no express power given to make leases for any term. Under these circumstances, leases which may last an *unreasonable* length of time after the termination of the trusts are in breach of trust. Such leases would incumber the legal title after it had come into the hands of the ultimate beneficiaries and the trusts were closed. Such leases might produce a very low rental compared with the value of the fee after the termination of the trusts. Under these circumstances the lease would be unjust to the one ultimately entitled. A power to make such leases in the trustee must be explicitly expressed. It has been suggested also that the trustee's power may be further limited so that he can make leases only "for such reasonable terms as are customary and essential to the proper care of, and to produce a reasonable income from, the property."[57] Under such a rule it is possible that leases which will expire within the period of the trusteeship may be in breach of trust.

In view of the rule as thus stated, it becomes of vital importance to determine what language will confer a greater power upon the trustee. It is believed that the usual provision that the trustee shall collect the rents, issues and profits is not sufficient to enlarge the trustee's power of leasing. Such language is certainly insufficient to give the trustee any power to make leases extending beyond the period of the active trusts.[58] Even

[57] *In re* Hubbell Trust, 135 Ia. 637, 664; Hutchinson *v.* Hodnett, 115 Ga. 990.

[58] In the following cases the trustee was held to take only an estate for the life of the equitable life tenant. If there had been an indefinite power of leasing given the trustee he would have taken the fee: Cooke *v.* Blake, 1 Exch. 220; Shapland *v.* Smith, 1 Brown, Ch. 75; Silvester *v.* Wilson, 2 T. R. 444; Baker *v.* Parson, 42 L. J. Ch. N. S. 228; Thurston *v.* Thurston, 6 R. I. 296; Brown *v.* Wadsworth, 168 N. Y. 225; Ware *v.* Richardson, 3 Md. 505; Handy *v.* McKim, 64 Md. 560, 567; Slater *v.* Rudderforth, 25 App. (D. C.) 497; In Hemphill's Estate, 5 Pa. Dist. 690; Ure *v.* Ure, 185 Ill. 216; Ward *v.* Amory, 1 Curtis (Cir. Ct. U. S.) 419; Bacon's Appeal, 57 Pa. 504.

In the following cases it was held that the trustee's lease terminated upon the death of the equitable life tenant because the trustee had only an estate for the life of the equitable life tenant. If there had been a general power of leasing the trustee must have had a fee: Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. 474; *In re* McCaffrey's Estate, 50 Hun. (N. Y.) 371. See, how-

explicit language that the trustee shall have power "to make leases" does not add anything to the power which the trustee has in the absence of any such express language.[59] Nor is a power to make long leases derivable in general from a power to sell.[60] It is only when the creator of the trust uses such phrases as that the trustees shall have power to lease "for any term they think proper,"[61] or where the period for which the trust is to last is itself indefinite,[62] that the indefinite power to lease occurs.

§ 646. When the trustee has a legal estate for years or for the life of the equitable life tenant only: If the trustee takes only a limited estate, as an estate for years or for the life of the equitable life tenant, then in the absence of an express power to lease beyond the term of the trusteeship, leases made by the trustee must terminate upon the termination of the trustee's estate.[63] It has been suggested, however, that even with that limitation the lease may be in breach of trust and subject to be set aside if it be for an unreasonably long term of years.[64]

§ 647. In the absence of power in trustees to sell the fee or to make long-term leases, such sale or lease may be effected with the aid of a court of equity in cases of necessity: Where the trustee has a fee a court of equity has full power to afford the

ever, Black *v.* Ligon, Harper's Eq. (S. C.) 205.

In Hale *v.* Hale, 146 Ill. 227, 248, the court's inference of a power to lease refers only to a power to lease during the term of the active trusts. The existence of such a power only indicated that the trustee was to have some legal estate, there being no words of direct devise to the trustee.

[59] *In re* Hubbell Trust, 135 Ia. 637; Walton *v.* Follansbee, 131 Ill. 147; *Id.*, 165 Ill. 480; Bergengren *v.* Aldrich, 139 Mass. 259; Hutcheson *v.* Hodnett, 115 Ga. 990; Crosby *v.* Davis, 2 Clark (Pa.) 403; Ackland *v.* Lutely, 9 A. & E. 879; Doe *v.* Simpson, 5 East. 162. But see Collins *v.* MacTavish, 63 Md. 166.

So a trustee with power to make leases has no power to make oil and gas leases: Ohio Oil Co. *v.* Daughetee, 240 Ill. 361.

[60] Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163; Bergengren *v.* Aldrich, 139 Mass. 259.

[61] Doe *v.* Willan, 2 Barn. & Ald. 84; Doe *v.* Wallbank, 2 Barn. & Adol. 554; Goddard *v.* Brown, 12 R. I. 31; Prather *v.* Foote, 1 Disney (Ohio) 434.

[62] Collier *v.* Walters, L. R. 17 Eq. 252.

[63] Standard Paint Co. *v.* Prince Mfg. Co., 133 Pa. 474; *In re* McCaffrey's Estate, 50 Hun. (N. Y.) 371; Bergengren *v.* Aldrich, 139 Mass. 259; Hutcheson *v.* Hodnett, 115 Ga. 990.

[64] Hutcheson *v.* Hodnett, *supra.*

trustee protection for acts done by him in the management of the trust estate. A court of equity may confirm the acts of a trustee in disposing of the fee,[65] or in making long-term leases[66] and thus prevent such acts from being in breach of trust. If the trustee takes merely an estate for the life of the equitable life tenant and the remainder is legal, equity still has power to vest the legal title of the remainderman in a trustee and order the sale of the entire fee. This follows from the cases where all the estates have been legal and a court of equity has appointed a trustee for the whole fee and decreed a sale or other disposition of the property.[67] The extent of the power of a court of equity in this respect may not have been fully settled in this state. It is clear that where the estate of an infant is involved and the adults are all consenting, the court has power to vest title in a trustee and order a sale over the objections of the guardian *ad litem* for the infant.[68] Our Supreme Court has also held that where there is a life estate in A and a remainder to her unborn children and a gift over, if A has no children, to her adult brothers, a court of equity had power to vest title to the whole fee in a trustee over the objection of an adult brother, and order a sale which would bind the adults and also the children of A when born.[69]

A court of equity will not, however, authorize a trustee holding the fee to sell, or make long-term leases, contrary to the terms of the trust, and will not appoint a trustee of legal estates to sell or make long-term leases unless a proper showing of necessity be made. The degree of necessity required is, how-

[65] Voris *v.* Sloan, 68 Ill. 588; Hale *v.* Hale, 146 Ill. 227; Gorman *v.* Mullins, 172 Ill. 349. See also Curtiss *v.* Brown, 29 Ill. 201.

On the same principle where the entire beneficial interest of the trust estate is in a *cestui* who is insane and in want, a court of equity may authorize the trustee, contrary to the terms of the trust, to expend the principal of the trust estate for the benefit of the *cestui:* Longwith *v.* Riggs, 123 Ill. 258.

[66] Marsh *v.* Reed, 184 Ill. 263; Denegre *v.* Walker, 214 Ill. 113.

[67] Gavin *v.* Curtin, 171 Ill. 640; Baldrige *v.* Coffey, 184 Ill. 73; King *v.* King, 215 Ill. 100.

[68] Hale *v.* Hale, 146 Ill. 227; Baldrige *v.* Coffey, 184 Ill. 73; Marsh *v.* Reed, 184 Ill. 263.

A court of equity will take jurisdiction also where the separate estate of a married woman was involved: Curtiss *v.* Brown, 29 Ill. 201.

[69] Gavin *v.* Curtin, 171 Ill. 640; Fienhold *v.* Babcock, 275 Ill. 282.

ever, to a considerable extent a matter of discretion with the court.[70] But it is not enough to warrant the decree of sale that more income would be produced thereby for the life tenant.[71] In *Denegre v. Walker*,[72] the court seems to have gone very far in giving power to the trustees to make a long-term lease. It looks as if the court regarded its action as justified upon mere grounds of business expediency. It is submitted that the case is one upon which it is dangerous to lean too heavily.

In all cases where on grounds of necessity a court of equity has ordered a sale, the proceeds have been held for those beneficially entitled to the estate sold. In *Wardner v. Baptist Memorial Board*[73] the court declined to order any sale of the fee so that part of the principal might be made available for the support of the life tenant.

§ 648. Power in life tenants to sell or dispose of the fee—Existence of the power: The plainest case of the existence of such a power is where language is used explicitly indicating that the fee may be sold or appointed by the life tenant.[74]

Suppose, however, the words used do not mention explicitly that the fee may be disposed of, and there is no gift over of "what remains" or "what is left" or "what is left unexpended" "or undisposed of": In such cases the special context may be strong enough to confer a power to dispose of the fee.[75] Where the language used is "with the right to dispose of" property for a particular purpose, such as supporting the life tenant and the life tenant's family and where the sale of the fee was under all the circumstances necessary to effect this

[70] Voris *v.* Sloan, 68 Ill. 588; Hale *v.* Hale, 146 Ill. 227; Gavin *v.* Curtin, 171 Ill. 640; Gorman *v.* Mullins, 172 Ill. 349; Baldrige *v.* Coffey, 184 Ill. 73; Marsh *v.* Reed, 184 Ill. 263; King *v.* King, 215 Ill. 100.

[71] Johns *v.* Johns, 172 Ill. 472. See also Johnson *v.* Buck, 220 Ill. 226 and Curtiss *v.* Brown, 29 Ill. 201.

[72] 214 Ill. 113.

[73] 232 Ill. 606.

[74] Butler *v.* Huestis, 68 Ill. 594, 596; Hamlin et al. *v.* United States Express Co., 107 Ill. 443, 447.

[75] Crozier *v.* Hoyt, 97 Ill. 23 (wife given full power to sell any of the property aforesaid and give good title to the same, either at public or private sale); Markillie *v.* Ragland, 77 Ill. 98 (*dictum* that language "deal with the same as though she were entire and sole owner; * * * such possession, and entire control and disposal, continue to and in her during her natural life," gave power to dispose of the fee).

object, a power to sell the fee is found to have been expressed.[76] If the life tenant is given expressly a power to "dispose of the property by will or otherwise before her death" the power to dispose of the fee *inter vivos* is expressed, because that power is on the same footing with the power to dispose by will, and the latter must be a power to dispose of the fee, or it would be senseless.[77] Where there is no special context in favor of the power to convey a fee, and no express power of disposal for a particular purpose or by will, but only such words as "with full power to dispose of as the life tenant pleases" or similar expressions, the results reached by the courts appear to be opposed. There are two tendencies: *First:* It is said that since the life tenant has power to dispose of his life estate as he pleases without any words conferring such power, words giving a power of disposal are useless unless they confer a power to dispose of the fee. A power to convey the fee has, therefore, been found even where there was an express gift over.[78] *Second:*

[76] Kaufman *v.* Breckinridge, 117 Ill. 305 ("to be disposed of and used agreeably to her direction and approval, and in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and our beloved children." The court found power to dispose of the fee, declaring that the personal property was of inconsiderable amount and that the purpose for which the power of disposal was given could not possibly be effected without the conveyance of the fee); Ducker *v.* Burnham, 146 Ill. 9, 13; Morse *v.* Cross, 56 Ky. 735; Hall *v.* Preble, 68 Me. 100; Richardson *v.* Richardson, 80 Me. 585; Stroud *v.* Morrow, 52 N. C. 463; Boyer *v.* Allen, 76 Mo. 498.

[77] Fairman *v.* Beal, 14 Ill. 244; Christy *v.* Pulliam, 17 Ill. 59; Pulliam *v.* Christy, 19 Ill. 331; Funk *v.* Eggleston, 92 Ill. 515, 520; Bowerman *v.* Sessel, 191 Ill. 651, 654; Hale *v.* Marsh, 100 Mass. 468; Dillon *v.* Faloon, 158 Pa. 468 (the power to dispose by will is a power to dispose by will of the fee); Forsythe *v.* Forsythe, 108 Pa. 129; Stroud *v.* Morrow, 52 N. C. 463; McCullough's Adm'r. *v.* Anderson, 90 Ky. 126.

[78] Cummings *v.* Shaw, 108 Mass. 159 ("for and during his natural life, with the right to dispose of the same as he shall think proper" with no devise over, confers a power to convey in fee); Lewis *v.* Palmer, 46 Conn. 454 ("for her to dispose of as she may think proper"); Glover *v.* Stillson, 56 Conn. 316 ("with power to dispose of any portion of the estate if they should desire," with a gift over); Security Company *v.* Pratt, 65 Conn. 161, 180 (power given to sell any part "of said life estate, real or personal," the proceeds to be held or appropriated by her "to her own use and benefit as of her own property and estate," gift over); Forsythe *v.* Forsythe, 108 Pa. St. 129 ("with power to dispose

On the other hand, it is said that the remainderman's interest expressly given should not be jeopardized by vague and ambiguous phrases, and hence the words, expressive only of a power of disposal, should be confined to a power to dispose of the life estate given.[79] The Supreme Court of this State has several times approved this latter tendency.[80] Several times the court has been guided by it.[81] In one case where the language was strong in favor of the power to convey the fee, we have a *dictum* that such power did not exist.[82]

of as she may think best''); Giles *v.* Little, 13 Fed. 100 (to my wife ''the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow); Moyston *v.* Bacon, 75 Tenn. 236; Woodbridge *v.* Jones, 183 Mass. 549 (1903) (''to use and dispose of the same as she may think proper with the remainder thereof on her decease'' to others, gives power to convey the fee. Court regarded ''remainder'' as used in technical sense).

[79] Bradly *v.* Westcott, 13 Ves. 445 (''to be at her full, free, and absolute, disposal during her life, without being liable to any account''; gift over); Brant *v.* Virginia Coal & Iron Co., et al., 93 U. S. 326 (''to have and to hold during her life, and to do with as she sees proper before her death.'' *Quaere*, whether any gift over); Rakestraw *v.* Rakestraw, 70 Ga. 806 (''be held and controlled by my wife during her lifetime. * * * In short, it is my will that my wife shall have full and entire control of all my effects, of whatever kind, with a gift over''); Bashore *v.* Mackenzie, 8 Ohio Cir. Ct. Reports, 678, 680 (''to be held and used by her for her own support and in support of my children'' and ''hereby authorizing and empowering her to manage, control and dispose of my property after my decease'').

[80] Boyd *v.* Strahan, 36 Ill. 355; Henderson *v.* Blackburn, 104 Ill. 227, 231; Kaufman *v.* Breckinridge, 117 Ill. 305; *In re* Estate of Cashman, 134 Ill. 88, 92; Metzen *v.* Schopp, 202 Ill. 275, 285; Mansfield *v.* Mansfield, 203 Ill. 92, 97; Wardner *v.* Baptist Memorial Board, 232 Ill. 606; Kennedy *v.* Kennedy, 105 Ill. 350.

[81] Boyd *v.* Strahan, 36 Ill. 355 (''to be at her own disposal, and for her own proper use and benefit during her natural life,'' with a gift over); Wardner *v.* Baptist Memorial Board, 232 Ill. 606. *A fortiori*, where the life tenant is only given ''the absolute control of the same during her lifetime,'' there is no power to convey the fee.

[82] Mansfield *v.* Mansfield, 203 Ill. 92, 97 (''should circumstances or their necessities require, the said person or persons to whom the lands hereinbefore named are specifically devised, shall have the power and authority to sell and convey or otherwise dispose of (including the right to mortgage) the same to any extent, not in excess of the third of the value of the same.'' The Court said: ''It is difficult to see

Suppose the language expressly creating the power does not mention that the fee may be disposed of, but, in addition to the express words of disposal (somewhat ambiguous so far as the disposal of the fee is concerned) there is added a gift over of "what is left" or "what remains" or "what is left undisposed of" or "what is left unexpended" or like expressions. In such cases the courts seem, practically without dissent, to find a power in the life tenant to dispose of the fee. Many of the cases go particularly on the phrases above quoted.[83]

If, however, there are no words indicating directly any power of disposal and only a gift over of "what remains," or "what is left," or "what remains unexpended," or "what remains unused," then the cases make the following distinction: As long as the gift over is of what "remains *unexpended*" or what "remains *unused*," a power to dispose of the fee is found.[84]

how that position [that there was a power to convey the fee] can be successfully maintained," but held not necessary to consider this question).

[83] Markillie *v.* Ragland, 77 Ill. 98, 101 (the phrase what remains especially relied upon to show a power to dispose of the fee); Funk *v.* Eggleston, 92 Ill. 520; Henderson *v.* Blackburn, 104 Ill. 229 (court relies upon the phrase "if anything is left"); Griffin *v.* Griffin, 141 Ill. 373, 378 (court did not go particularly on the phrase "what remains"); Ducker *v.* Burnham, 146 Ill. 9, 13; Skinner *v.* McDowell, 169 Ill. 365, 369 (court goes on the phrase "what is left"); Mann *v.* Martin, 172 Ill. 18 (weak language for power and then the phrase "what is left"); Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Thompson *v.* Adams, 205 Ill. 552, 557, 558 (court says the phrase "what remains" is valuable to give a power only as it explains something before which is ambiguous and declares that, in the absence of previous words indicating a power to some extent, no power to dispose of the fee will be implied); Dickson *v.* New York Biscuit Co., 211 Ill. 468, 482 ("what remains" used to fortify previous language indicating power of sale); Spengler *v.* Kuhn, 212 Ill. 186, 196. See also to same effect: Bishop *v.* Remple, 11 Oh. St. 277; Warren *v.* Webb, 68 Me. 133; Scott *v.* Perkins, 28 Me. 22; McCullough's Adm'r *v.* Anderson, 90 Ky. 126; Lynde *v.* Estabrook, 89 Mass. 58; Hale *v.* Marsh, 100 Mass. 468; Paine *v.* Barnes, 100 Mass. 470; Little *v.* Giles, 25 Neb. 313; Johnson *v.* Johnson, 51 Oh. St. 446; Moody *v.* Tedder, 16 So. C. 557; Coat's Ex'r *v.* Louisville & Nashville Railroad Co., 92 Ky. 263; Schreiner *v.* Smith, 38 Fed. 897; McMillan *v.* Deering & Co., 139 Ind. 70.

[84] *In re* Estate of Cashman, 134 Ill. 88; Walker *v.* Pritchard, 121 Ill. 221, 229, 230; Gaffield *v.* Plumber, 175 Ill. 521; Shaw *v.* Hussey, 41 Me. 495; Chase *v.* Ladd, 153 Mass. 126. But in Ward *v.* Caverly,

If, however, the word "unexpended" or "unused" or some word of similar force is not inserted, so that the gift over is simply of "what remains" or "what is left," then no power to dispose of the fee is expressed.[85]

§ 649. **Extent of power of the life tenant**: A usual difficulty 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 *In re Estate of Cashman*,[86] it would seem that, when the words of a gift after the life estate of "what is left unexpended" 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,[87] and sometimes not.[88] Sometimes the question is raised as to whether the power is to convey by deed or will, or both.[89] In *Bevans v. Murray*,[90] where the husband, a life tenant, was given "full power to sell, * * * and to use so much of the income and principal thereof as he may desire," the court said he did not have an unlimited power of disposal but only the power to dispose of the property for his support and comfort.

276 Ill. 416, the words "remain unexpended," were held to refer only to the personal property, so that the life tenant had a right only to dispose of the personalty and no power to dispose of the fee of the realty.

[85] Vanatta *v.* Carr, 223 Ill. 160; Thompson *v.* Adams, 205 Ill. 557, 558; Dickson *v.* New York Biscuit Co., 211 Ill. 468, 482; Welsch *v.* Belleville Savings Bank, 94 Ill. 200, 202.

See, however, the language of the following cases: Skinner *v.* McDowell, 169 Ill. 365, 369; Mann *v.* Martin, 172 Ill. 18; Saeger *v.* Bode, 181 Ill. 514, 519.

Contra, Clarke *v.* Middlesworth, 82 Ind. 240; Ramsdell *v.* Ramsdell, 21 Me. 288.

[86] 134 Ill. 88; Walker *v.* Pritchard, 121 Ill. 221.

[87] Kaufman *v.* Breckinridge, 117 Ill. 305; Griffin *v.* Griffin, 141 Ill. 373.

[88] Markillie *v.* Ragland, 77 Ill. 98. See Spengler *v.* Kuhn, 212 Ill. 186, 196.

[89] 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*, § 726, 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.

[90] 251 Ill. 603.

He was entitled to convey in consideration of services in managing the property, but he had no power to convey without consideration in order to change the beneficiaries. This last was not a sale but an appointment. There was no power except one to sell or dispose of the property for a consideration. In *Hopkinson v. Swaim*[91] a power in the life tenant to appoint trustees to manage the shares of the remaindermen, "under such limitations and restrictions as in his discretion he may deem best, so as to secure the same to the said child or issue of deceased child, for his, her or their sole and separate use, maintenance and enjoyment," conferred only a power to appoint trustees and provide for the powers of the trustees. It conferred no power to alter the beneficial interests.

§ 650. Disposition of the proceeds of sale: Where the life tenant has power to dispose of the fee by sale, his power to use up the proceeds of sale must be expressly given or he will hold the proceeds in trust to invest, use the income, and pay over the principal to the remainderman. Thus, where the donee of the power was entitled to sell for her "comfort and convenience," she could use up the proceeds for that purpose.[92] Where the donee merely had the power to sell she was obliged to hold the proceeds for herself for life and then pay over the principal to the remainderman.[93]

§ 651. Power of life tenant to make leases: A life tenant—even one with power to dispose of the fee—cannot make leases to continue beyond the termination of the life estate.[94]

[91] 284 Ill. 11.
[92] Ellis *v.* Flannigan, 279 Ill. 93.
[93] Powers *v.* Wells, 244 Ill. 558; Barton *v.* Barton, 283 Ill. 338.
[94] Powers *v.* Wells, 244 Ill. 558.

CHAPTER XXVI.

RULE AGAINST PERPETUITIES.

TITLE I.

THE RULE AND ITS COROLLARIES.

§ 652. The rule as stated by Professor Gray[1] is in force in Illinois: It is 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]

§ 653. The future interest must vest in the proper time: The corollary of the Rule most often repeated by our Supreme Court is that the future interest *must* vest in the proper time.[3] That is, at the time the interests are created it must appear, in

[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; Hill *v.* Gianelli, 221 Ill. 286, 291; Johnson *v.* Preston, 226 Ill. 447, 456; Quinlan *v.* Wiekman, 233 Ill. 39, 44; Mettler *v.* Warner, 243 Ill. 600, 609; McCutcheon *v.* Pullman T. & S. Bank, 251 Ill. 550, 555; Dime Savings Co. *v.* Watson, 254 Ill. 419, 423; Wood *v.* Wood, 276 Ill. 164, 168; Kolb *v.* Landes, 277 Ill. 440, 447.

In Waldo *v.* Cummings, 45 Ill. 421, 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; Schukneeht *v.* Schultz, 212 Ill. 43, 46; Reid *v.* Voorhees, 216 Ill. 236.

[3] 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; Schukneeht *v.* Schultz, 212 Ill. 43, 46; Pitzel *v.* Schneider, 216 Ill. 87,

any conceivable combination of circumstances, that the interest must vest in the time prescribed. It is not sufficient that it may vest in time or that it in fact turns out that it must do so. One of the stock cases which illustrates this corollary is this: Where the limitations are by will to A for life, then to A's wife (meaning any wife he may have at his death) for life and then to such children of the marriage as survive the wife. A's wife may not be born at the testator's death and hence the limitation to the children is void for remoteness.[4]

§ 654. What is meant by "vest":[5] "Vest" means "come into possession" in the modern sense, or vest in possession in a certain feudal sense, or vest in interest in the feudal sense in which vest is used in defining vested remainders. The Rule is satisfied if the future interest must vest in any one of these ways within the time prescribed. If the interest must come into possession in the modern sense within the proper time, the Rule is not violated. If it must come into possession in a feudal and non-modern sense it is also valid. Thus, if the interest be a freehold of inheritance subject to a term of one thousand years, it vests in possession in the feudal sense at once. The freeholder subject to the term has seisin.[6] Hence the Rule is not violated. It follows that legal interests after a term, however long, do not violate the Rule.[7] So if the future interest comes into possession at too remote a time, but within the proper time vests in interest in the feudal sense in which a remainder vests in interest, the Rule is not violated.[8] Vesting in this sense means coming into a position with reference to a preceding estate of freehold where the future interest

97. See also Reid *v.* Voorhees, 216 Ill. 236, 243; Johnson *v.* Preston, 226 Ill. 447; Quinlan *v.* Wickman, 233 Ill. 39, 44; Wood *v.* Wood, 276 Ill. 164, 168.

[4] In Wood *v.* Wood, 276 Ill. 164, 171, the court seems to have intimated that the wife referred to was the wife the life tenant had at the time of the testator's death. In that case the gift over would be valid.

[5] *Ante,* §§ 117, 118.

[6] *Ante,* § 32.

[7] Eldred *v.* Meek, 183 Ill. 26, 36, *semble;* Marsh *v.* Reed, 184 Ill. 263, 274-275.

[8] 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.

stands ready throughout its continuance to take effect in possession whenever and however the preceding estate determines.[9] When the remainder must fulfill this description in the time prescribed, the Rule is not violated. The feudal conception of vesting in interest was originally applied only to the vesting of legal future interests by way of remainder after a freehold. But for the purpose of applying the Rule against Perpetuities the same conception is used with reference to equitable remainders in land and legal and equitable interests in personal property. In short, for the purposes of applying the Rule against Perpetuities the law has taken over the feudal conception of a vested remainder and applied it to future interests in any kind of property. If, therefore, an interest be limited to A for life, then to A's unborn son for life and then to B if he survive A, B's interest may not vest in possession till too remote a time, but it will vest in interest, if at all, on A's death and the Rule against Perpetuities is not violated.[10]

§ 655. Other corollaries referred to: The contingency may be postponed for a number of lives provided they are all in being when the contingent interest is created.[11]

It was recognized in *Smith v. McConnell*[12] 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.[13]

§ 656. References to the rule as stated in Bouvier's Law Dictionary: Our Supreme Court has sometimes cited with approval the statement of the Rule given in Bouvier's Law Dictionary as follows: "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."[14] The logical result of this definition would cause the Rule against Perpetuities to

[9] *Ante*, §§ 25, 28, 308, 327, 328.

[10] Brown *v.* Brown, 247 Ill. 528, 6 Ill. Law Rev. 269.

[11] Madison *v.* Larmon, 170 Ill. 65, 71; Smith *v.* McConnell, 17 Ill. 135, 140.

[12] 17 Ill. 135, 140, 141.

[13] Ingraham *v.* Ingraham, 169 Ill. 432, 460.

[14] Waldo *v.* Cummings, 45 Ill. 421, 426; Hale *v.* Hale, 125 Ill. 399, 409; Hart *v.* Seymour, 147 Ill. 598; Lunt

be a rule invalidating restraints on alienation. It is clear from 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 approve.[15] In *Mettler v. Warner*[16] the court declared that the Rule against Perpetuities had nothing to do with the validity of postponements of enjoyment, and in *Kolb v. Landes*[17] the court declared that there was no inconsistency between the definition in Bouvier and that of Gray, and the inference is that Bouvier's statement meant what Gray said.

§ 657. The difficulty in most cases has to do with the application of the rule to the particular limitation: In many cases it is conceded that if the interest is contingent upon a given event the Rule is violated. If it is not subject to the contingency but vests at an earlier time subject only to a postponement of payment, it is conceded that the Rule is not violated. In such cases the whole contest is over the question of construction relating to the time of vesting. These cases have been dealt with under the sections where questions of construction relating to vesting are considered.[18] In other cases the only process is that of analyzing the limitations with reference to the Rule—

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; Johnson *v.* Preston, 226 Ill. 447; Branson *v.* Bailey, 246 Ill. 490; Dwyer *v.* Cahill, 228 Ill. 617, 623.

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."

[15] Howe *v.* Hodge, 152 Ill. 252, 274; Ingraham *v.* Ingraham, 169 Ill. 432, 451; Madison *v.* Larmon, 170 Ill. 65, 71.

[16] 243 Ill. 600, 609.

[17] 277 Ill. 440, 447.

[18] Reid *v.* Voorhees, 216 Ill. 236, *ante,* §§ 499, 500, 510, 513, 527; Armstrong *v.* Barber, 239 Ill. 389, *ante,* §§ 499, 500, 509, 510, 516, 518, 523, 527, 528; Mettler *v.* Warner, 243 Ill. 600, *ante,* §§ 499, 509, 528; O'Hara *v.* Johnston, 273 Ill. 458, *ante,* § 527.

applying the Rule as a measure to the limitations which are expressed.[19] In some instances this is a process requiring care and skill.[20]

TITLE II.

THE RULE AGAINST PERPETUITIES DISTINGUISHED FROM THE RULE WHICH MAKES VOID RESTRAINTS ON ALIENATION AND PROVISIONS REQUIRING A TRUSTEESHIP (OTHERWISE VALID) TO BE EFFECTIVE AT TOO REMOTE A TIME.

§ 658. The special rule as to restraints on alienation and provisions for indestructible trusts: As soon as any restraints on alienation are permitted the question arises, how long will they be allowed to continue or at what time in the future may they be imposed. The English judges met these questions with regard to restraints on alienation attached to the separate property of a married woman. The interest vested in the married woman in time so that the Rule against Perpetuities was not violated. But a restraint on alienation could be imposed which might be in operation more than lives in being and twenty-one years after the creation of the interests. Jessel, M. R., was right when he said that the Rule against Perpetuities was not violated. His opinion was that since restraints on alienation upon a married woman's separate property were an exception to the invalidity of restraints on alienation in general, there ought to be no restriction upon them. But he yielded to decisions which had already been rendered and held that if the restraint might be in operation more than lives in being and twenty-one years after the creation of the interest it would be void.[21] This, however, was not an application of the Rule against Perpetuities. It was the application of a special rule to control the creation of restraints on alienation which were in general valid.

[19] Johnson *v.* Preston, 226 Ill. 447; Dwyer *v.* Cahill, 228 Ill. 617; Quinlan *v.* Wickman, 233 Ill. 39; Mettler *v.* Warner, 243 Ill. 600; Branson *v.* Bailey, 246 Ill. 490; Comstock *v.* Redmond, 252 Ill. 522; Dime Savings Co. *v.* Watson, 254 Ill. 419; Anderson *v.* Williams, 262 Ill. 308; Wood *v.* Wood, 276 Ill. 164; Kolb *v.* Landes, 277 Ill. 440; Moroney *v.* Haas, 277 Ill. 467.

[20] See especially Mettler *v.* Warner, 243 Ill. 600; Comstock *v.* Redmond, 252 Ill. 522; Dime Savings Co. *v.* Watson, 254 Ill. 419; Moroney *v.* Haas, 277 Ill. 467.

[21] *In re* Ridley, 11 Ch. Div. 645 (1879).

With the advent in this country of the doctrine of *Claflin v. Claflin*,[22] which permitted trusts of absolute and indefeasible equitable interests to be made indestructible for some period beyond the minority of the beneficiary[23] the question at once arose, for what period might the trust be made indestructible. Clearly a trust to last "forever" was not to be permitted;[24] nor was one which was to continue "as long as the trustees saw fit,"[25] or for an indefinite period.[26] So if the trust was required to continue during the lives of persons unborn at the testator's death,[27] or till a person unborn at the creation of the interests reached twenty-five.[28] In these cases the provision for the continuance of the trust was void. Thus, the courts drifted naturally into fixing the limit of time, during which the trusteeship of an absolute and indefeasible interest might be required to continue, at lives in being and twenty-one years after the creation of the interests. They not infrequently called this an application of the Rule against Perpetuities. This was natural in the seventies and eighties.[29] Indeed, it was natural enough until the second edition of Gray's Rule against Perpetuities, which appeared in 1906. There it was pointed out that this was not an application of the Rule against Perpetuities but a new rule required to control the length of time a trusteeship may be continued.[30] When this rule is violated no beneficial interests are void. The legal title conveyed to the trustees is not invalidated.[31] Even where no limit is placed upon the

[22] 149 Mass. 19 (1889).

[23] *Post*, §§ 732 *et seq.*

[24] Williams *v.* Herrick, 19 R. I. 197 (1895); Bigelow *v.* Cady, 171 Ill. 229.

[25] Slade *v.* Patten, 68 Me. 380 (1878).

[26] Winsor *v.* Mills, 157 Mass. 362 (1892).

[27] Pennsylvania Co. *v.* Price, 7 Phila. (Pa.) 465 (1870).

[28] Sadler *v.* Pratt, 5 Sim. 632 (1833).

In *In re* Shallcross's Estate, 200 Pa. 122 (1901), a provision that a trust should continue till a child reached twenty-five was held void on the ground that it was to last too long. It would seem that the court incorrectly applied the rule which was recognized, because the child in question was a life in being at the testator's death.

[29] Slade *v.* Patten, *supra;* Pennsylvania County *v.* Price, *supra;* Winsor *v.* Mills, *supra;* Williams *v.* Herrick, *supra.*

[30] Gray's Rule against Perpetuities, 2nd and 3rd ed., §§ 121f, 121g, 121h, 121i.

[31] Pulitzer *v.* Livingston, 89 Me. 359 (1896), overruling on this point Slade *v.* Patten, *supra.*

length of time the trusteeship is to last, yet if each beneficiary has power to terminate the trust as to his share at any time, the rule controling the length of time a trusteeship may be required to continue is not violated.[32] When, however, as in the usual real estate or stock trust, the trusteeship is to last indefinitely or for the life of a corporation which is longer than twenty-one years, and the beneficial interests are always absolute and indefeasible and the trust cannot be terminated earlier by any individual beneficiary, but only by a vote of a proportion of them, it is necessary that the trust should be limited to lives in being at the creation of the trust and twenty-one years after the death of the last survivor in order to insure, for that period at least, the indestructibility of the trust. The omission of this precaution exposes the continuance of the trust to assault by a single beneficiary.[33]

§ 659. **The Illinois Cases:** *Bigelow v. Cady*[34] very closely follows the earlier Maine case of *Slade v. Patten*.[35] In the former there was a trusteeship for the benefit of the testator's two daughters, one son and the widow. There were gifts over in these words: "In case of death of either of the four above named heirs it shall go (their share) to the heirs of the deceased heir, if they have any; if not, it shall be equally divided between my remaining heirs above mentioned, and their heirs forever, share and share alike. If my wife, Mary J. Mascall, dies leaving no heirs of mine, then her share (one-fourth) shall go to my heirs and their heirs forever, share and share alike." The court, by reference to other clauses, regarded the testator as having expressed the intention that the trusteeship should remain indestructible forever. Whether this is correct or not is immaterial in determining the principle upon which the court proceeded. The effect of the gift over was to reduce the gift to the two daughters and the son to a life estate, because the gift over is on no other contingency except their death.[36] Hence

[32] Pulitzer *v.* Livingston, *supra.*

[33] The holding to the contrary in Howe *v.* Morse, 174 Mass. 491 (1899), may perhaps be set down to the fact that it arose in the jurisdiction of the so-called Massachusetts or Boston Real Estate Trust and the court was no doubt conscious that a great many such trusts had been made without any provisions limiting the time they were to continue.

[34] 171 Ill. 229.

[35] 68 Me. 380.

[36] *Ante*, § 162.

there was an equitable interest in the two daughters and the son for life and then to their heirs, which by the rule in *Shelley's* case would give them the fee.[37] Thus the same situation is present as was before the Maine court in *Slade v. Patten*—a trusteeship to last forever in favor of adults who took an absolute and indefeasible fee. As in *Slade v. Patten* our court held the provision for the trusteeship void, insisting that it violated the Rule against Perpetuities. Our court also, as in *Slade v. Patten*, went a step further and declared that no title passed by the will to the trustees;[38] that there was an intestacy and that the legal heirs, who were the two daughters and the son, should have partition. The holding that no title passed to the trustees was, it is believed, strictly erroneous. But no harm was done because the beneficiaries were entitled in any event to have the trusteeship terminated at once. In holding the attempt to create a trust of an absolute and indefeasible interest, which should last forever, void, the court was entirely correct.

In *Hart v. Seymour*[39] the grantee who had received his title from the trustees was attempting to redeem from a sale on execution. One of his contentions was that the sheriff's deed was void because the deed of trust under which the trustee purported to act was a perpetuity and void, so that no legal title passed. The court, however, held that the trustees did have title in fee and that title passed to the grantee. There was no provision for any indestructible trust. The court regarded the trusteeship as a mere real estate trust for handling certain subdivided lands for sale and that the trusteeship was to last not longer than a reasonable time, which would necessarily be less than twenty-one years. The property was to be immediately divided and immediately sold. For aught that appears there was no impediment to any *cestui* demanding the termination of the trusteeship as to his interest at once.

In *Mettler v. Warner*[40] the trustees were directed to continue the trusteeship during a term commencing at the testator's death and ending fifteen years after the first day of the next

[37] *Ante*, § 412.

[38] Lawrence *v.* Smith, 163 Ill. 149, contains *dictum* to the same effect.

[39] 147 Ill. 598.

[40] 243 Ill. 600, 5 Ill. Law Rev. 251.

March after the probate of the will. The beneficial interests created were held to be valid. The trusteeship itself was valid. So far as the invalidity of the provision for the continuance of the trusteeship was concerned no question arose and, therefore, was not passed upon.

In *Armstrong v. Barber*[41] the trusteeship was to continue for various periods from and after the probate of the will. Again it was held that the beneficial interests were valid and that the trusteeship itself was valid. Then the court pointed out that if the provision requiring the trusteeship to last a given length of time after the probate of the will was void, it was not by reason of an application of the Rule against Perpetuities, but by reason of the application of another and different rule relating to the length of time a trusteeship might be made indestructible.

In *Wagner v. Wagner*[42] the trust in question was to last as long as the trustee saw fit, but no point was made that for that reason the trusteeship could be terminated at any time by one having an absolute and indefeasible interest.

In *Guerin v. Guerin*[43] a direction that the beneficial interest shall always remain in trust was held to mean "remain in trust during the beneficiary's life," and, therefore, was not void.

In *O'Hare v. Johnston*[44] it was apparently conceded that the provision requiring a trust to continue for thirty years from the testator's death might be void, but as the beneficial interests were all valid and no beneficiary with an absolute indefeasible interest was claiming any right to terminate the trust, no question was raised as to the invalidity of the provision for the continuance of the trust.

In *Hopkinson v. Swaim*[45] the provisions for a trusteeship and restraints on alienation created by the exercise of a special testamentary power were not, when referred to the will creating the power, to continue for too long a period from the donor's death. Hence they were valid so far as the special rule concerning the length of time they were permitted to last was concerned.

[41] 239 Ill. 389.
[42] 244 Ill. 101.
[43] 270 Ill. 239.
[44] 273 Ill. 458.
[45] 284 Ill. 11.

§ 660. Trusts for the perpetual care of a cemetery lot: In the absence of a statute expressly permitting it,[46] a trust for the perpetual care of the testator's cemetery lot is held void.[47] This result was obtained by our Supreme Court in *Mason v. Bloomington Library Assns.*[48] It may be assumed that any trust for a similar purpose, which is expressly required to, or which pursuant to the terms of the attempted trust, may last longer than lives in being and twenty-one years from the testator's death will be void *in toto*. It is usually assumed that the invalidity of such trusts rests upon an application of the Rule against Perpetuities.[49] It is submitted that Mr. Gray is entirely correct in denying that the Rule against Perpetuities has any application.[50] That rule makes void future interests which may vest at too remote a time, but in the case put there is no future interest at all. Whatever interest exists is a present interest. The vice in the attempted trust is that it is an effort to create a trusteeship which must, or which may, according to the terms of the gift, last or remain indestructible for longer than lives in being and twenty-one years from the testator's death. An expressed intent to create such an indestructible trust, if valid in any case, is void if the attempt is made to cause it to last for too long a time.[51] When there is a *cestui que trust*, however, the expressed intent that the trusteeship shall be kept up for too long a time is merely unenforceable by the trustee. It is left to any *cestui* who is entitled to an absolute indefeasible equitable interest to terminate the trusteeship at his pleasure. But where there is no *cestui* to terminate the trust, as in the case of a trust for the care of a cemetery lot, the so-called trusteeship is all there is, and hence the courts would seem to have no alternative but to hold the whole trust void from the beginning. Any other course would leave the trustee free to carry out the trust which the law forbade in a way in which the law forbade. The principle announced by Gray[52] is the one really applicable. This

[46] Iglehart *v.* Iglehart, 204 U. S. 478; Rhode Island Hospital Co. *v.* Town Council of Warwick, 29 R. I. 393.

[47] See cases cited in Ames' Cases on Trusts, 2nd ed. 201, note 1.

[48] 237 Ill. 442. See also Burke *v.* Burke, 259 Ill. 262, 269-271.

[49] See cases referred to in Gray's Rule against Perpetuities, 2nd and 3rd ed., § 899.

[50] Rule against Perpetuities, 2nd and 3rd ed., § 898.

[51] Armstrong *v.* Barker, 239 Ill. 381, *ante*, § 659. Gray's Rule against Perpetuities, 2nd ed., § 121i.

[52] Rule against Perpetuities, 2nd and 3rd ed., § 121i.

the learned author seems to have overlooked, because he supports the holding that the trust for the perpetual care of a cemetery lot is void solely upon the ground that there is no *cestui* at all. "The vice," he says, "in such devises is not that the interests of the *cestuis que trust* are too remote, but that there are no *cestuis que trust* at all."[53] This requires him to say that all the trusts for the care of cemetery lots, or like objects, where there is no *cestui que trust,* but which are limited to last for not to exceed lives in being and twenty-one years from the testator's death, are void also, but here he runs contrary to the authorities, such as they are.[54] It seems difficult also to give a satisfactory reason for holding a trust without a *cestui* wholly void for that reason. The trustee has the legal title. Equity raises a constructive trust for the settlor or testator's heirs or next of kin or residuary legatee, if the trustee refuses to perform the acts specified. But why should it interfere, until the trustee does so refuse? What rule of public policy is infringed by the carrying out of the objects specified by the testator? It is believed that none has ever been suggested. Why, then, should the trustee not be permitted to do what the testator directs? This, it is believed, is substantially the view of Professor Ames.[55] It is submitted that it is sound and that the authorities relied upon by him should be followed.

§ 661. Effect on other provisions of holding void a requirement that a trust should remain indestructible for too long a time: Clearly only the postponement should be held void. It was urged in *O'Hare v. Johnston*[56] that such a postponement was introduced for the protection of the beneficiaries, so that if void, the entire scheme of the testator would be destroyed and therefore the beneficial interests also must fail. This, however, the court denied. In *Slade v. Patten,*[57] however, a valid gift over was discarded because the whole trust was regarded as void. The same steps precisely were taken under almost identical cir-

[53] *Id.*, § 898.

[54] Mussett *v.* Bingle, W. N. [1876], 170; Angus *v.* Noble, 73 Conn. 56; Leonard *v.* Haworth, 171 Mass. 496, *semble;* Pirbright *v.* Salwey, W. N. [1896], 86. See also cases cited in Ames' Cases on Trusts, 2nd ed. 201, note 2, and "The Failure of the 'Tilden Trust,'" by J. B. Ames, 5 Harv. Law Rev. 389, 397 *et seq.*

[55] "The Failure of the 'Tilden Trust,'" 5 Harv. Law Rev. 389.

[56] 273 Ill. 458.

[57] 68 Mo. 380.

cumstances by our court in *Bigelow v. Cady.*[58] The reason for this step, however, was not clearly stated and the result reached of doubtful propriety. Where the trust is one for the perpetual care of a cemetery lot and is void because the trust may last too long, there is, it is believed, nothing to do except to give the heirs of the testator a resulting trust at once.[59]

TITLE III.

INTERESTS SUBJECT TO THE RULE.

§ 662. **Legal interests:** The rule against Perpetuities did not commence its development until 1680, when the *Duke of Norfolk's* case was decided.[60] It was not finished until 1833.[61] It was, therefore, proper and to be expected that contingent and remote future interests which were recognized by the feudal land law and which had been subject to creation unfettered by any rule against perpetuities for centuries before that rule appeared, were not within the rule. Thus, a right of entry for condition broken would not be subject to the rule. Such is the actual holding of our Supreme Court in *Wakefield v. VanTassell.*[62] So possibilities of reverter have been sustained when, if the Rule against Perpetuities had applied to them, they must have been void.[63] Gray insists that the rule should apply both

[58] 171 Ill. 229.

[59] Mason *v.* Bloomington Library Assn., 237 Ill. 442.

[60] *Ante,* § 115.

[61] *Ante,* § 116.

[62] 202 Ill. 41. See also the following cases where if the Rule had been applied the right of entry for condition broken would have been held void, but where the right of entry was sustained without, however, any consideration of whether the Rule against Perpetuities applied: Price *v.* School Directors, 58 Ill. 452; Gray *v.* Chicago, M. & St. P. Ry., 189 Ill. 400; Lyman *v.* Suburban Railway Co., 190 Ill. 320; 20 Law Quart. Rev. 291.

In Board of Education *v.* Trustees, etc., 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.

[63] 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

to possibilities of reverter [64] and to rights of entry for condition broken.[65] The English cases support its application to the latter.[66] It is conceded, however, that the law is otherwise in the country generally.[67] This is, it is submitted, if not an absolutely necessary view, at least a correct one.

The common law contingent remainder, which was subject to the common law rule of destructibility, had existed for over two centuries before the *Duke of Norfolk's* case. There is some opinion to the effect that the Rule against Perpetuities never applied to such remainders.[68] The moment, however, that the rule of destructibility is partially abrogated, as it was by the Contingent Remainders Act of 1845, the contingent remainder ceases to be the common law interest which it was before, because it may, under such act, take effect as a springing executory interest after the termination of the preceding estate of freehold Under these circumstances the Rule against Perpetuities is appropriately applied to it. The recent English cases, which appear to hold that contingent remainders are subject to the Rule against Perpetuities,[69] were decided with reference to contingent remainders to which the English Contingent Remainders Act of 1845, at least, applied. They do not, therefore, sustain the proposition that the Rule against Perpetuities would apply to the common law contingent remainder which continued to be fully subject to the rule of destructibility.[71]

suggested and the court found another ground for the result reached.

[64] Rule against Perpetuities, § 312.

[65] *Id.*, §§ 299 *et seq.*

[66] *Id.*, § 302.

[67] *Id.*, §§ 304 *et seq.*

[68] In "Perpetuities," by Charles Sweet, 15 Law Quart. Rev. 71, 85, the learned author says: "The doctrine that contingent remainders are not subject to the modern Rule against Perpetuities is supported by the authority of the following judges and writers: (1) Mr. Fearne, (2) Mr. Charles Butler, (3) Mr. Preston, (4) Mr. Burton, (5) The Real Property Commissioners (Lord Campbell, W. H. Tinney, Lewis Duval, John Hodgson, Samuel Duckworth, P. B. Brodie and John Tyrrell), (6) Lord St. Leonards, (7) Mr. Joshua Williams, (8) Mr. George Sweet, (9) Mr. Leake, (10) Mr. Challis." See also Challis on Real Property, 2nd ed. 183-186.

[69] *In re* Frost, 43 Ch. Div. 246; *In re* Ashforth's Trusts, 21 T. L. R. 329 (1905).

[71] In Madison *v.* Larmon, 170 Ill. 65, 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. For the controversy which has arisen on this point, see

Springing and shifting future interests by way of use[72] or executory devise[73] are, of course, subject to the rule.

§ 663. Equitable interests: The rule applies to equitable interests.[74]

§ 664. Contracts—Bauer v. Lumaghi Coal Co.[75] and London & S. W. Ry. v. Gomm:[76] It is believed that the 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 purchaser, 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

14 Law Quart. Rev. 133, 234; 15 *id.* 71; 20 *id.* 289; 49 Solic. Journal, 397; Gray's Rule against Perpetuities, §§ 285 *et seq.*

The rule against double possibilities if any such rule can be said to have existed (Gray's Rule against Perpetuities, 3rd ed., §§ 121-131, 931 *et seq.*), was the common law rule (separate from the Rule against Perpetuities) which controlled the creation of contingent remainders. It might perhaps be plausibly suggested that if contingent remainders were subject to such a rule, that was a reason why the modern Rule against Perpetuities should be applied in its place as a better rule to accomplish what the older common law rule was designed to effect.

[72] 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.

[73] Post *v.* Rohrbach, 142 Ill. 600.

[74] 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.

[75] 209 Ill. 316.

[76] 20 Ch. Div. 562.

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.[77]

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.[78]

§ 665. **Options to purchase**: If the purchaser had paid the 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 be violated. In such a case the purchaser would be, in fact, the *dominus* of the property. He would not have a future interest, but a present absolute interest.

Such is the reasoning upon which a general power to appoint by deed or will, that may in fact be exercised at too remote a

[77] 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."

[78] Woodall v. Clifton, L. R. [1905] 2 Ch. 257; 39 Law Journal 644; 18 Harv. Law Rev. 379; 42 Solic. Journal, 628.

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.[79] 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,[80] 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, the purchaser may, 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.[81]

Whether, however, such a condition of substantial ownership in the purchaser actually exists, must depend 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?

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

[79] Bray *v.* Bree, 2 Cl. & F. 453 (1834); *In re* Teague's Settlement, L. R. 10 Eq. 564 (1870); Gray's Rule against Perpetuities, § 477.

[80] London & S. W. Ry. Co. *v.* Gomm, 20 Ch. Div. 562.

[81] 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. Rossignol, 5 Cal., 64, 65. For the construction of such covenants see article entitled "Leases—Covenants of Perpetual Renewal," by I. Homer Sweetser, 13 Harv. Law Rev. 472.

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 business, 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*.[82] 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.[83] 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.[84]

The difficulty, on principle, which at least one writer has had with this result [85] disappears when it is perceived that only a practical question of the extent of the control by the lessee and the burden of the condition precedent are involved. Are these 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.[86]

TITLE IV.

INTERESTS LIMITED TO TAKE EFFECT "WHEN DEBTS ARE PAID," "A TRUST EXECUTED," OR "A WILL PROBATED."

§ 666. **Introductory**: Whenever language introducing a gift seems to provide that the gift shall take effect upon the happening of an event which may by possibility not occur until too remote a time—as for instance, "when a will is probated" or "debts paid" or an estate "settled" or an executory

[82] The same may be said of the condition in Birmingham Canal Co. *v.* Cartwright, 11 Ch. Div. 421, and the decision, therefore, in that case in favor of the purchaser is clearly wrong and properly overruled by the Gomm case.

[83] Bauer *v.* Lumaghi Coal Co., 209 Ill. 316, *ante*, § 664.

[84] 42 Solic. Journal, 628.

[85] Mr. T. Cyprian Williams, 42 Solic. Journal, 628.

[86] Mr. T. Cyprian Williams' distinction (42 Solic. Journal, 628),

trust "executed and performed"—it is at once suggested that the gift is void for remoteness. Before a conclusion can be reached, however, a number of important distinctions must be made.

§ 667. Suppose a term is given to trustees upon trust to pay debts and subject to the term the property is devised to A absolutely: In this case A has a present interest subject to the term. It is usually called a "vested" interest. It is not void for remoteness.[87]

§ 668. Suppose the fee is given to trustees upon trust to pay debts[88] and when debts are paid the land is devised to A absolutely—Is A's interest legal or equitable? Since the devise is direct to A with no suggestion that the trustees are to terminate the trust by a conveyance to A, it might be thought that A's estate was a legal future interest. If so taken it would (supposing the trustee still to have the fee simple) be an executory devise cutting short the legal fee of the trustee. On the other hand, if the language be taken as requiring a conveyance from the trustee to A of what is left when the debts are paid, A's interest will be equitable. It is settled that the latter is the proper construction to be given to the gift to A.[89] It is not believed that there is one construction at *law* for the gift to A in the case put and another in *equity*. The principles of construction applicable are the same in both courts. Each should reach the same result. In a court of law A should not be allowed to maintain ejectment, because the legal title would be outstanding in the trustee. It is possible that the courts of law and the courts of equity might reach different results and that, in a system of separate law and chancery courts with no common court of appeal, two different rules might actually be established. In that event the rule of equity would probably prevail by reason of the use of the in-

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.

[87] Gray's Rule against Perpetuities, § 415. *Ante*, § 654.

[88] Observe that by the general rule all trusts to pay debts give the trustee a fee. Hawkins on Wills, 151.

[89] Morgan *v.* Morgan, 20 R. I. 600; Gray's Rule against Perpetuities, § 415; Lewis on Perpetuities, 626 *et seq.*; Hawkins on Wills, 152.

junction by the court of chancery to enjoin the bringing or prosecution of suits of law based upon the interpretation given by courts of law. Under the English Judicature Act of 1873 [90] the rule in equity would prevail. In American jurisdictions with a single court of last resort, one would expect the rule of equity to be taken as the correct rule for law and equity alike.

§ 669. **Suppose A's interest be equitable:** If a fee be devised to trustees upon trust to pay debts and "after debts are paid," or "when debts are paid," or "subject to the payment of debts," an absolute equitable interest is devised to A, so that A has the right to, and indeed must, call upon the trustee for a conveyance of the legal title in order to close the trust, then it seems settled that the words "after debts are paid," or "when debts are paid," or "subject to the payment of debts," refer not to the *time* when the ultimate gift is to vest in interest, but merely the *quantum* of estate which A is to take and the duties which the trustee is to perform. If this is not a literal or primary meaning of the words used it is at least a plausible secondary meaning, because the gift to A is absolute and subject to no other event than the payment of debts. The reference to that payment is naturally a reference to the fact that the debts are first to be paid and that A is to have what is left. In short, A has the *whole interest* immediately, less the amount needed to pay debts. Hence A has an immediate equitable fee which is not void for remoteness.[91] So, if the fee is devised to trustees upon trust to sell and "when the sale is made" to pay the proceeds to A absolutely, it has been held that "when the sale is made" would refer merely to the duties which the trustees were to perform and the character and *quantum* of the estate they were to handle and not at all to the time when the gift to A would vest in interest.[92]

If we could generalize from the above cases, we should have a formula something like this: Words which introduce a gift that is subject to the fulfilment of trusts and which refer to the accomplishment of the purpose of a trust which is, in the usual case, quickly executed and incidental to the determination of a

[90] Secs. 24, 25.

[91] Bacon *v.* Proctor, Turn. & R. 31; Morgan *v.* Morgan, 20 R. I. 600; Seofield *v.* Olcott, 120 Ill. 362, 376; Ducker *v.* Burnham, 146 Ill. 9, 20; Hawkins *v.* Bohling, 168 Ill. 214, 220; Bates *v.* Spooner, 75 Conn. 501.

[92] Bates *v.* Spooner, *supra*.

residue to be distributed, may be construed as referring to the *quantum* of the estate, the duties of the trustees and the priority of the object of the trusts over those ultimately to take, rather than the time when the ultimate gift is to vest in interest. Thus, suppose the fee were given to trustees upon trust "to make suitable provision for the care of the testator's cemetery lot in a certain cemetery [which by its charter could take deposits upon trust for such perpetual care] and when this trust shall have been executed and performed then to A absolutely." Why should not the words "when this trust shall have been executed and performed" be construed as referring to the *quantum* of estate and the duties of the trustees and the fact that the provision for the cemetery lot is to have priority over the persons ultimately to take, and not at all to the time of the vesting in interest of the gift to A? If that position were taken A would have an immediate absolute equitable interest on the death of the testator subject merely to the duty of the trustees to make the provision for perpetual care. A's gift, therefore, would not be void for remoteness.

The cases, so far as the writer knows, neither affirm nor deny the propriety of such a generalization. In *Oddie v. Brown*[93] the testator devised the residue of his estate to trustees to invest and suffer the interst to accumulate until the principal and accumulations "should amout to £3,000, or thereabouts," and "when and so soon as the principal sum and interest should amount to the sum of £3,000, or thereabouts," then to pay over the dividends to certain persons for life and the principal to others. The Vice Chancellor [Sir John Stuart] held the gifts over void for remoteness. This was reversed in the Court of Appeal. But the judges differed in their reasoning. The Lord Chancellor [Lord Chelmsford], while holding that the ultimate gift could not, upon the language used and apart from the Thellusson Act, vest in interest until the accumulation was made, yet held the ultimate gifts valid, because by the Thellusson Act the accumulations must stop in twenty-one years and the devisees were thereupon entitled to vested interests in the fund accumulated. Lord Justice Turner, who agreed in the conclusion reached by the Lord Chancellor, placed his opinion on the ground that the words "when and so soon as the principal and interest should

[93] 4 De G. & J. 179.

amount to the sum of £3,000, or thereabouts," referred merely to the duties of the trustees and were not at all effective to introduce a contingency into the gift after the accumulations. In short, his view was that the words importing the contingency should be construed to refer only to the *quantum* of estate which the trustees were to obtain by the accumulations and not to the *time* when the ultimate gifts were to vest in interest. This makes two judges to one on the proposition that apart from the Thellusson Act the ultimate gifts did not vest in interest until the accumulations had been made as provided. It appears, however, that after thirty-seven years of accumulations the total fund amounted to only £1,600, so that it may have been inferred that the testator must have had in mind when his will was made, and expressed definitely, that there should be a long period of accumulations. This would prevent the application of the generalization stated at the commencement of this section, for that is confined to cases where the trusts are of a character in the usual case quickly executed and incidental to the determination of a residue to be distributed. The result reached by the court in *Siedler v. Syms*[94] may be explained in the same way. There the gift was to trustees of bank stock upon trust to collect during the corporate existence of the bank under its present charter, or by virtue of any renewals or extensions thereof, the dividends, and to pay them equally among all the employes of the bank who may be employed therein for the time being, with an ultimate gift "in case said bank shall by dissolution or otherwise cease to exist" to the Bank Clerks' Mutual Benefit Association. It was held that the gift over was void. The trust here is one which is in terms expressed to last for a long time and not improbably a long time beyond lives in being and twenty-one years.

§ 670. Suppose legacies are bequeathed to several and the residue of the testator's personal estate alone is bequeathed to A "when the testator's debts and legacies are paid and the estate settled": In the cases noted *ante*, § 669, where the ultimate gift was sustained, there was a trusteeship, the trustee taking the fee or absolute interest. Suppose that legacies are bequeathed to several and the residue of personalty alone is bequeathed to A "when debts and legacies are paid and the estate settled." Here the executor takes all the personalty absolutely

[94] 56 N. J. Eq. 275.

upon trust to pay debts and legacies and then to distribute the balance to the residuary legatees. The case is not really different from those referred to *ante*, § 669. The same court—that is, a court of equity or a probate court succeeding to the equitable jurisdiction of a court of chancery in the administration of estates—will decide the question of construction as a court of chancery would decide the similar question when a trusteeship is involved. The words "when debts and legacies are paid and the estate settled" refer to the *quantum* of estate and the duty of the executor first to pay the debts and legacies, and not at all to the *time* of the vesting in interest of the residuary bequest.

§ 671. **Suppose there are bequests of several legacies and then a devise to A absolutely of the residue of the testator's real and personal estate "when debts and legacies are paid and the estate settled":** As to the personal estate the situation is precisely the same as that in the case put *ante*, § 670. A court of equity or a probate court succeeding to the jurisdiction of a court of equity in the administration of deceaseds' estates, would construe the gift to A as immediate, subject to a charge for the payment of debts and legacies. But neither a court of equity nor a probate court will have anything to do with the construction of the devise of the real estate. There is no trusteeship as to the realty and the executor obtains no interest in it. Nevertheless, the same principle upon which a court of equity found the equitable interest in A in the cases put *ante*, §§ 669 and 670, to be equitable interests subject merely to a charge for the payment of debts is equally applicable here. The real estate in the case put is, by the use of the word "residue," charged in equity with the payment of debts and legacies. Hence there is a rational ground for holding that the language "when debts and legacies are paid and the estate settled" refers to the *quantum* of estate which will be left for the residuary devisee and not at all to the *time* of vesting in interest of the gift. In short, there can still be an immediate legal fee in A subject to the equitable charge to pay debts and legacies. Is there any reason why a court of law or a court dealing with a legal title, in passing upon a question of construction relating to that legal title, should not take notice of the fact that in equity there is a charge upon the legal title and then apply the rule of construction that is avail-

able in a court of equity when all the interests are equitable? It is believed there is none.[95]

§ 672. Suppose that Blackacre be devised to A in fee when the testator's debts are paid, there being no charge of the debts upon the real estate by words, but only by the usual statute making real estate liable for the payment of debts after the personal estate is exhausted: Here again the question as to the validity of A's gift will arise in a court of law dealing with a legal title. There is no trusteeship. The executor takes no interest in the real estate. He has a mere right conferred by statute to have the real estate sold under a decree of court to pay debts in case the personal estate is insolvent. Nevertheless there is the same rational basis as existed in all the preceding cases for construing the words "when debts are paid" as referring to the *quantum* of estate conferred and the fact that the debts are in a way a prior lien upon the premises, rather than the *time* when the devise to A shall vest in interest. There is, it is believed, no reason why the rational basis for this construction should not be as available in a court of law with respect to a legal title as in a court of equity with respect to an equitable title.[96]

§ 673. Suppose a devise be made of Blackacre to A in fee when the testator's debts and legacies are paid and neither the debts nor legacies are charged upon the real estate by the testator's words or by any statute: Here we come for the first time to the case where the words "when debts and legacies are paid" cannot by any possibility refer to the *quantum* of estate. The property devised is wholly free from all claims for debts and legacies. Therefore, the reference to their payment can have nothing to do with the amount of the estate devised. Nor can

[95] See Heisen *v.* Ellis, 247 Ill. 418; McCutcheon *v.* The Pullman Trust & Sav. Bank, 251 Ill. 550. In the latter case the court seems not to have rested its decision upon the ground that "when the executor shall be discharged" referred merely to the *quantum* of the estate, but rather to have held that the gift to the trustees upon that event must take effect if at all before the time fixed for the final distribution of the trust estate, which was placed at ten years from the testator's death. It is submitted that the gift to the trustees was to take effect no matter whether the time named for the ultimate distribution had expired or not, and that the court's decision might better have been placed squarely upon the principle laid down in the text.

[96] Lewis on Perpetuities, 637.

the words importing the contingency refer to the duties of any trustee or executor, since there are none. The phrase "when debts and legacies are paid," if it is to be given any meaning, must be given its literal or primary meaning as referring to the *time* when A is to take. Hence, the gift to A is a springing executory devise. It does not vest in interest until it vests in possession and it is, therefore, void for remoteness. With this result the authorities seem to agree.[97] So, if the devise be to A absolutely "when the will is probated," the gift to A must be void for remoteness.[98] The event here specified is such that the reasoning indulged in *ante*, §§ 670-672, where the event is the payment of debts and legacies, is wholly inapplicable. There is no rational basis for saying that the gift is immediate to A, subject to a charge that the will be probated. The probate of the will does not fix the *quantum* of the estate. The words refer too explicitly to time and time alone. The same is true where the gift was of an annuity of £100 to the Central London Rangers "on the appointment of the next lieutenant-colonel."[99] Here the appointment of the next lieutenant-colonel had nothing to do with the *quantum* of estate or the performance of any prior trusts. Hence there was nothing to do but to hold the gift void for remoteness, and this in spite of the fact that the gift was to a charity.

§ 674. Suppose a devise in fee to trustees upon trust to pay debts and legacies and when the same are paid to divide the estate among such of his children or more remote issue as may "then" be living: We have already observed that to a considerable extent the words "when debts are paid" will be held to refer to the *quantum* of estate and not to the time of vest-

[97] Gray, Rule against Perpetuities, § 415; Lewis on Perpetuities, 623, 625.

[98] Johnson *v.* Preston, 226 Ill. 447. The cases where the devise to the trustees is to take effect immediately upon the testator's death, but it is provided that the trust shall continue till a given number of years after the probate of the will (Armstrong *v.* Barber, 239 Ill. 389; Mettler *v.* Warner, 243 Ill. 600), must be distinguished. In such cases the devise is valid but the provision which requires against the will of a *cestui* absolutely and indefeasibly entitled, that the trust continue, is unenforceable. This is not the application of the Rule Against Perpetuities but a rule prohibiting the length of time that a trust of an absolute and indefeasible equitable interest may last. *Ante*, § 658 *et seq.*

[99] *In re* Lord Stratheden [1894], 3 Ch. 265.

ing in interest. If the gift is to an ascertained person like A, the gift to A is construed as an immediate one, subject merely to the charge for the payment of debts.[1] But here we have a gift to a class of persons who are described as "then living." "Then" refers to the time when debts and legacies are paid and can refer to nothing else. "Then" picks out the element of time which is contained in the phrase "when debts and legacies are paid" and uses it explicitly and unequivocally. "Then" cannot have any sensible meaning as referring to *quantum* of estate or the duties of the trustees or the priority of debts and legacies to the distribution of the residue. Hence in the case put the ultimate gift is void for remoteness.[2] So, if after a direction (not preceded by any prior gift) that the trustee shall make suitable provision for the perpetual care of the testator's cemetery lot in a particular cemetery, the charter of which permits it to receive deposits upon trust for perpetual care of its cemetery lots, there is an ultimate gift "when said trust shall have been executed and performed to those persons who would then answer the description of my heirs at law if I had died at that time," the gift over must clearly be void for remoteness.

§ 675. **Suppose that the devise be in fee to trustees upon trust for A for life and immediately upon A's death to pay A's debts and when his debts are paid to divide among the testator's then living issue:**[3] Here the word "then" does not necessarily and unequivocally refer to the time when the debts of A are in fact paid. It may refer to the death of A, the issue living at A's death taking subject to the payment of A's debts. This would be clear if the devise read, "to pay the income to A for life and immediately upon his death to pay all his debts and divide what remains among the then living issue" of the testator. Here only one time is expressed—the death of A—although

[1] *Ante*, §§ 669-671.

[2] *In re* Bewick, Ryle *v.* Ryle, 80 L. J. R. Ch. D. 47; *In re* Wood [1894], 3 Ch. 310; *In re* Roberts, 50 L. J. Ch. 265; Lawrence *v.* Lawrence, 4 W. Australian L. R. 27. Belfield *v.* Booth, 63 Conn. 299, is *contra* on the ground that the deceased's estate *must* be settled in a reasonable time from the testator's death. This position, as Professor Gray points out (Rule against Perpetuities, 2d ed., §§ 214b-214d), is untenable. Brandenburg *v.* Thorndike, 139 Mass. 102, is to be supported upon the ground indicated in Gray's Rule against Perpetuities, 2d and 3d ed., §§ 214a, 214c.

[3] This section was prepared by Mr. Herbert Pope of the Chicago Bar.

something is directed to be done at that time which cannot be performed in a moment of time, and which must be performed before "what remains" can be ascertained and paid over to the testator's issue. The "then living issue," however, would properly be held to refer to those living at the death of A. Even if, in such a case, the words were "when the debts are paid," to divide all that remains among the "then" living issue of the testator, the word "then" might still refer to the death of A, and not to the time when the debts might in fact be paid.

Similarly, if the direction is that the trustees shall, immediately upon the death of A, set apart a fund for the perpetual care of a cemetry lot in a certain cemetery, and divide what remains—or "when it is done divide what remains"—among the then living issue of the testator, the word "then" could be construed as referring to the death of A.

Independently of the argument that the words, "when the debts are paid," etc., refer, in such a case, not to the *time* when the ultimate gift is to vest in interest, but to the *quantum* of the estate, it may be urged generally that when a testator directs something to be done at a definite moment of time, and then says that when that thing is done as directed, what remains shall be paid to a class to be "then" ascertained, the word "then" is at least used ambiguously. It may be construed to refer to the moment of time when the thing in question is direected to be done, or to the time when it is in fact done. There is certainly no greater straining of the language used to give it the first meaning, particularly if the Rule against Perpetuities is thereby avoided, then there is in the cases put *ante*, §§ 669-671.

§ 676. **Gifts conditioned upon the devisees making payments to others:** Such a condition may be a condition precedent to the vesting of the devise,[4] and may occur at too remote a time. In *Hill v. Gianelli*,[5] however, it was held that the condition must be performed, if at all, in the lifetime of the devisee and therefore the gift was not void for remoteness.

TITLE V.

LIMITATIONS TO CLASSES.

§ 677. **Introductory:** If a devise be made to A for life and then to such of his children as reach twenty-five and there are

[4] Nevius *v.* Gourley, 95 Ill. 206; 97 Ill. 365; *ante*, § 222.

[5] 221 Ill. 286.

no children *in esse*, the Rule is violated as to every possible member of the class and the gift to the class fails. Suppose one child is *in esse* at the testator's death. That child is a life in being and must attain twenty-five, if at all, within a life in being at the testator's death. If the gift to that child could be regarded as separable from the gift to the other possible members of the class it would be valid, while the gift to other members of the class not *in esse* would fail. Where, however, the gift is to a class as such, the gifts to different possible members of the class are not separable. The result is that if the gift is too remote as to any member of the class, the gift to every member of the class fails. If the limitations be to A for life and then to such children as reach twenty-five and one has already reached twenty-five at the commencement of the interests, that child has a vested interest which taken by itself is not void for remoteness; but the vested gift is inseparable from the possible interests of other members of the class, which are too remote, and the entire gift, must, therefore, fail.[5a] The Rule against Perpetuities, in its application to gifts to classes, may, therefore, be stated 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.[6] Such was the rule established in England by *Leake v. Robinson*.[7] The authority of that case has been fully recognized by our Supreme Court in *Howe v. Hodge*.[8] The rule as above formulated has actually been applied in *Lawrence v. Smith*[9] and *Ingraham v. Ingraham*[10] 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. 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.[11]

[5a] Gray, Rule against Perpetuities, 2nd and 3rd ed., § 205a.

[6] 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.

[7] 2 Mer. 363 (1817).

[8] 152 Ill. 252, 275; *post*, § 678.

[9] 163 Ill. 149; *post*, § 684.

[10] 169 Ill. 432, 467-469; *post*, § 684. Also Schuknecht *v.* Schultz, 212 Ill. 43.

[11] The writer desires to say at

§ 678. 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* [12] prevails.[13]

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

this point that the following classification of results could not have been made by him had it not been 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.

[12] 149 Mass. 19; *post,* §§ 732 *et seq.*

[13] 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,* § 732. Kentucky: Smith *v.* Isaacs, 78 S. W. 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, 2nd ed. 115.

for the determination of classes. But the maximum and minimum 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,[14] and that these limits may fairly be assumed to be the period of a life in being and twenty-one years.[15] 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.[16]

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.[17] The postponement clause is again bad because it may last for too long a time.[18] The class, however, may increase till the death of the life tenant.[19]

(y) If in case (a), a grandchild is *in esse* at the testator's death, then the minimum of the class is ascertained at that

[14] Bigelow *v.* Cady, 171 Ill. 229, might be explained upon such a principle. See also Bartlett, Petitioner, 163 Mass. 509, 512.

[15] *Post*, § 737; 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. 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.

[16] 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.

[17] Chapman *v.* Cheney, 191 Ill. 574.

[18] This is not contradicted by anything in Chapman *v.* Cheney, *supra.*

[19] Chapman *v.* Cheney, *supra.*

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.[20]

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* § 568.

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.[21] 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,[22] 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.[23]

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.[24] By the ordinary rule for the determination of classes, the class will increase until the death of the life tenant, A.[25] 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 esse* at the testator's death, and bad as to all others. If the

[20] Howe *v.* Hodge, 152 Ill. 252.

[21] 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.

[22] *Ante,* § 568.

[23] There was no decision upon this point in Howe *v.* Hodge, 152 Ill. 252.

[24] Flanner *v.* Fellows, 206 Ill. 136; Johnson's Trustee *v.* Johnson, 79 S. W. 293 (Ky. 1904); *In re* Rhodes' Estate, 147 Pa. St. 227 (1892).

[25] *Id.*

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.[26]

§ 679. 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*[27] 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.

(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

[26] 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.

[27] *Post,* § 732 *et seq.*

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,[28] 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 as to 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, whichever 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*,[29] to the grandchildren of the testator's living brother, to be paid when they reach twenty-five, must, therefore, have been 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 postponement 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

[28] *Ante*, § 568.

[29] 5 Sim. 171.

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,[30] then we have a misapplication of the rule which rejects the postponed enjoyment clause. But that misapplication has nothing to do with effect of the operation of the Rule against Perpetuities.[31]

§ 680. **Cases (e) and (f):** Suppose 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. 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 is valid on different shares according to the principle applied, *ante* § 679. Suppose, however, again assuming the doctrine of *Claflin v. Claflin*[32] 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.*[33] 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 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,[34] it must be rejected as wholly

[30] Oppenheim *v.* Henry, 10 Hare 441.

[31] Gray's Rule against Perpetuities, 2nd and 3rd ed., § 639aa.

[32] *Post*, §§ 732 *et seq.*

[33] *Ante*, § 568.

[34] *Post*, § 737.

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).[35]

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.[36] 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.

§ 681. 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 for such of the testator's grandchildren as 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 *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

[35] This view appears somewhat more fully stated in an article by the author entitled "Vested Gifts to a Class and the Rule against Perpetuities," 19 Harv. Law Rev. 598.

[36] Oppenheim *v.* Henry, 10 Hare 441; Gray's Rule against Perpetuities, 2nd and 3rd ed., § 639; *ante*, § 568; *post*, § 732.

both cases, therefore, the gift to the whole class is void for remoteness.[37]

(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.[38]

TITLE VI.

SEPARABLE LIMITATIONS.

§ 685. Contingencies separated by act of the testator or settlor: 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

[37] 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*, § 566. 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.

[38] Pitzel *v.* Schneider, 216 Ill. 87.

Note: §§ 682-684, both inclusive, in the original MSS. were the same as §§ 266-268 of the former work on Future Interests. The writer decided to leave these sections out of the present work after the sections had been numbered and the cross references inserted. That is the reason for the gap in the section numbers at this point.

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*,[39] 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 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.[40] This position the court seems to have admitted the soundness of. It, however, held the gifts void on another ground.[41]

In *Quinlan v. Wickman* [42] the separable limitations were in case "my said daughter Elizabeth Wickman should die without leaving any children, or in case the surviving child of my said daughter Elizabeth Wickman, or all of such children, if more than one, die before arriving at the age of thirty years." The gift over on the death of Elizabeth without leaving any children was valid. The gift over on the other contingency was void for remoteness. The contingencies, however, were separated by the express language of the testatrix and the one which was valid could, therefore, take effect.[43]

[39] 163 Ill. 149.

[40] Gray's Rule against Perpetuities, §§ 355, 389 *et seq.*

[41] *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." The idea was also advanced that since the trust might last too long the whole trust was void. See *ante*, §§ 658 *et seq.*

[42] 233 Ill. 39.

[43] Moroney *v.* Haas, 277 Ill. 467.

§ 686. **Separation of contingencies by operation of law—The rule of Doe d. Evers v. Challis:** [44] In this case the limitations were of legal estates substantially to A for life, remainder to his children (then unborn), with a gift over if he left children who died under twenty-three, to B in fee. As long as A had no children B's interest stood ready to take effect as a remainder. It was a contingent remainder. It was limited on an event (the failure of A to have any children) which might not occur till after the termination of the preceding life estate. If the life estate had terminated prematurely by forfeiture or merger before A's death without having had children, B's remainder would have been subject to the rule of destructibility of contingent remainders. But B's interest was liable to be turned from a contingent remainder to a shifting executory devise. This would happen if a child were born to A. Such a child would take a vested remainder in fee at once on birth and B's interest, therefore, must have become at once a shifting interest, which was void for remoteness. The holding in *Doe v. Challis* was that because in one event B's interest took effect as a remainder and in the other as a shifting executory devise, the difference in the nature of such interests caused a separation of the contingencies by operation of law and hence the gift to B, in the event that A died without ever having had any children, was valid.

It follows that where equitable interests or personal property are involved, or where the rule of destructibility of contingent remainders is wholly abolished, the distinction between the future interest taking effect as a remainder and as a shifting executory devise, fails, and there can be no separation of the contingencies by operation of law.[45]

TITLE VII.

APPLICATION OF THE RULE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS TO PREVENT THE VIOLATION OF THE RULE AGAINST PERPETUITIES.

§ 687. **Introductory:** A legal contingent remainder which is subject to the Rule against Perpetuities may fail to violate

[44] 18 Q. B. 224, 231 (1850); 7 H. L. Cas. 531 (1859).

[45] *In re* Bence [1891], 3 Ch. 242; *In re* Hancock, [1901] 1 Ch. (C. A.)

the rule solely because, by the rule of destructibility, the contingent event upon which it is to take effect, must happen before or at the time of the termination of the preceding life estate or the remainder will be destroyed. Thus, where the limitations are to A for life, remainder to the eldest (unborn) son of A, if he attain twenty-five, the remainder, if it took effect according to the expressed intent, would be void for remoteness. But the moment the rule of destructibility becomes applicable so that A must attain twenty-five before the termination of the life estate in order to take at all, the rule is not violated.

§ 688. Suppose the legal contingent remainder is limited to a class: Suppose the remainder is to such children of A (the life tenant) as attain twenty-five. Here under the English authorities prior to the recent Contingent Remainders Acts, the remainder will fail as to every member of the class who has not attained twenty-five before the termination of the life estate.[46] Hence the remainder cannot be void for remoteness. The moment, however, the remainder was made indestructible so that members of the class attaining twenty-five after the termination of the life estate could share, the entire remainder to the class violated the Rule against Perpetuities. If, pursuant to *Simonds v. Simonds*[47] the remainder to the class becomes indestructible if one member reaches twenty-five before the life estate terminates, then in that event, which may possibly happen, the gift to the class would be void for remoteness.

Suppose the legal estates are to A for life, then to such children of A as "either before or after" A's death attain twenty-five. This is not a gift to two separate classes which may be valid as to one and void as to the other. It is a gift to a single class regardless of when they reach twenty-one. Under *In re Lechmere and Lloyd*[48] it is not destructible as to children who have not reached twenty-five before the life tenant's death where some have attained twenty-five before that time. In *Dean v. Dean*[49] it was held to be not destructible as to children who had not attained twenty-five before the life tenant's death, even

482; [1902] A. C. 14, overruling Watson *v.* Young, 28 Ch. Div. 436 (1885), where the rule of Doe *v.* Challis was misapplied.

[46] *Ante*, §§ 99, 101.

[47] 199 Mass. 552 (1908).

[48] 18 Ch. Div. 524 (1881); *ante*, § 102.

[49] L. R. 3 Ch. 150 (1891); *ante*, § 99.

where no children had attained twenty-five before the life tenant's death. It follows, therefore, that the gift to the entire class in the principal case put is void for remoteness.

§ 689. Suppose the future interest is one which may take effect as a remainder or as a shifting interest: [50] Thus suppose the limitations are to A for life, remainder to A's children (now unborn), but if A leaves no children who shall attain twenty-five, then to B in fee. Here B's interest stands ready to take effect as a remainder if no children are born to A. But the moment a child is born to A, that child takes a vested remainder, and the gift over to B, if it takes effect, must do so as a shifting interest. If B's interest is subject to a rule of destructibility in case it has to take effect as a shifting interest, then it cannot be void for remoteness. If, however, it is not subject to any such rule of destructibility the gift over in the event of A's having a child which dies under twenty-five is void for remoteness. But the gift over on this event is separable from the event of A's dying without having had any child, and the gift over in this latter event is not too remote. The separation of the contingencies is said to occur by operation of law because in one event the future interest is a contingent remainder and as such destructible, and in the other, a shifting executory interest.[51]

TITLE VIII.

POWERS.

§ 690. Powers void in their creation because they may be exercised at too remote a time: A power is not void in its inception because, by its exercise, limitations may be made which would be void for remoteness.[52] It is only when the power itself may possibly be exercised at a time beyond the limits of the rule that it is void in its creation.[53]

To this, however, there is an exception: If within lives in being and twenty-one years from the time of the creation of the power there must come into the hands of the donee a right to exercise a general power to appoint by deed or will, the power is valid in its creation, although the donee may not exercise it

[50] *Ante*, § 105.

[51] *Ante*, § 686.

[52] Hopkinson v. Swaim, 284 Ill. 11, 24.

[53] Gray's Rule against Perpetuities, § 473.

within the time required by the rule. Thus, if in a marriage settlement there be given to the unborn child of the marriage a general power to appoint by deed or will, it is clear that within lives in being at the date of the settlement and twenty-one years thereafter the power will come into the hands of one who may exercise it. But the actual exercise of the power may not occur until the end of lives not in being at the time of the settlement. The power, however, is valid in its creation, for within the proper time the donee has become completely *dominus* of the property, because he can appoint to himself. Such is the holding of *Bray v. Bree.*[54] If, however, the marriage settlement conferred a general power on the unborn daughter of the marriage to appoint by deed or will, but required that such appointment should take effect only after the marriage of the daughter, there would be a condition precedent to the exercise of the power that the daughter must marry. She, therefore, would not become *dominus* of the property until that event had occurred, and the power, therefore, is void in its inception. That is *Louisa's* case in *Morgan v. Gronow.*[55] In the same way, if the marriage settlement confers a general power upon the unborn children of the marriage to appoint by will only, the power cannot be exercised till the child dies. Then only can the donee possibly become *dominus* of the property. That time is too remote. Hence the power is void in its inception. This is precisely the holding of *Wollaston v. King*[56] and *Tredennick v. Tredennick.*[57]

§ 691. Invalidity for remoteness in the exercise of a valid power—Where the power is special: Suppose that the power as created must be exercised, if at all, within lives in being and twenty-one years from the date of the creation of the power, so that the power is valid in its inception. Thus, suppose A by his own ante-nuptial settlement or by the will of X has a power to appoint among his issue and appoints by will to his daughter

[54] 2 Cl. & F. 453; 8 Bligh, N. S., 568 (1834).

[55] L. R. 16 Eq. 1 (1873).

[56] L. R. 8 Eq. 165 (1869).

[57] [1900] 1 I. R. 354. On the other hand, in 3 Dav. Prec. Conv., 3rd ed. 156, note, it is said that until Wollaston *v.* King, *supra,* an appointment such as was made in that case would have been considered not too remote on the ground that the general power of appointment (whether exercisable by deed or will, or will only) is in substance part of the interest (a life estate) limited to the object of the said power (the life tenant).

for life and then to such children of his daughter as reach twenty-one. Here A's power is valid in its inception because it must be exercised within lives in being at its creation, *i. e.*, within A's life. The remoteness, however, of an appointment made pursuant to such a power depends, according to Gray, on "its distance from the creation and not from the exercise of the power." [58] Hence the ultimate interest appointed to the grandchildren of A who reach twenty-one is void.

In determining the distance from the creation of the special power of the interests appointed, a fictitious or hypothetical process is indulged in of reading the interests appointed into the instrument creating the power. This gives rise to difficulties which may best be indicated by considering the following cases:

Suppose X devises to A for life with a special power in A to appoint to his issue. If A is married at X's death and has children living at X's death, A can appoint a given sum to each of the children by name and the appointment to such as were living at X's death is valid though contingent upon their reaching twenty-five, or any other age, because they are lives in being at X's death. In reading the appointment back into X's will we would have a gift to persons then living.[59]

Suppose, however, that A is a bachelor at X's death. A appoints two thousand dollars to each of his daughters when they reach twenty-four. One daughter is over three years old at A's death and one is under that age. If the bare words of the appointment be read into the will of X the gift to the daughter over three years old must fail because as so read, it might be to a child who would not be three years old at A's death. But if the appointment be read back into X's will with the essential characteristics which each daughter has at the time of A's death—as for instance, that one is named M and is less than three years old, and another named N and more than three years old,—then the appointment to N is not void for remoteness and since it is expressly separable from the other, it is valid. Such is the result reached in *Wilkinson v. Duncan*.[60] Mr. Gray supports this case.[61] The process of reading the appointment back

[58] Gray's Rule against Perpetuities, § 473.

[59] See Hopkinson *v.* Swaim, 284 Ill. 11.

[60] 30 Beav. 111 (1861).

[61] Rule against Perpetuities, 2nd ed. and 3rd ed., § 523c.

into the instrument creating the power is artificial. Why not make it a sensible artificial process which will support gifts as far as possible?

Suppose that A also appoints a sum to all of his sons when they reach twenty-four and some sons are over three years of age at A's death and others are under that age. If, in regard to the gift to the daughters, the gift be read back with the ages at A's death of each daughter, then the same step should be taken with regard to the gift to the sons. But having done so, the results are quite different. The gift to some of the sons will still be void and, as the gift is to all as a class and, therefore, inseparable, the whole gift must fail.[62] This result also was reached in *Wilkinson v. Duncan*. If, however, at A's death all the sons were over three years of age, then if you read the appointment into the will of X with the characteristics of every member of the class as to age, the gift to the entire class must be valid.

§ 692. Where the power is general to appoint by deed or will: Here it is held that the validity of the exercise of the power depends not on the distance of the interest appointed from the creation of the power, but on the distance of such interest from the time of the exercise of the power.[63] Why? Because it is said that, at the time of appointment, the donee is *dominus* of the property. "He has the absolute control over it. He can deal with the property as if he owned it in fee. * * * The appointment can be considered an appointment to the donee himself and then a settlement of his own property."[64] In short, the courts look at the substance of the situation and not the form. If the donee is at the time of appointment in all respects in a position like that of the absolute owner, then the validity of his act, so far as the question of remoteness is concerned, is to be determined with reference to the time of the appointment.

§ 693. Where the power is to appoint by will only, but is as general as such a power can possibly be—Problem stated: Suppose X devises to A for life, with a power, as general as such a power can be, to appoint by will. Can A by will appoint to trustees for his daughter for life and then upon trust

[62] *Ante*, § 677.

[63] Gray's Rule against Perpetuities, 2nd and 3rd ed., § 524.

[64] *Id.*

for such children of the daughter as reach twenty-one? Is the appointment to the grandchildren valid?

Observe that there is no question whatever of the validity of the power in its creation. The power is valid to start with, for it must be exercised in lives in being at the date of its creation. The only question is whether in determining the validity of the exercise of the power the remoteness of the limitations created is to depend upon the time when the power was created or when it was exercised. If the former view be adopted the appointment to A's grandchildren is too remote. If the latter is correct then the gift to the grandchildren is valid.

§ 694. The cases are in conflict: In *In re Powell's Trusts*,[65] Vice Chancellor James held the exercise of the power void for remoteness. In *Rous v. Jackson*,[66] *In re Flower*[67] and *Stuart v. Babington*,[68] the power was held to have been well exercised and these cases must be regarded as establishing the law in England contrary to *In re Powell's Trusts*.

Mr. Gray supported *In re Powell's Trusts* and the American cases have followed his opinion. In *Genet v. Hunt*[69] a marriage settlement provided for the wife for life with a power in her to appoint by will to any one, and in default of appointment to her heirs. She appointed to her children for life and then to their heirs. If the limitations appointed were measured from the date of the settlement the New York statute was violated, because the absolute power of alienation was suspended for three lives, including the lives of the children of the marriage, who were not *in esse* at the time their interests were created. The court in adopting the view of *Powell's Trusts* paid tribute to the powerful influence which Mr. Gray's views have had. It seems to have followed *In re Powell's Trusts* only because Mr. Gray said it ought to. In the Pennsylvania case of *Lawrence's Estate*[70] the limitations created in the exercise of the power were valid even though the view of *Powell's Trusts* was adopted. The court, however, also paid tribute to the influence of Mr. Gray's views by announcing their preference for the rule of

[65] 39 L. J. Ch. N. S. 188 (1869).
[66] 29 Ch. Div. 521 (1885).
[67] 55 L. J. Ch. N. S. 200 (1885).
[68] 27 L. R. (Ireland) 551; "General Powers and the Rule against Perpetuities," 26 Harv. Law Rev. 64.
[69] 113 N. Y. 158.
[70] 136 Pa. 354.

In re Powell's Trusts. In the recent case of *Minot v. Paine*[71] the ruling of *In re Powell's Trusts* prevailed.

Mr. Gray originally put his principal reliance for the support of *In re Powell's Trusts* upon the English cases of *Wollaston v. King*,[72] *Morgan v. Gronow*[73] and *Tredennick v. Tredennick*.[74] The American cases which rely upon Mr. Gray's view must be regarded as relying to the extent that Mr. Gray did on the same cases; but these, as has already been indicated,[75] only hold that a power in an unborn person to appoint by will was void in its inception because it might be exercised at too remote a time.

In *Wollaston v. King* and *Tredennick v. Tredennick* the general power was given by a marriage settlement to the unborn child of the marriage, to be exercised by will only. The fact that it was a general power, or that the donee became *dominus* of the property or practically the owner at the time of his death, was immaterial, for that did not happen soon enough. The time was so late that the power was void in its inception. In *Morgan v. Gronow* the situation was the same except that the general power was given by a marriage settlement to an unborn daughter to be exercised by deed or will upon her marriage. Here the donee when she married could exercise the power by deed or will, yet the power was void for remoteness in its inception because the marriage of the daughter might happen at too remote a time. The principle applicable is the same as that acted upon in *Wollaston v. King.*

To declare, as Mr. Gray does,[75a] that *Wollaston v. King, Tredennick v. Tredennick,* and *Morgan v. Gronow* "stand together with *Powell's Trusts* in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power" is to confound two entirely different situations—one where the question is as to the original validity of the power at the time of its creation; the other where the power is valid when created but where the question is, has it been validly exercised. In the first case the fact that the power conferred upon an unborn person is a general power to appoint

[71] 230 Mass. 514.

[72] L. R. 8 Eq. 165 (1869).

[73] L. R. 16 Eq. 1 (1873) (Louisa's Case).

[74] [1900] 1 Ir. R. 354.

[75] *Ante,* § 690.

[75a] Rule against Perpetuities, 2nd and 3rd ed., § 526a.

by deed or will causes it to be validly created because the donee will have a complete right to exercise it at the commencement of his life, or at least when he is twenty-one, and at that time—which is not too remote—he will become practically the owner. On the other hand, if he were given the power to appoint by will only, he could not possibly exercise the power till he died. He could not possibly become "practically the owner" till then. Hence the power is void in its inception. In the second case, the fact that a general power to appoint by deed or will is conferred which is valid, causes the validity of the limitations created in the exercise of the valid power to depend on their remoteness from the date of the execution of the power. This is because the donee is practically the owner *at the date of the exercise of the power.* In short, the fact that a power is a general power to appoint by deed or will, or a general power to appoint by will only, has an entirely different significance, depending upon whether one is considering the validity of the power in its inception or the validity of the exercise of a power admittedly valid in its inception.

§ 695. Solution of the problem on principle: It is conceded that the solution of the problem depends upon whether, at the time of the appointment, the donee of the power is in substance, or practically, the owner. If he is, the exercise of the power is valid. If he is not, it is void.

Mr. Gray[76] insists that the donee is not "practically the owner; he cannot appoint to himself; he is, indeed, the only person to whom he cannot possibly appoint, for he must die before the transfer of the property can take place." When Mr. Gray says the donee cannot appoint to himself so as to enjoy the property during his life, we must agree with him. It follows inevitably that during the life of the donee he is not practically the owner. If this is what Mr. Gray means when he says that the donee is not "practically the owner," all must agree. But is that the important inquiry? Is it not essential to determine whether *at the moment of exercising* the general power the donee is practically the owner? For instance, if a donee were given a general power to appoint by deed or will when he reached thirty or married, it would not be illuminating to say

[76] Gray's Rule against Perpetuities, 2nd and 3rd ed., § 526b.

that he was not practically the owner before he reached thirty or married, and, therefore, could not be practically the owner when he reached that age or married. In the same way it will not do to say that because a donee is not practically the owner before his death, he cannot be practically the owner at the moment of his death. In short, our real inquiry must be, is the donee with a general power to appoint by will only, practically the owner at the moment of his death?

How is one to determine whether at a particular time the donee of a general power is practically the owner? The natural test would seem to be: can he do everything with reference to the property which is subject to the power that he could do if he were the owner? Thus, if the donee have a general power to appoint by deed or will at thirty, we say he can do everything at thirty with reference to the property subject to the power that he could do if he were the owner. In the same way, when the donee has a general power to appoint by will only, we determine whether he is practically the owner at the moment of death by asking whether he can do everything with reference to the property subject to the power that he could do if he were the owner. We do not need to ask whether he can enjoy the property personally, because we know that no owner of property can at the moment of death enjoy it personally. His entire right of ownership consists in the power to dispose of it.

What, then, is there that an owner of property can do in the way of disposing of his property at the moment of his death which the donee of a general power to appoint by will cannot accomplish? Nothing! *Ergo,* the donee of a general power to appoint by will, if that power be valid in its inception, is, at the moment when he may exercise the power, practically the owner.[77] *Rous v. Jackson,*[78] *In re Flower,*[79] and *Stuart v. Babington,*[80]

[77] It does not really add anything to the weight of the argument that one having a general power to appoint by will, while he cannot appoint to himself, can appoint to his estate, and the question whether there is a lapsed devise or bequest under the donee's will or the property subject to the power goes in default of appointment, depends upon whether the donee has appointed to his estate first and then devised his own property, or has appointed direct to the objects of appointment: Chamberlain *v.* Hutchinson, 22 Beav. 444 (1856); *In re* Davies' Trusts, L. R. 13 Eq. 163 (1871).

[78] 29 Ch. D. 521 (1885).

[79] 55 L. J. Ch. N. S. 200 (1885).

[80] 27 L. R. Ir. 551 (1891).

which proceed upon this premise and hold the power in A to appoint by will to have been well exercised when A appoints to his daughter for life and then to such of her children as reach twenty-one, are correct on principle. The direct repudiation in each case of the contrary result reached in *In re Powell's Trusts*[81] should be approved. Mr. Gray's attempt to sustain *Powell's Trusts* on principle cannot be regarded as successful.

To take Mr. Gray's view would be to make a further distinction in regard to the exercise of powers which would add an additional pitfall for testators and produce results which are incongruous. For instance, suppose A has a general power to appoint by will and to appoint by deed also after marriage. Suppose A appoints by will and dies the day before marriage. Under Mr. Gray's view the appointment would violate the rule, although if A had died the day after marriage the same will would have been valid. Is it not incongruous for the same act to be dependent for its validity upon such a fortuitous combination of circumstances? Again, suppose A has a general power to appoint by will and to appoint by deed also during the twenty-four hours preceding his death. This, according to Mr. Gray's view, would make A *dominus* so that his appointment by will would be valid. It is incongruous that this should be so when, if the practically useless power to appoint by deed had not been given, the appointment would be void. Still further, suppose A has a general power to appoint one fund by deed or will and a general power to appoint another by will only. A's appointment by will of both funds would be void as to one and valid as to the other. This is incongruous and furthermore, it adds another trap for testators. Draftsmen are now familiar with the danger of devising the testator's own property and property over which he has a power of appointment in the same words because the gift of the testator's own property may be valid and the same gifts by way of appointment may be void. This situation is unfortunate enough, but to add to it the necessity of testators drawing a distinction between appointments under a power to appoint by deed or will and a power to appoint by will alone is to pile distinction on distinction and add trap to trap.

The argument against Mr. Gray's view may also be stated in

[81] 39 L. J. Ch. 188 (1869).

this way: If A owns property and devises it, the remoteness of the interests limited are determined by reference to his death. Whether he has owned the property during his entire life or acquired it only the moment before his death, the rule is the same. The fact that he acquired the property the moment before his death and therefore had, practically speaking, no power to enjoy or alienate it in his lifetime is immaterial. A, with a general power to appoint by deed or will, is in the same position as the owner in fee who enjoyed such ownership during his life. A, with a general power to appoint by will only, is in the same position as the person who acquires property the moment before he dies. If the remoteness of the interests appointed are to be determined as of the date of appointment in the former case because it is the same as if A had the fee during his lifetime, why should not the remoteness of the interests appointed be determined as of the date of the appointment in the latter case because it is the same as if A had acquired the property the moment before he died? In short, if no difference is made between the case where A owns property during his lifetime and the case where he acquires it only the moment before death, why should any difference be made between the case where A has a general power of appointment by deed in his lifetime and the case where he has a general power to appoint by will only at his death?

Mr. Gray (in correspondence with the author) mentioned the following as an unfortunate result of supporting *Rous v. Jackson:* Suppose, he said, A having a general power to appoint by will appoints to B for life and then as B may appoint by will and this keeps up throughout the alphabet. All agree that such a series of limitations would be offensive, but the case put can be dealt with by itself, and A's appointment to B for life and then as B appoints may be held void on grounds entirely apart from the application of the Rule against Perpetuities. A's appointment is void because it is the creation of a substantial restraint on alienation of the fee simple by the splitting up of the interests, so that reckoned from the death of A's testator X the alienation of the fee has been seriously impaired for longer than lives in being and twenty-one years.[82] The second power to appoint can, of course, be linked up with the first gift for life

[82] *Ante,* §§ 658 *et seq.*

and power to appoint because of the general principle that appointments are limitations of interests by the *donor* of the power. Hence, the second life estate and power which are the result of the first appointment are clearly created by the donor of the first power and as such represent a *device* of the first donor of the power for putting a practical restraint on alienation by deed during two successive lives and possibly longer than lives in being and twenty-one years. Nor is there anything inconsistent in this method of condemning the exercise of the power and the creation of the second life estate and power of appointment with the reckoning of the time, in the application of the Rule against Perpetuities, from the death of the first donee. This latter step is in accordance with the exception founded upon the fact that the donee is *dominus* at the time he exercises the general testamentary power. The Rule against Perpetuities is one thing and the rule which forbids the particular device which makes the fee practically inalienable for too long a time by splitting the estates is another, In the application of the Rule against Perpetuities the first donee may well be the *dominus,* but in the application of the rule which forbids a *practical restraint* on alienation by splitting the ownership for too long a time the question of whether the first donee is *dominus* or not is immaterial.

TITLE IX.

LIMITATIONS AFTER AN ESTATE TAIL.

§ 696. Validity of such limitations has already been dealt with: It seemed convenient in dealing with limitations after an estate tail [83] to consider the question of their remoteness along with other questions. Logically the remoteness of the interest should be dealt with at this point.

TITLE X.

CHARITIES.[84]

§ 697. Trusts for charitable purposes not void for remoteness though the trust must last indefinitely: In several Illi-

[83] *Ante,* §§ 410, 411.

[84] *What is a charitable bequest:* Ingraham *v.* Ingraham, 169 Ill. 432; Crerar *v.* Williams, 145 Ill.

nois cases,[85] it is suggested that a trust for 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.[86]

§ 698. Where a 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 precedent 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 was void for remoteness. Courts, however, are quick to see an immediate gift for charity[87] which makes the gift valid, and to hold pursuant to the power of Courts of Equity over charities, that the corporation or association will be permitted to take if it be formed within a reasonable time and if not that the gift to charity will be carried out *cy pres*.[88]

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.

[85] 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.

[86] *Ante*, § 656. Note that in Kirkland *v.* Cox, 94 Ill. 400, 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.

[87] Ingraham *v.* Ingraham, 169 Ill. 432, 452 (quoting Gray's Rule against Perpetuities, § 607).

[88] This must be the ground upon which Morgan *v.* Grand Prairie Seminary, 70 Ill. App. 575, is to

Crerar v. Williams,[89] is 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*,[90] 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.[91] In *Franklin v. Hastings*[92] the testator provided: "For the purpose of aiding in the establishment and support of a public library in the village of Lexington, Illinois, and in honor of my deceased parents, I direct, empower and authorize my executor to hold and apply the sum of ten thousand ($10,000) dollars as follows: Upon the organization of a regularly incorporated library association by the people of Lexington, Illinois, the name of which corporation shall include in it and as a part of it the name of Smith, and that upon provision being made by the people of Lexington, Illinois, and such other persons as may desire, for a fund for the use of said library association sufficient, together with the fund of $10,000 aforesaid, to properly establish and maintain said library, the sufficiency of which fund shall be in the discretion of my said executor but which need not exceed the sum of five thousand ($5,000) dollars, then and in that case my said executor shall pay to the proper officers of said library association the said sum of $10,000." This was held to be an immediate and unconditional gift to charity.

TITLE XI.
ACCUMULATIONS.

Topic 1.
Apart from the Statute on Accumulations.

§ 699. Accumulations other than for charity: When the future interest is executory and there is a provision for accu-

be supported. The charitable bequest there was held valid although the gift was on condition that the city donated a lot.

[89] 145 Ill. 625.

[90] 169 Ill. 432, 454-459.

[91] 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.

[92] 253 Ill. 46, 48-49.

mulation 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.[93] 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 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*,[94] 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.[95]

§ 700. 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 for the same reason 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.[96] Whether such a provision for accumulation can be so diregarded, 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

[93] Rhoads *v.* Rhoads, 43 Ill. 239; Hale *v.* Hale, 125 Ill. 399; Ingraham *v.* Ingraham, 169 Ill. 432, 450.

[94] *Post*, § 732.

[95] *Post*, § 737; *ante*, §§ 658 *et seq.*

[96] *Id.*

advantage to the heirs at law of the testator, for as against them, the whole fund is at once payable to charity.[97]

TOPIC 2.

THE STATUTE ON ACCUMULATIONS.

§ 701. The Thellusson Act re-enacted in Illinois: The Illinois Act of 1907[98] relating to accumulations is substantially a copy of the Thellusson Act.[99] The English cases construing the English Act decided prior to 1907 are, therefore, authority for the construction of the Illinois Act.[1] It would seem that no question of the invalidity of any clause for accumulation can arise till at least twenty-one years after the Act was passed, because the question of what shall be done with the income, which cannot be accumulated, can only arise after the accumulation which is permitted by the statute has been effected.[2] Our Supreme Court has twice indicated that under the terms of the statute the accumulations, if they exceed what the statute permits, are only void as to the excess.[3] The invalidity of a clause for accumulations can hardly affect the validity of other clauses.[4]

TITLE XII.

CONSTRUCTION.

§ 702. Attitude of the court in handling questions of construction which must be determined before the Rule is applied: Mr. Gray thus summed up the attitude announced by the English judges:[5] "The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will or settlement is to be construed as if the rule

[97] Ingraham *v.* Ingraham, 169 Ill. 432.

[98] Laws 1907, p. 1.

[99] 39 and 40 Geo. III, ch. 98 (1800).

[1] For an exposition of the English cases construing the English Act, see Gray's Rule against Perpetuities, §§ 686 *et seq.*

[2] French *v.* Calkins, 252 Ill. 243, 254.

[3] French v. Calkins, *supra;* Kolb *v.* Landes, 277 Ill. 440, 449.

[4] Kolb *v.* Landes, *supra.*

[5] Gray's Rule against Perpetuities, § 629.

did not exist, and then to the provision so construed the rule is to be remorselessly applied." Our Supreme Court in *Dime Savings and Trust Company v. Watson* [6] approved this attitude and the English cases which announced it.

Mr. Gray, however, says: [7] "There is a legitimate use of the Rule against Perpetuities in matters of construction. When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest." It should be observed that this presupposes a case where the two possible constructions are evenly balanced, and where there is, in consequence, an actual ambiguity. It does not mean that where the highest degree of ingenuity can demonstrate that there are two possible constructions the court may adopt that which does not offend the rule. Our Supreme Court has several times declared the rule to be that "where a will is susceptible of two constructions, one of which will render it valid and the other void, courts will, if they can do so without doing violence to the intention of the testator, adopt the construction that will render the will valid.[8] This probably means what Mr. Gray says. As worded, however, it takes the emphasis away from the idea that the two constructions must be fairly balanced so that a real ambiguity arises.

§ 703. Modifying clauses: The English cases adopted a special rule with regard to modifying clauses. Mr. Gray states it as follows: [9] "When there is a good absolute gift, and the settlor or testator goes on, in an additional clause, to modify the gift, and, by modifying it, makes it, in part, too remote, the modification is rejected *in toto*, and the original gift stands. Thus if land is devised to an unborn child in fee, and by a subsequent clause of the will the testator directs that the land so devised shall be settled on such child for life, remainder to its children in fee, which remainder is void for remoteness, the whole modifying clause is disregarded, and the child takes a

[6] 254 Ill. 419, 427.

[7] Gray's Rule against Perpetuities, § 633.

[8] Heisen *v.* Ellis, 247 Ill. 418, 429; McCutcheon *v.* Pullman T. & S. Bank, 251 Ill. 550, 555.

[9] Gray's Rule against Perpetuities, § 423.

fee simple." This rule was applied by our Supreme Court in *Carpenter v. Hubbard.*[10] There a clause at the beginning of the will fixed a period of distribution which did not violate the rule. A later clause altered the time of distribution so that the rule was violated. It was insisted in argument that of two conflicting clauses in a will, the later one represented the expressed intent and the validity of the entire will must be judged with reference to that expressed intent alone, and hence the ultimate gift was void for remoteness. This the court denied and applying the rule as to modifying clauses, rejected the period of distribution as stated in the latter part of the will, and permitted the intent as expressed in the first part of the will, as to the period of distribution, to stand.

TITLE XIII.

ESTOPPEL AND ELECTION.

§ 704. One who has received an interest devised by a will is not precluded from attacking the provisions of the same will on the ground that they violate the Rule against Perpetuities: The Rule against Perpetuities is a rule founded upon public policy which individuals cannot waive to the detriment of the public. It is true that it is left to the interest of individuals to vindicate the rule. But the rule itself is none the less one in which the public is so much interested, that the individual is not permitted to estop himself from asserting its application. It seems, therefore, to be the rule that an heir claiming property because a limitation, in violation of the Rule against Perpetuities, fails, is not precluded from asserting his right to it merely, because he has taken benefits under valid provisions of the will.[11]

[10] 263 Ill. 571.

[11] Schuknecht *v.* Schultz, 212 Ill. 43, 48; Mason *v.* Bloomington Library Assn., 237 Ill. 442; *In re* Oliver's Settlement, [1905] 1 Ch. 191, 198-199; *In re* Walkerly's Estate, 108 Cal. 627, 658-659; Fifield *v.* VanWyck, 94 Va. 557, 562; *In re* Schmidt's Estate, 15 Mont. 117; Bowers *v.* Smith, 10 Paige (N. Y.) 193, 204; Walker *v.* Taylor, 15 App. Div. 452, 457-458; 44 N. Y. Supp. 446; Staples *v.* Hawes, 24 Misc. Rep. (N. Y.) 475, 480; *In re* Durand, 56 Misc. Rep. (N. Y.) 235, 240.

The *dictum* in the opinion of Judge Tuley, set out at length in Madison *v.* Larmon, 170 Ill. 65, 82, if it be to the contrary, cannot be

TITLE XIV.

EFFECT OF FAILURE OF SOME LIMITATIONS FOR REMOTENESS ON OTHERS.[12]

TOPIC 1.

EFFECT ON PRIOR LIMITATIONS NOT TOO REMOTE WHEN SUBSEQUENT LIMITATIONS FAIL FOR REMOTENESS.

§ 705. General rule as stated by our Supreme Court in Barrett v. Barrett:[13] Whenever some one or more of the limitations of a will are void for remoteness, the important practical question at once arises, how far will the valid limitations also fail. In the recent case of *Barrett v. Barrett*,[14] the court laid down the general rules as follows: "Where several trusts are created by will which are independent of each other and each is complete within itself, some of which are lawful and others are unlawful, and which may be separated from each other, the illegal trusts may be cut out of the will and the legal ones permitted to stand." On the other hand, "when some of the trusts in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or to some of them, then all the trusts must be construed together and all must stand or all must fall." These general statements do not go very far in determining results in particular cases. The question still remains, when are the gifts separable and when are they inseparable? When is it to be held that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected? When does manifest injustice result from

regarded as law. The remarks of the learned judge were unnecessary to the decision. The recent case in this state of Schuknecht *v.* Schultz, 212 Ill. 43, is directly *contra* to Judge Tuley's *dictum*. The decision in Mason *v.* Bloomington Library Assn., 237 Ill. 442, is also *contra*, because there the legacy which was void for remoteness, went to the residuary legatee, so that the residuary legatee was in the position of taking the residue under the will and also of increasing his residuary gift by urging the invalidity of one of the bequests.

[12] *Compare ante*, §§ 642, 661.

[13] 255 Ill. 332, 338.

[14] *Id.*

a construction which sustains some portions of the will while others are eliminated? It is only when we come actually to classify all results reached that we obtain any insight into the considerations which induce the court to answer these questions one way or the other.

§ 706. Cases where the court held that the limitations not void for remoteness should be enforced: In *Howe v. Hodge* [15] we have the devise of a residue to trustees to convert and divide the principal among all the testator's grandchildren, so as to vest an interest in them at birth, but subject to a postponement of payment of the principal until each arrived at thirty years of age. Then there was a gift over if any grandchild died before that age. The gift over was held void for remoteness, but the original gift to the grandchildren stood. This was in spite of the fact that there was a trusteeship and because the valid gift was the disposal of an absolute interest in the corpus of the estate direct to the grandchildren. This is the controlling feature noted in *Barrett v. Barrett.*[16]

In *Nevitt v. Woodburn*,[17] a devise was made to the testator's son for life, with a remainder in fee to his children, with a gift over if he died childless to the families of the testator's brothers. The gift over was void for remoteness. It was held, however, that this did not invalidate the gift to the grandchildren. The court said that there was no such connection between the limitations as required both to stand or fall together and that no injustice was done by permitting the valid part to stand. In *Barrett v. Barrett*, the following characteristics are noted as controlling the decision: (1) That there was no trusteeship. The estates were legal. (2) The valid portion of the will included a life estate and a disposition of the fee directly and absolutely, the void part being a gift over after such disposition in fee. Hence, with the gift over eliminated, there was a simple life estate with a vested and indefeasible interest in fee in remainder.

In *Chapman v. Cheney*,[18] the trustees appear to have had only a legal estate for the life of the son, upon trust for the son for life, with legal remainders to the son's children vesting in interest at once (as the court construed the will), with a post-

[15] 152 Ill. 252.
[16] 255 Ill. 332, 346.
[17] 190 Ill. 283.
[18] 191 Ill. 574.

ponement of payment until the grandchildren reached thirty, and a gift over if any died before reaching that age. The gift to the grandchildren was valid and the gift over, if they died under thirty, was void. The court held, however, that the valid portions of the will should stand and be enforced. The characteristics noted in *Barrett v. Barrett,* for this result were (1) the absence of a trusteeship covering the remainder and gifts over; (2) the fact that the valid parts of the will include a life estate and a disposition of the remainder in fee simple, so that when the ultimate gift over was held void there remained a life estate and a vested and indestructible fee in remainder.

In *Johnson v. Preston,*[19] land was (as the court construed the will) devised to trustees to take effect from and after the probate of the will and to continue thereafter for twenty-five years. This was held void for remoteness. The beneficial interests, however, (as the court construed them) were *in presenti* to J. R. P. and G. H. P. and after the twenty-five years the land to go to them "or their heirs." This last phrase "or their heirs" seems to have been taken, following *Ortmayer v. Elcock,*[20] as if it indicated merely that the persons named were to take the fee. There was an annuity given of $100 a year for the twenty-five year period or the life of the annuitant. The heirs filed a bill for partition on the theory that the entire will, because of the remote limitation to trustees, failed. The bill was dismissed and this was affirmed by the Supreme Court. It was clear to the court that the gift to the trustees was void for remoteness, but it was denied that the devise to the trustees was so connected with the limitations to the beneficiaries that the latter could not be enforced. The annuity was enforced as a charge against the land. From the point of view of what is manifest justice and also the presumed intent of the testator, this result seems proper enough. The trusteeship is the subordinate thing and the beneficial interest the main thing. There is no reason, therefore, why the illegality of the former should carry down the latter. In *Barrett v. Barrett,* however, the court speaking by Mr. Justice Hand, seems to suggest that the will was in effect entirely set aside, the property passing as intestate estate, and that the court did in effect find the trusteeship and beneficial interests so bound up together that when the former failed, the whole failed. The

[19] 226 Ill. 447. [20] 225 Ill. 342.

court said: "The entire trust was held void and the estate intestate." We do not so understand the scope of the court's opinion in *Johnson v. Preston.*

In *Quinlan v. Wickman,*[21] the trustee took an absolute interest in the trust estate upon trust for the testatrix's child Elizabeth for life, then to such of her children as reached thirty, with a gift over on two contingencies, (1) if Elizabeth died leaving no children; and (2) if she died leaving children who died before they reached thirty; then over to Nellie absolutely. The gift to the children of Elizabeth at thirty was void; also the gift over on the contingency that Elizabeth died leaving children and they died under thirty. A bill was filed by the heirs at law for partition on the theory that the whole will failed. The bill was dismissed. This was affirmed because, while part of the will was void, yet the life estate in Elizabeth was valid subject to a valid gift over if she died without leaving any children. Hence, although the heirs had a vested reversionary trust pending the happening of Elizabeth's dying leaving children, yet since it was uncertain ever to vest in possession, they could not have partition. Here, then, the valid portions of the will were sustained (1) although there was a trusteeship covering the invalid as well as the valid gifts; (2) although one valid gift was in the same clause and a part of the same sentence with the void gift over; and (3) although the sustaining of the valid portion resulted in Elizabeth having a life estate and also a share as heir if the event of her dying leaving no children did not happen. It very likely appeared to the court that the will indicated a general purpose on the part of the testator to prefer Elizabeth and Nellie to the rest of his heirs at law and that he, therefore, made these special provisions for them by his will. To hold them all invalid would be to defeat that purpose completely and divide the property set aside for Elizabeth and Nellie between the heirs at law. Hence it probably seemed fair and reasonable to the court to sustain the special gifts for Elizabeth and Nellie as far as possible. This the court was able to do by giving Elizabeth her life estate and sustaining the gift over to Nellie in the one contingency of Elizabeth dying without leaving children. On the other hand, if Elizabeth died leaving children, the gift over would not take effect; Elizabeth

[21] 233 Ill. 39.

would inherit part of the fee and be able to dispose of it to her children.

In *Moroney v. Haas*[22] the situation was very similar to that in the last case. There was created a trusteeship for Sadie (one of the testatrix's heirs at law) for life, then to her children or issue of a deceased child, with a gift over "in case no such children or issue of deceased children shall survive" the life tenant, "or in case no surviving child shall attain the age of twenty-five years and all shall die without issue," to James Hill (another one of several heirs of the testatrix). The gift over on the first contingency was valid; on the latter void; yet only the invalid portion was rejected.

§ 707. Cases where the valid portions of the will failed along with the invalid: In *Lawrence v. Smith*[23] the testator gave all his property to trustees to pay annuities to two sons and a daughter and to pay to each of three daughters, A, B and C, six hundred dollars annually during their lives, and upon their death to pay three hundred dollars to each of their children till such children reached twenty-five, and then to pay such children each $10,000. The gift of $10,000 was valid to each child born during the life of the testator. After the payment of all of the above sums the testator directed the principal of his estate to be paid to his grandchildren then living. This last was void for remoteness. It was decided that all the above mentioned gifts failed because the ultimate limitation over was void for remoteness. This was affirmed. Here there was a trusteeship covering all the gifts. Furthermore, the gift of $10,000 to each grandchild was contingent on such grandchild reaching twenty-five. Hence with the ultimate gift over eliminated there was no absolute and direct gift of the corpus of the estate to any beneficiary. There was left merely the annuities, the payment of sums to the daughters for life and to the grandchildren till each reached twenty-five. This situation presents some distinction from that presented in *Howe v. Hodge*,[24] *Nevitt v. Woodburn*,[25] and *Chapman v. Cheney*.[26] In spite of this distinction, however, the gifts can hardly be said to be inseparable so far as the language used is concerned. The result seems to

[22] 277 Ill. 467.
[23] 163 Ill. 149.
[24] 152 Ill. 252.
[25] 190 Ill. 283.
[26] 191 Ill. 574.

be based rather upon the ground of what is manifestly just under all the circumstances, or is a guess as to what the testator would have desired had he known that the ultimate gift over was void, or perhaps both. On the question of the injustice of sustaining the valid limitations the court probably observed that to sustain the annuities and gifts to daughters and their children till each reached twenty-five, and the payment of $10,000 to each grandchild living at the testator's death who reached twenty-five, would in fact tie up the distribution of the entire estate. The children, as the testator's heirs at law, would be ultimately entitled, subject to deductions for indefinite amounts, which would prevent the distribution as long as they lived. Such a situation no doubt appealed to the court as unjust to the children. It no doubt also appealed to the court that the testator, under the circumstances, would have desired his children to receive the estate at once rather than that they should actually have an equitable ownership in it without being able to obtain a distribution. As the testator's children, who were his heirs at law, and their families were all treated substantially alike, there was absent the situation presented in *Quinlan v. Wickman*,[27] where the testator was specially preferring two of his heirs over the remainder. According to Gray [28] our Supreme Court made a very poor guess as to what the testator would have intended had he known the ultimate limitation was void. If, however, guessing as to what the testator would have intended is permissible, it is on the whole futile to complain that the court has not made as good a guess as it ought to.

In *Eldred v. Meek*,[29] there were, by clauses 4, 5 and 6, gifts of separate parcels to named grandchildren, contingent upon their reaching twenty-five. These were valid. Then by clause 10 there was a gift over if the grandchildren died under that age, to such children of them as reached twenty-five. This was void. It was held that because the gift over in clause 10 failed, the separate contingent gifts in clauses 4, 5 and 6 failed also. The situation presented here was like that in *Lawrence v. Smith*,[30] to this extent, that there was a trusteeship covering all the gifts and the gifts which were valid were contingent

[27] 233 Ill. 39; *ante*, § 706.

[28] Gray's Rule against Perpetuities, 2nd and 3rd ed., § 249c.

[29] 183 Ill. 26.

[30] 163 Ill. 149.

upon the devisees reaching twenty-five, so that with the gifts over eliminated there was no absolute present gift to any devisee. Here, however, the testatrix's only heir at law seems to have been her child. The gifts to the grandchildren were gifts to the children of the testatrix's only child. Hence if the gift over were held void and the valid portions of the will sustained, the fee would not go to the grandchildren but to the testatrix's only child, subject to be divested if the grandchildren reached the age of twenty-five. If the gifts to the grandchildren are entirely eliminated, then the daughter would obtain the whole property as intestate estate. As the daughter was given one-fourth of the personal property absolutely, there would seem to be a clear purpose on the part of the testatrix to prefer her grandchildren by giving them specific portions of her estate when they reached twenty-five. Following the decision of the court in *Quinlan v. Wickman*,[31] it might have been expected that the purpose of the testatrix would be carried out as far as possible by permitting the specific gifts to the grandchildren to stand. It is difficult to perceive any ground in the supposed intent of the testator, or as a matter of justice to the daughter, for holding void the valid gifts to the testatrix's grandchildren who reached twenty-five.

In *Owsley v. Harrison*,[32] one share of the estate was to be kept together for two years after the testator's death, and one-half of such share was devised to the testator's children for life, and on the death of any one of them within the two years leaving issue, such surviving issue should take a life estate with a remainder to the heirs of their bodies. The remainder to the heirs of the body was void for remoteness. The court held that the life estates failed along with the gift over and there was an intestacy. Here there appears to have been no trusteeship. But if the ultimate gift over only was held invalid the children would have taken life estates, with a succeeding life estate to their children and an ultimate fee in the children of the testator themselves as heirs at law. Thus, the children of the testator would have had the fee subject to a possible life estate after their death. This would have prevented distribution at once and caused the inconvenience in the matter of disposition which such contingent estates make. This inconvenience

[31] 233 Ill. 39.

[32] 190 Ill. 235.

was avoided by the elimination of the second life estate, thus giving the children of the testator the fee at once.

In *Pitzel v. Schneider*,[33] there was a trust for the widow for life of an annuity and then a provision that the income should go to two children of the testator for their lives. Then there was a gift over to all the testator's grandchildren when they reached twenty-five. It was held that the last was clearly void and that this resulted in the whole trust failing and an intestacy. The language of the court on this point is very brief. It should be noted that the wife had died before the testator, so that there was no question about the validity of her annuity. The two children who received the income at the widow's death were the testator's only heirs at law. Hence when the ultimate gift failed they took as heirs at law the remainder, and having an equitable life estate also, they might well say that they had the entire equitable interest and the trusts should be wound up. The remarks of the court might be regarded as applicable to this precise situation.

In *Reid v. Voorhees*,[34] there was no trusteeship. The third clause disposed of the rents of land to nephews and nieces for thirty years. If during that time any died without an heir, his or her share was to go to the living heirs. By the fifth clause all the property devised by the third clause went, after thirty years, to the nephews and nieces or their heirs. The last was void for remoteness. This was held to carry down with it the third clause, because, otherwise, a mere gift of rents for thirty years would be left with no further disposition of the property. Then the question arose as to the second clause. That gave the residue of personal property to two nephews. There was no verbal connection between the gift by the second clause and that by the third clause. The properties given by each clause were distinct. Yet the court held that the second clause failed with the third and fifth. The second clause disposes of personal property to two nephews. The third clause disposes of real estate to other and different nephews and nieces. There was no trusteeship. Why should the failure of the gift in the third clause carry with it the gift in the second clause? The only explanation seems to be that by holding the second clause invalid the court was able to distribute the testator's property

[33] 216 Ill. 87, 98. [34] 216 Ill. 236.

to the two nephews named in the second clause and the nephews and nieces named in the third clause in the proportions which the court believed the testator intended. The personal property devised by the second clause and the real estate devised by the third were practically equal in value. If there was an intestacy with respect to the property named in both clauses then the two nephews named in the second would take one-half the personalty and one-half the real estate, which was about equal to the value of all the personalty named in the second clause. The other nephews and nieces would take one-half the personalty and one-half the realty, which was about equal in value to the real estate named in the third clause. This seemed to the court a practically equitable result. On the other hand, if the third clause were held void and the second sustained, the two nephews named in the second clause would receive one-half the real estate attempted to be devised by the third clause in addition to what they received by the second. This seemed to the court manifest injustice. They probably said to themselves that the testator would not have so intended had he known that the gift in clause three had failed.

Dime Savings Co. v. Watson,[35] and *Barrett v. Barrett,*[36] present a situation very like *Owsley v. Harrison,* except that the interests were all equitable. In *Dime Savings Co. v. Watson* the testator gave nine-tenths of the income of the estate held by trustees to nephews and nieces and the lineal descendants of any deceased nephew or niece until twenty years after the death of the last surviving nephew and niece, when there was to be a division among the testator's grandnephews and nieces. The ultimate gift over was void. If the rest had stood it would have left the nephews and nieces who were the testator's heirs at law to take the income for life, with a gift of the income to their lineal descendants for a further period, with the ultimate interest in the nephews and nieces as heirs at law. Thus, the nephews and nieces would fail in securing an actual distribution because of the very slight interest of their lineal descendants, who might just as well take their chances of receiving an interest from their parents direct. Hence all the limitations above named were held to fail. So in *Barrett v. Barrett,* after a life estate to the wife, there was a gift of

[35] 254 Ill. 419. [36] 255 Ill. 332.

an undivided one-fourth to each of four sons for life, with a gift of each share to the children or issue of the sons for life, with a gift over of the absolute interest to the lawful issue and next of kin of grandchildren. There was a trusteeship over all the interests. The ultimate gift was void. If the other gifts had stood there would have been life estates to the children and grandchildren and an ultimate gift over by descent to the children. The situation would have been inconvenient for the children, since while having practically the entire interest, there could be no distribution, because of the life estate in their children. If the children took the entire estate at once their children's interests would be sufficiently protected by reason of the fact that they would naturally take ultimately from their parents. All the gifts were held to fail.

§ 708. **Summary of conclusions from the cases:** 1. When the fee simple or absolute interest in property is disposed of by a valid provision, either with [37] or without [38] the introduction of a preceding life estate, and only the gift over which defeats the fee or absolute interest is void, the valid disposition will stand. If there is no trusteeship of the property disposed of absolutely or in fee, this conclusion is aided,[39] but it will be reached even when there is a trusteeship.[40]

2. On the other hand, where there is a succession of life estates, with an ultimate gift of the absolute interest which is void for remoteness, and the first life tenants are the heirs at law, all the limitations will fail and there will be an intestacy. It makes no difference that there is a trusteeship.[41]

3. Suppose, after a life estate, there is limited a contingent gift over of the fee or absolute interest which is valid, and another contingent gift of the same property which is void, and the trusteeship covers all the gifts: (a) If the life tenants are the heirs at law who take ultimately and there is no plan to prefer some to others, then all the interests will fail and the

[37] Nevitt *v.* Woodburn, 190 Ill. 283; Chapman *v.* Cheney, 191 Ill. 574.

[38] Howe *v.* Hodge, 152 Ill. 252.

[39] Nevitt *v.* Woodburn, *supra;* Chapman *v.* Cheney, *supra.*

[40] Howe *v.* Hodge, *supra.*

[41] Reid *v.* Voorhees, 216 Ill. 236 (as to the third clause); Dime Savings Co. *v.* Watson, 254 Ill. 419; Barrett *v.* Barrett, 255 Ill. 332. *Accord:* Lockridge *v.* Mace, 109 Mo. 162; also Johnston's Estate, 185 Pa. 179; Hewitt *v.* Green, 77 N. J. Eq. 345, 363.

heirs at law will take at once as upon an intestacy.[42] (b) On the other hand, if the instrument shows a plan to prefer some of the heirs to others by giving the life estate and the contingent interests to particular heirs and excluding other heirs entirely, then the limitations which are valid will stand in order to carry out such preference as far as possible.[43] (c) In *Eldred v. Meek*[44] no life estate preceded the contingent gifts and the testator seemed to have a plan to prefer the children of his daughter to the daughter herself in respect to the gift of certain pieces of property devised to the daughter's children if they reached twenty-five. It would seem that the views acted upon by the court[45] might well have been applied in this case to sustain the specific gifts of real estate to the children of the testator's daughter which were valid, holding only invalid the gift over which was void for remoteness.

4. Several cases rest upon situations so special in character that they hardly warrant any generalization with respect to what facts will cause the valid limitations to fail along with the invalid.[46]

§ 709. Gray's statement in his Rule against Perpetuities[47] not followed: Gray states what he considers to be the proper rule thus: "If future interests created by any instrument are avoided by the Rule against Perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument." He points to *Eldred v. Meek*,[48] *Lawrence v. Smith*[49] and *Owsley v. Harrison*[50] as in opposition to this statement and insists upon the impropriety of the results therein reached. It must now be plain from the entire line of cases on this subject in this State that Gray's view, as above expressed, has not been followed by our Supreme Court.[51] It is equally apparent that our Supreme Court is not really guided in its conclusion by any actual

[42] Lawrence *v.* Smith, 163 Ill. 149.

[43] Quinlan *v.* Wickman, 233 Ill. 39; Moroney *v.* Haas, 277 Ill. 467.

[44] 183 Ill. 26.

[45] *Id.*

[46] Johnson *v.* Preston, 226 Ill. 447; Reid *v.* Voorhees, 216 Ill. 236 (as to the invalidity of the second clause).

[47] § 247.

[48] 183 Ill. 26.

[49] 163 Ill. 149.

[50] 190 Ill. 235.

[51] This may be said in spite of the fact that the court has recently quoted Gray's statement with approval in Moroney *v.* Haas, 277 Ill. 467, 472.

consideration of whether the limitations, according to the language used, are separable and independent or dependent and part of a single scheme which must stand or fall together as a whole. What it really does is to obtain a result which it regards as manifestly just under all the circumstances. As a part of the inquiry regarding what is manifest justice the court undertakes to determine what the testator would have desired with respect to the valid dispositions if he had known that part of his will must fail, and were given no time within which to make a new one. In short, where part of the limitations fail for remoteness, the court exercises a discretion in determining whether it is advisable that any other part of the will shall also fail. The appeal in the present state of the decisions must be to the discretion of the court.

Topic 2.

Effect on Subsequent Limitations When Prior Limitations are Void for Remoteness.

§ 710. The rule of Monypenny v. Dering:[52] The English cases have countenanced a rule "that a vested limitation, or a limitation for life, to a living person is void if it follows an interest which is too remote."[53] The principal English case in support of such a rule is *Monypenny v. Dering*. The same rule has been more loosely expressed as follows: "Where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void." This rule has been referred to with approval by our Supreme Court, and *Monypenny v. Dering* cited.[54] Gray strongly disapproves of the doctrine, which he says,[55] "introduces an arbitrary element into the Rule against Perpetuities, and defeats the intentions of testators without any pretext of public policy, under the false pretence of supporting them."

[52] 2 De G. M. & G. 145.

[53] Gray's Rule against Perpetuities, §§ 251-257.

[54] Quinlan *v.* Wiekman, 233 Ill. 39, 46, 47.

[55] Gray's Rule against Perpetuities, § 257.

BOOK V.

ILLEGAL CONDITIONS AND RESTRAINTS ON ALIENATION.

CHAPTER XXVII.

FORFEITURE AND RESTRAINTS ON ALIENATION.

§ 711. 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.

TITLE I.

FORFEITURE ON ALIENATION.[1]

Topic 1.

Of a Fee Simple or an Absolute Interest in Personalty.

§ 712. Where the fee simple or absolute interest is in possession: The doctrine is recognized in this state that a provision of forfeiture upon the alienation of the fee simple, or an absolute interest in personalty, is in general void.[2] In *Davis*

[1] Attitude of the court in regard to the construction of clauses of forfeiture: Henderson *v.* Harness, 176 Ill. 302. In Newcomb *v.* Masters, 287 Ill. 26, the question as to whether a breach had occurred and whether notice must be given were considered.

[2] Henderson *v.* Harness, *supra*, *semble;* Davis v. Hutchinson, 282 Ill. 523; Jenne *v.* Jenne, 271 Ill. 526, 537. 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 num-

v. Hutchinson[3] the court quoted with approval Gray's statement that since the invalidity of the provision for forfeiture on alienation depended upon public policy "the technical form of putting an end to a fee simple upon alienation must be immaterial."

Littleton said:[4] "But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." The inference from this is that if the provision for forfeiture was operative if the one taking the fee aliened to anyone except a person named, or a small class of persons, it would be void. It was so held in *Attwater v. Attwater*.[5] In *Doe v. Pearson*[6] and in *In re Macleay*[7] such a provision of forfeiture was sustained. Our Supreme Court has recently gone to an opposite extreme and denied the statement of Littleton by holding void a gift over if any devisee aliened to a named person or his wife.[8]

§ 713. Forfeiture upon alienation of future interests: A contingent remainder being inalienable, a provision for the forfeiture of the chance ever to have it vest if alienation is attempted while the interest remains future, cannot be void.[9] Where the remainder is vested in interest and indefeasible a provision for forfeiture upon alienation while the interest remains a future one has been sustained by the English cases[10] and denied validity

ber of years, was valid merely for the sake of argument, since it went on to hold that it had not been violated.

[3] 282 Ill. 523, 528.

[4] § 361.

[5] 18 Beav. 330 (1853).

[6] 6 East, 173 (1805).

[7] L. R. 20 Eq. 186 (1875).

[8] Jenne *v.* Jenne, 271 Ill. 526.

[9] Larges' Case, 2 Leon. 82 (1588).

[10] *In re* Porter, L. R. [1892] 3 Ch. 481. Here the remainder was subject to be divested if the remainderman died under twenty-one, but Mr. Gray assumes the remainderman had reached twenty-one, so that the remainder was indefeasible when the clause of forfeiture was attempted to be applied. Gray, Restraints on Alienation, 2nd ed., § 51a. *In re* Goulder, L. R. [1905] 2 Ch. 100; Kiallmark v. Kiallmark, 26 L. J. Ch. 1; Kearsley *v.* Woodcock, 3 Hare, 185. But Powell *v.* Boggis, 35 Beav. 535, seems *contra*. The scope of Gazzard *v.* Jobbins, 14 N. S. W. R. Eq. 28 (1893) is uncertain because the court, after determining that the forfeiture clause applied whether the remainderman was out of possession or in possession, may have held that it could not separate the clause of forfeiture but

in Michigan.[11] The reason for this difference in result is that the Michigan court emphasized the fact that a vested remainder was alienable at law like a fee in possession. Hence a provision of forfeiture on alienation was void. The English judges, on the other hand, may have remembered that in equity an attempted alienation of a vested and indefeasible remainder or reversion would be set aside unless a proper consideration was paid.[12] In short, there was a public policy against allowing the unrestricted alienation of such interests. Hence, a provision of forfeiture on attempted alienation was not so far contrary to public policy as to be void.

TOPIC 2.

OF ESTATES FOR LIFE OR FOR YEARS.

§ 714. Forfeiture upon the alienation of a life estate: *Waldo v. Cummings*,[13] 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*,[14] however, the court seems to have intended to hold that such a provision of forfeiture, attached to a life estate, was invalid.[15] 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.

must regard it as all bad, since it would be void so far as it was intended to operate after the remainder vested in possession.

[11] Mandlebaum *v.* McDonell, 29 Mich. 78 (1874).

[12] *Ante*, §§ 370 *et seq.*

[13] 45 Ill. 421.

[14] 176 Ill. 302. See also Hunt *v.* Hawes, 181 Ill. 343; Streit *v.* Fay, 230 Ill. 319; Newcomb *v.* Masters, 287 Ill. 26.

[15] Walker v. Shepard, 210 Ill. 100, 111, 112, *semble, accord.*

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.[16] But observe where this reasoning takes one. Every right of re-entry attached to a 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 nothing in this reason of repugnancy,[17] 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 settled that the forfeiture of a fee upon alienation is void.[18] 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.[19] The reason for this latter result is that 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

[16] Same reasoning approved in Walker *v.* Shepard, *supra.*

[17] *Ante,* § 447; *post,* §§ 723, 735.

[18] *Ante,* § 712.

[19] *Post,* § 715.

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."[20] *Henderson v. Harness* seems to stand alone as a decision contrary to such a rule.[21]

§ 715. 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.[22]

Topic 3.

Of an Estate Tail or the Statutory Estates in Place Thereof.

§ 716. 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[23] the provision for forfeiture is void.[24] 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 his children.[25] The question in this state, therefore, becomes: Will the provision for

[20] Gray's Restraints on Alienation, 2nd ed., § 78.

[21] It should be observed that 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." This was repeated in Streit *v.* Fay, 230 Ill. 319, 324.

[22] *Ante*, §§ 233-239.

[23] *Ante*, § 402.

[24] Gray's Restraints on Alienation, 2nd ed., §§ 75-77.

[25] *Ante*, § 405.

forfeiture upon alienation be discharged as to both the life estate and the remainder, or will the life estate and the remainder in fee both be subject to the restraint, and the provision of forfeiture on each interest be dealt with separately?

This question becomes important in dealing with *Henderson v. Harness.*[26] 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 the *Rule in Shelley's Case* could be applied,[27] A would have a fee tail with a restraint on alienation going to the whole estate. If, then, it could be said 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 estate tail into limitations to A for life with a remainder to the life tenant's children. It will, therefore, be urged that one cannot say 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,*[28] that before the Statute on Entails operates, the donee must become actually seized of an estate tail. While so seized the provisions of forfeiture on alienation were void and ceased to exist.

TITLE II.

FORFEITURE ON FAILURE TO ALIENATE—GIFTS OVER ON INTESTACY.

TOPIC 1.

WHERE THE FIRST TAKER HAS A FEE OR ABSOLUTE INTEREST.

§ 717. Introductory—Typical cases stated for consideration: The validity in general of springing and shifting executory in-

[26] 176 Ill. 302.
[27] *Ante,* § 412.
[28] 196 Ill. 119; *ante,* § 403.

terests in real and personal property, especially when created by will, is now fully established.[29] It is important, therefore, to classify and arrange cases where certain classes of shifting interests are void because there is in fact a provision of forfeiture on alienation which is void on grounds of public policy. Sometimes these cases take the form of a gift over on failure to alienate. An analysis showing the distinctions which may be taken can best be effected by presenting six typical cases for consideration, both on principle and under the authorities.

Case 1: To A absolutely, but if he does not dispose of the property by deed or will, then to B. This is the same as if the gift over read "if A die intestate." The case is not altered in substance if A be given a power to dispose of the property by deed or will, with a gift over of what remains undisposed of in that manner. 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 in 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. (Case 2, *infra.*) 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 presented in *Wilson v. Turner*,[30] and *Lambe v. Drayton*.[31] It has seemed 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

[29] *Ante*, §§ 462, 463-467.

[30] 164 Ill. 398; 55 Ill. App. 543.

[31] 182 Ill. 110. See also Orr v. Yates, 209 Ill. 222.

classed as cases of gifts over on intestacy.[32] There is much to support this in the fact that our Supreme Court regarded them as falling within the rule of *Wolfer v. Hemmer*,[33] where the gift over was clearly upon intestacy.

Case 1a: To A absolutely, but if he die without leaving issue and without disposing of the property by deed or will, to B. The case is the same if the gift is upon A's death intestate and without leaving issue; or if the limitations are to A absolutely, with power to dispose of it by deed or will, and if A dies without leaving issue then what remains undisposed of, to B.

Case 2: To A absolutely, but if he does not dispose of the property by *deed*, then to B. This is the same in effect as a gift over to B if A attempts to dispose of the property by will. The case is still the same if A be given a power to dispose of the property in his lifetime, with a gift over of all that remains undisposed of in that manner.[34] The case is still the same if there be a gift over of all that remains undisposed of by the first taker during his lifetime,[35] for where the first taker is given

[32] 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.

[33] 144 Ill. 554.

[34] 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."

[35] 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

an absolute interest the express power to alienate by deed is surplusage. The absolute interest gives the first taker 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.

Case 2a: To A absolutely, but if he dies without leaving issue and without disposing of the property by *deed*, then to B. This case, while remaining substantially the same, may be worded

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*, §§ 720 *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 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," (*ante*, §§ 648, 649), 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.

in the same different ways as Case 2, always adding, however, the contingency of A's dying without leaving issue.

Case 3: To A absolutely, but if he does not dispose of the property by will, then to B. This is the same in effect as if the gift over were to B if A did attempt to dispose of the property by deed. 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.

Case 3a: To A absolutely, but if he dies without leaving issue and does not dispose of the property by will, then to B. This case also, while remaining substantially the same, may be worded in the same different ways as Case 3, always, however, with the addition of the contingency of A's dying without leaving issue.

§ 718. Consideration of Cases 3 and 3a: In Case 3 the gift over is upon a failure to alienate by will. This is in effect an indirect way of providing a forfeiture if the first taker does alienate by deed. The gift over is, therefore, void.[36]

In Case 3a it might be argued that the gift over on a definite failure of issue was valid taken by itself, but that its presence made the fee of the first taker unmarketable and that the power to alienate by will, so to convey an indefeasible title even if there were a failure of issue, was a practical extension of the first taker's liberty of alienation. This practical liberty in alienation would, however, be slight because it is only a liberty to convey at death. The case, therefore, presents strongly the feature of a provision of forfeiture upon attempted alienation by deed and the gift over has accordingly been held void.[37] This result was reached by our Supreme Court in *Wilson v.*

[36] Holmes *v.* Godson, 8 De Gex, M. & G. 152 (1856). But see Meldahl *v.* Wallace, 270 Ill. 220, where the gift over of a remainder after a life estate if the remainderman died intestate (probably meaning without making a will) before the life tenant, was apparently sustained. Compare *ante,* § 713.

[37] Gulliver *v.* Vaux, 8 De G., M. & G. 167, set out very fully in Holmes *v.* Godson, *supra.*

Wilson.[38] The deed in question in that case, as the court construed the words, conveyed a fee to John Wilson with the following gift over: "It is further provided that the above land is not to be transferred, but if said John Wilson and Julia Wilson, his wife, should die intestate (with no children), the above described lands are to be the undivided property of my three youngest sons [naming them]." Upon the death of John Wilson without children and intestate, the court held that his fee descended, one-half to his widow and the other half to his collateral heirs, subject to the widow's dower, and that the gift over was void. The gift over was not, however, void because it was a fee on a fee by deed.[39] The gift over was on "intestacy." This usually means intestate as to the particular property, which is the same as "without disposing of the property by deed *inter vivos* or by will at the first taker's death." We have, however, the very peculiar circumstance that John's fee is made expressly inalienable *inter vivos* in the very sentence which expresses the gift over. We are, therefore, bound to construe the word "intestate" with reference to the fact that the grantor has already declared "that the above land is not to be transferred" *inter vivos* by the first taker. The gift over, then, could not be read as taking effect if John failed to alienate by deed *inter vivos* or by will, because that would necessarily give to John the right to defeat the gift over by an attempted alienation *inter vivos*, which is directly contradictory to the language used. In order, therefore, to reconcile the declaration that John's fee is to be inalienable *inter vivos* and that there should be a gift over if he died intestate, we must give the word "intestate" a meaning which it is quite capable of bearing without any great departure from the natural meaning of the word,—*viz:* the failure to alienate the property in question by will. Hence, the gift over is in the event that John dies without children and without alienating the property by will. This is the same as a gift over if John dies without children and does attempt to alienate the property by deed.

§ 719. **Cases 2 and 2a:** In Case 2 the gift over is upon the failure of the first taker to dispose of the property by deed. This is the same as a provision of forfeiture if A does dispose of the

[38] 268 Ill. 270.

[39] *Ante*, § 462.

property by will. The gift over is accordingly void.[40] That is the result reached by our Supreme Court in *Stewart v. Stewart.*[41] There the gift over was to take effect if the first taker did not dispose of the property *inter vivos,* which is the same as a gift over if he did attempt to dispose of the property by will.

In Case 2a the situation is practically quite different. A gift over on a definite failure of issue taken by itself is valid. It leaves, however, the first taker with an interest which is practically unmarketable in his lifetime because of the uncertainty as to whether he will die without issue or not. When, therefore, you add the fact that the gift over does not take effect unless the first taker also fails to dispose of the fee by deed, you have in fact given to the first taker a power of disposal of his fee so as to cut off the gift over. This makes his fee or absolute interest marketable during his life. Instead of creating a provision of forfeiture on alienation, an unmarketable title has in fact been made marketable. Accordingly, the gift over has been held valid in Case 2a.[42] In New York [43] and Massachusetts,[44] however, where they have failed to draw any distinction between Case 2a and Case 1, the gift over has been held void.[45]

§ 720. Case 1—Gifts over on intestacy—Result of the authorities: In whatever form it may appear the legal effect

[40] Shaw *v.* Ford, 7 Ch. Div. 669 (1877).

[41] 186 Ill. 60.

[42] Doe *v.* Glover, 1 Com. Bench, 448 (1845).

Attorney-General *v.* Hall (5 July, 1731), Fitzg. 9, 314, W. Kel. 13, while apparently *contra,* went only on the proposition that no gift over after an absolute interest in personal property would be permitted, drawing a distinction between gifts of chattels real and gifts of chattels personal. Since gifts over of chattels personal are now permitted by will and in this country by deed or will, Attorney-General *v.* Hall has no standing whatever as an authority.

[43] Jackson *v.* Bull, 10 Johns. 19.

[44] Ide *v.* Ide, 5 Mass. 500.

[45] In accord with Jackson *v.* Bull and Ide *v.* Ide, see the following: Flinn *v.* Davis, 18 Ala. 132; Kelley *v.* Meins, 135 Mass. 231; Annin's Ex'rs *v.* Vandoren's Adm'r, 1 McCart. (14 N. J. Eq.) 135 (personal property); Van Horne *v.* Campbell, 100 N. Y. 287; Riddick *v.* Cohoon, 4 Rand. (Va.) 547 (personal property; only ground of decision was uncertainty in the subject-matter which would go over); Melson *v.* Cooper, 4 Leigh (Va.) 408.

of the gift over on intestacy is the same. By the authority of the English cases,[46] by the authority in this country of Chancellor Kent[47] especially, and of many state jurisdictions[48] including Illinois,[49] the gift over is absolutely void. This is the rule, also, whether the gift be of real[50] or personal[51] property.

§ 721. 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 principle. In fact our Supreme Court 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*,[52] which established the invalidity of gifts over on intestacy, was decided, 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

[46] Gray's Restraints on Alienation, 2nd ed., §§ 57-64.

[47] Jackson *v.* Robins, 16 Johns. (N. Y.) 537; 4 Kent Com. 270.

[48] Gray's Restraints on Alienation, 2nd ed., §§ 65-74g.

[49] Ackless *v.* Seekright, Breese (Ill.) 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;* Kron *v.* Kron, 195 Ill. 181; Metzen *v.* Schopp, 202 Ill. 275, *semble;* Orr *v.* Yates, 209 Ill. 222, *semble;* Ashby v. McKinlock, 271 Ill. 254, 259, *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.*

Observe, however, that in Meldahl *v.* Wallace, 270 Ill. 220, the gift over of a remainder if the remainderman died intestate before the life tenant, was held invalid. See *ante,* §§ 713, 718.

[50] 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.*

[51] Welsch *v.* Belleville Savings Bank, *supra;* Mills *v.* Newberry, *supra;* Wilson *v.* Turner, *supra;* Orr *v.* Yates, *supra.*

[52] 144 Ill. 554.

reason against holding gifts over on intestacy 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.[53] There is, it is believed, a legitimate excuse for restating Gray's reasoning in support of 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 momentarily to cast doubt upon the validity of all shifting interests by deed or will.[54] 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.

§ 722. 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.[55] While this is not the reason generally given in the American cases,[56] 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,[57] yet in *Mills*

[53] In Burton *v.* Gagnon, 180 Ill. 345, at p. 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." 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.

[54] *Ante*, §§ 445-447, 468-469.

[55] Gray's Restraints on the Alienation, 2nd ed. § 58.

[56] *Id.* § 65.

[57] Walker *v.* Pritchard, 121 Ill. 221, 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

v. Newberry[58] we have a strong authority for resting the invalidity of the gift over on intestacy of personal property[59] upon the ground of its uncertainty.[60]

§ 723. **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.[61]

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.[62] Taken literally this reason was unworkable since it would make all shifting interests by deed or will invalid. 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.[63] 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.[64]

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.[65] Curiously enough it has

$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 Wilson *v.* Turner, 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.

[58] 112 Ill. 123, citing Ross *v.* Ross, 1 Jac. & W. 154.

[59] Observe that in Mills *v.* Newberry, 112 Ill. 123, some real estate was also involved.

[60] See Dalrymple *v.* Leach, 192 Ill. 51, the gift over of real estate was held void on the ground of uncertainty which is properly applied only in cases of personalty.

[61] See H. Clay Horner's Article, Chicago Legal News, June 17, 1905, p. 354.

[62] Gulliver *v.* Vaux, 8 DeG. M. & G. 167.

[63] *Per* Fry, J. in Shaw *v.* Ford, 7 Ch. Div. 669.

[64] *Ante,* §§ 218, 219.

[65] Gray's Restraints on Alienation, 2nd ed. §§ 31-44.

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.[66] The lower courts in New York have seized upon a section of the New York Revised Statutes,[67] 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.[68] In one case[69] at least, so holding, the court, by Peckham, J., speaks with contempt of the rule which makes the gift over on intestacy 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 take by descent.[70] Conceding this rule to be applicable, the class, upon alienation to which the forfeiture occurs, is very small and the sort of alienation aimed at is very restricted. 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:[71] "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.[72] Thus, upon a feoffment or release to A and his heirs to the use of A and his heirs, A was in by the

[66] *Post*, § 726, on life interests with power of disposition or appointment.

[67] Part 2, § 1, Tit. 2, Art. 1, par. 32, p. 725.

[68] Gray's Restraints on Alienation, 2nd ed. §§ 56g, 70.

[69] Greyston *v.* Clark, 41 Hun. (N. Y.) 125, 130.

[70] Akers *v.* Clark, 184 Ill. 136, 137; Biggerstaff *v.* Van Pelt, 207 Ill. 611, 618.

[71] Gray's Restraints on Alienation, 2nd ed. § 59.

[72] 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."

common law, *i. e.*, by the feoffment or release.[73] 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 was 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.[74] 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."[75] 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 reason of repugnancy, destroy the most common and unobjectionable sort of executory devises.

The reason given by Chancellor Kent,[76] 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. This has been restated by our Supreme Court in this form:[77] "An executory devise is indestructible by any act of the owner of the preceding estate, and if the owner of a determinable fee conveys in fee, the determinable quality of the fee follows the transfer." The rule that an executory devise was indestructible meant that the first taker could not by any tortious conveyance destroy it as the life tenant could destroy a contingent remainder. Such a rule has no possible connection with the question whether an executory devise is void. Furthermore, if it did have any bearing upon the validity of the gift over, the inference would be, not that the gift over was void but that the gift over was valid and the power given to the first taker to destroy it by conveying by deed or

[73] Orme's Case, L. R. 8 C. P. 281.

[74] *Ante*, §§ 62, 456.

[75] Fry, J., in Shaw *v.* Ford, 7 Ch. Div. 669.

[76] Jackson *v.* Robins, 16 Johns. (N. Y.) 537; 4 Kent's Commentaries, 270.

[77] Williams *v.* Elliott, 246 Ill. 548, 552.

will would be void. Yet our Supreme Court asserts:[78] "It necessarily follows that if the first devisee has an estate which he can convey in fee simple so as to destroy an attempted limitation over, such limitation is void!"

What then, is the 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,[79] 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, and of having been originally designed to prevent the total defeat of the settlor's intent.[80] 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[81]—"a reversion to a primitive type."

§ 724. Case 1a—Gifts over on intestacy and failure of issue—On principle the gift over should be held valid even though the gift over on intestacy alone be held void: The only reason for holding the gift over in Case 1a void is because gifts over on intestacy are void and no sound distinction can be drawn between a gift over on intestacy alone and a gift over on failure of issue and intestacy.

A distinction, however, can be made between the cases on two grounds: *First,* the gift over if the first taker dies without leaving issue standing by itself is valid. The gift over, however, makes the first taker's interest practically unmarketable. The actual effect, then, of the added contingency of intestacy is that the first taker has added to his fee the power to appoint by deed or will a merchantable title to anyone he may choose. Hence, the gift over on the contingency of intestacy is greatly in favor of alienation and not in substance a gift over by way of for-

[78] *Id.*

[79] *Ante,* §§ 412 *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.

[80] *Ante,* §§ 34, 35.

[81] Gray's Restraints on Alienation, 2nd ed. § 74b.

feiture on alienation.[82] If this reasoning is sufficient to save the gift over in Case 2a,[83] it is even more effective to do so in Case 1a. *Second*, in Case 1 there is a certain forfeiture of the first taker's interest if he attempts to permit the property to descend and this forfeiture he can only prevent by alienation by deed or will. In Case 1a, however, the forfeiture on alienation by descent is still further cut down because the added condition of the first taker dying without leaving issue is also present. If no principle of public policy is offended by the gift over in Case 1, how much less is it offended in Case 1a?

§ 725. State of the authorities: In *Friedman v. Steiner*[84] 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 co-owner 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. 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.[85] 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*,[86] 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.[87] *Friedman v. Steiner* was not men-

[82] See Andrews *v.* Roye, 12 Rich. (S. C.) 536.

[83] *Ante*, § 719.

[84] 107 Ill. 125.

[85] See *ante*, § 301.

[86] 180 Ill. 345.

[87] A third possible ground for holding the gift over void was that

tioned. 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.[88]

In *Koeffler v. Koeffler*,[89] 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 [90] 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

it was upon an indefinite failure of issue. *Ante*, § 542.

[88] 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*, §§ 364, 482. 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 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.*

[89] 185 Ill. 261.

[90] *Ante*, § 301.

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 unnoticed.

In *Orr v. Yates*[91] 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 involved they were as follows: To the testator's wife for life with a vested remainder 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 dying intestate. On a bill to construe the will it was decreed that the gift over was void. This was reversed. The court observed that, to hold the gift over void, would be to defeat the intent of the testator—a result 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.

In *Williams v. Elliott*[92] a remainder after a life estate was devised to a niece Phoebe, and to the testator's three daughters and "their heirs and assigns forever. But in case the said Phoebe shall not dispose of the said estate devised to her, by will or otherwise before her death, and should die without issue, seized of said estate," then over to the three daughters in fee. Phoebe died intestate and without issue and her heirs-at-law claimed her interest as against the devisees over. It was held that Phoebe's heirs-at-law were entitled; that the gift over was void. The court made the distinction that in *Friedman v. Steiner* the first taker "was clothed with unlimited power of alienation in fee simple, and by necessary implication from the language of the will had a power other than that incident to the ownership of a base or determinable fee." The first taker's "power

[91] 209 Ill. 222.

[92] 246 Ill. 548.

to convey in fee simple was not regarded as an incident of her ownership, but was a power distinct from the right of property." On the other hand, in *Williams v. Elliott* the court regarded the power of the first taker to convey in fee as arising solely from the fact that the first taker had a fee; that this power was an unlimited one and that the gift over, therefore, was upon the exercise of an unlimited power of alienation in the first taker "as owner of the estate" and, therefore, void. The court said: There has been no case "in which such a devise has been sustained if there was an absolute power of alienation in fee simple by the first devisee at his own discretion and as owner of the estate."

In *Forbes v. Forbes*[93] there was a devise to Cordelia in fee with a gift over in case she died without issue surviving her. Then followed a clause providing that nothing herein contained shall be taken or construed as depriving Cordelia "of the right and power to sell and convey the lands devised * * * in fee simple." Cordelia died intestate without ever having had issue. It was held that the gift over took effect. The reason appears to have been that Cordelia took a fee subject to be terminated by a gift over on death without issue, which, standing alone was valid; that the language above quoted gave her a power to convey the fee independent of her fee and appendant to it, and that the gift over which was merely in default of the exercise of a power appendant was valid. The court said: "The provision that nothing contained in the will should deprive her of the right and power to sell and convey the lands devised to her, or any part thereof, in fee simple, was intended by the testator to confer a power over the estate, and the power not being exercised, the limitation over took effect upon her death without surviving issue."

The decisions above analyzed have placed the court in this position:

1. If the gift over on failure of issue is such as to cause the first taker to have a fee subject to be defeated by a valid gift over—often called by our court a base or determinable fee in the first taker—with a superadded power of alienation which is appendant to the fee but independent of it and does not arise

[93] 261 Ill. 424, 427, 432.

as an incident of the ownership of the fee in the first taker, the gift over on failure to exercise the power is valid.

2. But if the first taker have a fee with an unlimited power of alienation which arises only from the fact that the first taker has a fee and is purely an incident of the ownership of the fee, then the gift over on failure to exercise this incidental power of alienation, even though it be also coupled with a definite failure of issue in the first taker, is void.

This distinction is, it is believed, *sui generis*. Whether it will persist, to confound judges and lawyers and cast spells of pseudo feudal mystery over a subject which ought to be handled on principles which determine rationally when a gift over violates some modern rule of public policy, only the future can determine.

TOPIC 2.

WHERE THE FIRST TAKER HAS ONLY A LIFE ESTATE.

§ 726. Gifts in default of the exercise of a life tenant's power of disposition or appointment are valid: If the first taker is given only 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.[94] Our Supreme Court has never ap-

[94] 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); Wilson *v.* Turner, 164 Ill. 398; 55 Ill. App. 543 (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.* Breckinridge, 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; Burke *v.* Burke, 259

parently 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 cases where the validity of the gift over has been sustained.[95] The distinction taken between the validity of interests preceded by an absolute title and taking effect 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.[96]

TITLE III.

RESTRAINTS[97] ON THE ALIENATION OF A FEE SIMPLE OR ABSOLUTE INTEREST IN PERSONALTY.

§ 727. Restraints on the alienation of a legal estate in fee or an absolute interest in personal property: These seem

Ill. 262; Bradley *v.* Jenkins, 276 Ill. 161; Ellis *v.* Flannigan, 279 Ill. 93.

[95] (a) In the following cases it seems 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; Burke *v.* Burke, 259 Ill. 262; Bradley *v.* Jenkins, 276 Ill. 161; Ellis *v.* Flannigan, 279 Ill. 93; Wilson *v.* Turner, 164 Ill. 398; 55 Ill. App. 543. (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; Wilson *v.* Turner, 164 Ill. 398; 55 Ill. App. 543. For other questions of construction arising in connection with the power in the life tenant see *ante*, §§ 648, 649.

[96] See *ante*, § 168. The following are some of the 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.

[97] 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.

definitely to have been held void in this state.[98] In *Askins v. Merritt*[99] 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 thirty, was invalid.[1]

In *Dee v. Dee*[2] it was held that a provision prohibiting a partition of a vested and indefeasible remainder prior to the time of vesting in possession was enforceable. This would appear from the opinion of the court to be an application of a broader rule which permits agreements and provisions against partition of absolute and indefeasible interests in possession.[3] The latter would appear to be a very substantial restraint on alienation of a legal fee. It is not clear that this aspect of the matter has been considered.

§ 728. Where the interests are equitable there are serious difficulties in effecting an involuntary alienation, even where no express restraints on alienation are imposed: Whenever one is the *cestui* of property in the hands of trustees settled upon him by one other than himself,[4] his creditors are in this state

[98] 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; Little *v.* Bowman, 276 Ill. 125, 130; 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.

Gallaher *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 the alienation was given effect by the court as charging the annuity upon the land and not strictly as a restraint on alienation.

[99] 254 Ill. 92.

[1] Smith *v.* Kenny, 89 Ill. App. 293; Renaud *v.* Tourangeau, L. R. 2 P. C. App. 4, 18; Gray, Restraints on Alienation, § 105, *accord.*

[2] 212 Ill. 338, 354.

[3] Ingraham *v.* Mariner, 194 Ill. 269.

[4] 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.

without remedy. No restraint on alienation is necessary.[5] It makes no difference that the interest of the *cestui* is absolute[6] or for life,[7] or whether it is in personal property[8] or real estate.[9] The defect in our law seems to arise from the failure of the legislature to make some remedies applicable, and by expressly prohibiting the use of the usual remedy by a creditor's bill. Garnishment of the trustee is very likely not possible.[10] The Statute on Executions[11] has no application where the equitable interest is in personalty. It has been held not to apply where the equitable interest is in realty, and has been created by an express trust with active duties in the trustee.[12] Execution by means of a creditor's bill is in terms prohibited by section 49 of the Chancery Act.[13] This is a most extraordinary state of the law. The *cestui* is free of all express restraints on alienation. He can alienate freely by his own act, yet his creditors must go unpaid.

§ 729. **By an extension of the rule of Claflin v. Claflin**[14] **which permits the creation of indestructible trusts of absolute and indefeasible equitable interests, restraints on alienation during the time the trust remains indestructible have also been permitted:**[15] This proposition is here merely noted. A discussion of its propriety is, for convenience in exposition, post-

[5] Potter *v.* Couch, 141 U. S. 296, 318.

[6] *Id.*

[7] Binns *v.* LaForge, 191 Ill. 598.

[8] *Id.*

[9] Potter *v.* Couch, *supra.*

[10] McKindsey *v.* Armstrong, 10 Upper Can. App. 17; Gray, Restraints on Alienation, 2nd ed., §§ 124q, 114a.

[11] R. S. 1845, p. 301, § 5; Laws 1871-2, p. 505, § 4; R. S. 1874, ch. 77, § 4.

[12] Potter *v.* Couch, *supra;* Moll *v.* Gardner, 214 Ill. 248, 252. But see Wallace *v.* Monroe, 22 Ill. App. 602.

[13] R. S. 1874, ch. 22, sec. 49. Potter *v.* Couch, *supra;* Binns *v.* LaForge, *supra;* Gray, Restraints on Alienation, 2nd ed., § 124r. This statute is copied from a New York act and should 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.

[14] 149 Mass. 19; *post,* § 732.

[15] Wallace *v.* Foxwell, 250 Ill. 616; Hopkinson *v.* Swaim, 284 Ill. 11; Boston Safe Deposit & Trust Co. *v.* Collier, 222 Mass. 390. Observe, however, that the *cestui* whose interest is subject to specific restraints on its involuntary alienation only cannot have a discharge until he surrenders to the trustee in bankruptcy his interest. Per Kohlsaat, J., in *In re* Fleishman, 120 Fed. 960.

poned.[16] It may be noted in passing that a state of the law which declares a restraint on the alienation of a legal estate in fee, or absolute interests in personalty, void on grounds of public policy, and yet permits the same restraint when an absolute and indefeasible interest is equitable, challenges inquiry.

TITLE IV.

RESTRAINTS ON THE ALIENATION OF ESTATES FOR LIFE OR FOR YEARS.

§ 730. Restraints on alienation of a life estate—When the interest is legal: It has been pointed out above,[17] that this jurisdiction is unusual in holding that a provision for the forfeiture on alienation of a legal life estate was void. Strangely enough, probably the only case in any jurisdiction in which a legal life estate has been held subject to an absolute restraint on alienation, is to be found in the supreme court reports of this state. Gray gives a full and complete analysis of this case,[18] or rather series of cases, because litigation involving the same questions was three times before our Supreme Court.[19] More recently one of the appellate courts of this state, in *Emerson v. Marks*,[20] 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 in the case of a restraint on alienation attached to a legal life estate, and one attached to an equitable life estate.

[16] *Post*, §§ 739-741.

[17] *Ante*, § 714.

[18] Gray's Restraints on Alienation, 2nd ed., §§ 135, 138.

[19] 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.

[20] 24 Ill. App. 642. See also Springer *v.* Savage, 143 Ill. 301.

§ 731. Where the life interest is equitable: Under *Brandon v. Robinson*,[21] 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.[22] In framing up a trust on these lines it was 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.[23] The distinction referred to was very clearly recognized in *Ingraham v. Ingraham*.[24]

Steib v. Whitehead,[25] seems, however, to be a 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 money in the hands of the trustee, was not, under the proper construction of the Garnishment Act, subject to that process.[26]

In estimating the immunity, apart from any restraint on alienation, of equitable life estates from actions by creditors, the effect of Ill. R. S. 1874, chap. 22, sec. 49, must not be overlooked.[27] In the two recent cases of *Binns v. LaForge*,[28] and

[21] 1 Rose 197.

[22] Lord *v.* Bunn, 2 Y. & C. C. C. 98. One case at least in this state indicates that this form of settlement is in use in Illinois; King *v.* King, 168 Ill. 273.

[23] Green *v.* Spicer, 1 Russ. & M. 395; Younghusband v. Gisborne, 1 Coll. 400. But see *In re* Coleman, 39 Ch. Div. 443.

[24] 169 Ill. 432, 471.

[25] 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; 217 Ill. 434.

[26] McKindsey *v.* Armstrong, 10 Upper Can. App. 17; Gray's Restraints on Alienation, 2nd ed., § 124q, § 114a, note 1.

[27] *Ante*, § 728.

[28] 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.

ReQua v. Graham,[29] 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, the extraordinary result is reached that a *cestui* can convey his interest, but his creditors cannot get it.[30]

TITLE V.

INDESTRUCTIBLE TRUSTS OF ABSOLUTE AND INDEFEASIBLE EQUITABLE INTERESTS.

TOPIC 1.

TAKEN BY THEMSELVES AND CONSIDERED SEPARATELY FROM ANY RESTRAINTS ON ALIENATION, THEY ARE VALID PROVIDED THEY ARE PROPERLY LIMITED IN TIME.

§ 732. The doctrine of Claflin v. Claflin,[31]—How far recognized in this state: How far does our Supreme Court recognize 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?

Gray in his Restraints on Alienation has dealt with the case of *Rhoads v. Rhoads*,[32] as supporting the rule of *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

[29] 187 Ill. 67.

[30] 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.

[31] 149 Mass. 19; Young *v.* Snow, 167 Mass. 287; Danahy *v.* Noonan, 176 Mass. 467, *accord*.

[32] 43 Ill. 239; Gray's Restraints on Alienation, 2nd ed., § 124.

vested nor contingent, but still executory.[33] 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,[34] *Chapman v. Cheney*,[35] and *Flanner v. Fellows*,[36] 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 not preceded by any life estate,[37] 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, the postponed enjoyment clause is valid where its existence is for the benefit of other members of a class.[38] So where there are gifts over during the period of the trusteeship so that the equitable interest is not indefeasible, there can be no ground for prematurely terminating the trust.[39]

When the author's Future Interests appeared in 1905, the only case in this State actually supporting the holding of *Claflin v. Claflin* was *Lunt v. Lunt*.[40] In that case 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

[33] *Ante*, § 482.
[34] 152 Ill. 252.
[35] 191 Ill. 574.
[36] 206 Ill. 136.
[37] *Ante*, § 566.
[38] Oppenheim *v.* Henry, 10 Hare, 441; Gray's Rule against Perpetuities, 2nd & 3rd, § 639aa.
[39] Bennett *v.* Bennett, 217 Ill. 434; Johnson *v.* Buck, 220 Ill. 226.
[40] 108 Ill. 307.

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.[41]

Recently there have been three cases[42] which have firmly established rule of *Claflin v. Claflin* in this state.

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

[41] 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 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.

[42] Wagner *v.* Wagner, 244 Ill. 101; Guerin *v.* Guerin, 270 Ill. 239, 245; Sheley *v.* Sheley, 272 Ill. 95.

an absolute equitable interest is valid, spendthrift trusts must be recognized, the converse proposition is true. If, therefore, *Steib v. Whitehead*,[43] recognizing the validity of spendthrift trusts, be regarded as law, it is not surprising that the rule of *Claflin v. Claflin* applied in *Lunt v. Lunt*, should be followed.

§ 733. 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.[44] 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 American jurisdictions had more frequently followed the Massachusetts rule than that of the English cases.[45]

§ 734. 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 few reasons given. *Saunders v. Vautier*,[46] 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.[47]

[43] 111 Ill. 247.

[44] Saunders *v.* Vautier, 4 Beav. 115; 1 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.

[45] There is a *dictum* in a recent Pennsylvania case in accord with the long line of English authorities: Shalleross'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 & 3rd ed., §§ 124c and 124d for reference to some Pennsylvania 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. 434 (Ky.); Avery *v.* Avery, 90 Ky. 613, *semble*. For the Illinois cases, see *ante*, § 732.

[46] 4 Beav. 115; 1 Cr. & Ph. 240.

[47] Josselyn *v.* Josselyn, 9 Sim. 63;

Lord Hershel in *Wharton v. Masterman*,[48] 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*,[49] 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*,[50] 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*,[51] Sir W. P. Wood, V. C., 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. It contains no reason upon which the rule is founded. Lord Langdale, M. R., in *Curtis v. Lukin*,[52] 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 conse-

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; Magrath *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. 806, note (c).

[48] [1895] A. C. 186, 193.

[49] 5 Beav. 147.

[50] 15 Beav. 166.

[51] H. R. V. Johns 265, 272.

[52] 5 Beav. 147, 156.

quence of making an absolute gift that there can be no postponement of enjoyment.[53] Such reasons have even been half-heartedly urged by the Law Lords.[54]

§ 735. The reason of repugnancy unsound: It is believed that the last of the reasons above mentioned is the most easily disposed of. It can hardly be said that the postponement is void for repugnancy or because one 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, all shifting interests by deed and shifting executory devises will be void for repugnancy as well as a provision for forfeiture on alienation attached to a legal life estate, and, gifts over on intestacy. It would hardly seem possible, 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, and it is the constant gain in force of this principle which enables Gray, at the end of his chapter on future interests, in his Rule against Perpetuities,[55] 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 one proceeds upon the principle of allowing the testator to do what he wants with his own, he does so in obedience to a principle which declares that dominion over an absolute interest should not be interfered with. Why, then, where there is an absolute equitable interest, does not the application of the same principle require that the *cestui* can terminate 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 per-

[53] Weatherall *v.* Thornburgh, 8 Ch. Div. 261; Harbin v. Masterman, [1894] 2 Ch. 184.

[54] Wharton v. Masterman, [1895] A. C. 186.

[55] § 98.

mitting 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.

§ 736. Reasoning based upon public policy—Preliminary: Lord Langdale,[56] adopted 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.[57] The *cestui* whose interest is subject 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?

§ 737. The duration of the postponement must be limited in time: [58] 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 the 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

[56] Curtis *v.* Lukin, 5 Beav. 147, 156.

[57] 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, 2nd ed., § 114a; Sanford *v.* Lackland, 2 Dill (U. S.) 6; Gray's Restraints on Alienation, 2nd ed., § 114; Havens *v.* Healy, 15 Barb. 296; Gray's Restraints on Alienation, 2nd ed., § 116.

[58] See *ante*, §§ 658-661.

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.[59] 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.[60] It should be observed, however, that the above qualification is not 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, no future interest is involved. There can, therefore, be no question of the application of the Rule against Perpetuities.[61] The rule governing the creation of postponements is a separate one which limits the time during which a trust may be rendered indestructible.

§ 738. **Consideration of the precise issue involved:** The precise question has then become: what reason of public policy

[59] *In re* Ridley, 11 Ch. Div. 645 (1879); Gray's Restraints on Alienation, 2nd ed., §§ 272b-272c.

[60] Kohtz *v.* Eldred, 208 Ill. 60, 72, *semble.* See also Sadler *v.* Pratt, 5 Sim. 632; Jackson *v.* Marjoribanks, 12 Sim. 93; Shallcross' 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. 293 (Ky. 1904).

[61] 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 second and third editions of Gray's Rule against Perpetuities we find the learned author suggesting the validity on principle of the married women's clause against anticipation (§ 121f) 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).

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*.[61a] 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."[62] 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 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 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.[63]

"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 rises 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

[61a] See De Ladson *v.* Crawford, 106 Atl. 326 (Conn.).

[62] Gray's Restraints on Alienation, 2nd ed., § 124n.

[63] Gott *v.* Nairne, 3 Ch. Div. 278; Ames' Cases on Trusts, 2nd ed., 455.

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.[64] 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 not been repeated. 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 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, proper.

It is believed that Gray's violent dislike for the rule of *Claflin v. Claflin,* is due to his abhorrence of spendthrift trusts. Thus, he suggests[65] that, if twenty-one is too young for a person to come of age, the legislature extend the period of minority, and

[64] Curtis *v.* Lukin, 5 Beav. 147, 156.

[65] Restraints on Alienation, 2nd ed., § 124o.

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 it may be expected that *Claflin v. Claflin* will be followed. It is by no means true, however, that, because there is no reason of public policy against such a postponement as was sustained in *Claflin v. Claflin*, there is none against spendthrift trusts. The writer believes, therefore, that while spendthrift trusts are entitled to all the abhorrence which 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.

TOPIC 2.

A HOLDING, HOWEVER, THAT RESTRAINTS ON ALIENATION (ATTACHED TO THE ABSOLUTE AND INDEFEASIBLE EQUITABLE INTEREST WHILE THE TRUST REMAINS INDESTRUCTIBLE) ARE VALID, IS INDEFENSIBLE.

§ 739. Such a holding has been made in Massachusetts and Illinois: The writer's defense of *Claflin v. Claflin*[66] was predicated upon the fact that restraints on alienation attached to the equitable interest while the trust remained indestructible would be held void. Gray's distrust of the doctrine of *Claflin v. Claflin* was founded upon the view that it meant ultimately that restraints on alienation attached to the equitable fee while the trust remained indestructible would be held valid. It turns

[66] 149 Mass. 19 (which is printed substantially as it appeared in his Future Interests in 1905, *ante*, §§ 732-738).

out that Gray was right. A recent case in Massachusetts[67] and two cases in Illinois[68] have so held.

In *Wallace v. Foxwell*[69] the will in question devised an absolute interest in realty and personalty to trustees upon trust to pay the income to the wife for life and at her death one-half the net income was to be paid to the testator's daughter for life, and on her death the principal was to be distributed among her right heirs. The other one-half of the net income and principal was disposed of by the 4th and 5th clauses as follows: "*Fourth*—Upon the decease of my said wife, Marcia I. Spaulding, to pay over to my son, Howard H. Spaulding, and to his wife, Florence B. Spaulding, one-half of the net income of my estate in such proportions as they may see fit, paying more or less to the one or the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding." "*Fifth*—To convey to my son, Howard H. Spaulding, after the decease of my wife, Marcia I. Spaulding, one-half of my estate at such time as may seem best for them to do so." Howard became a bankrupt during the widow's life and all his interest was sold by a trustee in bankruptcy. After the death of the widow the trustee filed a bill to determine what interest the person claiming under the bankruptcy sale had. A decree was entered that the purchaser at the bankruptcy sale had obtained no interest whatsoever. This was affirmed.

As to the personal estate the decision is unquestionably correct. The *Rule in Shelley's Case* was not applicable to give to Howard any absolute interest in the personalty.[70] The fifth clause did not tend to indicate that Howard was to have any absolute interest in the personalty. It merely gave to the trustees a power to convey the absolute interest to Howard in his lifetime if they saw fit.

As to the real estate there is more difficulty. It was argued in support of the decree that there was a general trust for con-

[67] Boston Safe Deposit & Trust Co. *v.* Collier, 222 Mass. 390 (1916).

[68] Wallace *v.* Foxwell, 250 Ill. 616; Hopkinson *v.* Swaim, 284 Ill. 11.

[69] 250 Ill. 616.

[70] Lord *v.* Comstock, 240 Ill. 492.

version so that all of Howard's interest was personal property. Therefore the *Rule in Shelley's Case* could not apply. This point is not touched upon by the court. It is fair to say, therefore, that in reaching its conclusion it assumed, at least for the sake of argument that there was no trust for conversion, and that the *Rule in Shelley's Case* applied,[71] so that the remainder to the heirs of Howard became a remainder in fee to Howard himself. The court sustained the decree below by holding that the absolute equitable interest of Howard obtained by him as a result of the application of the *Rule in Shelley's Case* was subject to a restraint on involuntary alienation placed upon it by the testator,[72] which was valid and effective to defeat the bankruptcy sale.

[71] *Ante,* § 412.

[72] *First:* It should be noted that no restraint on alienation is created by words directly. The restraint is found only as a result of a supposed general scheme to protect the beneficiary. The analytical argument, however, is very strong against the existence of any restraint on alienation even on this theory. The scheme actually used is the regular one adopted where spendthrift trusts are held void. We have here a power given to the trustees to pay more or less, as they see fit, to the spendthrift Howard or his wife. In short, if Howard gets into financial difficulties the trustees are given the means of saving the estate from his creditors by transferring the payments to his wife. This is the scheme that is approved by Lord Eldon in Lord *v.* Bunn, 2 Y. & C. C. C. 98. It is regularly used in England and states where restraints on alienation were held void even when attached to a life estate. The device is entirely distinct and different from the direct restraint on alienation. It presupposes the accomplishment of the testator's purpose without any restraint on alienation. For the court to work a direct restraint on alienation out of it, is to impose upon the testator a scheme which there is every reason to believe from the language used he did not have. See *post,* §§ 742-748.

Second: If there be a restraint on alienation then it is observable that it is attached to the life estate of Howard and to that alone. By the Rule in Shelley's Case, Howard's life interest is not affected at all. Only the remainder to Howard's heirs is turned into a remainder in fee to Howard himself, so that Howard then has an equitable life estate together with his wife, with a restraint upon his alienating that life estate, and then a separate equitable and vested remainder in fee in himself not subject to any restraint or alienation. As the life estate and the remainder in fee only coalesce and come together in a single fee by the doctrine of merger, there will be no merger if that will prejudice the rights of others or defeat the express provision of the testator in the carrying out of some other provisions of the will. In the principal case if the wife be

In *Hopkinson v. Swaim*[73] the testator devised to William for life and the fee to the children of William, with power in William to appoint a trustee for the children's interest. William appointed a trustee and provided restraints on the alienation of the children's interests. It was apparently assumed that the trusteeship was to continue at least for the lives of the children who had absolute and indefeasible equitable interests. It was assumed also that the restraints on alienation would continue for the same period. In an attempt to have the execution of the power declared wholly inoperative, it was contended on behalf of the children that the restraints on alienation were void. The court, however, sustained them. After pointing out that restraints on the alienation of an equitable life estate were valid spendthrift trusts, the court said: "There is no reason for such a rule in the case of a life estate which does not apply equally to a fee during the life of the owner."

§ 740. The position of the court in the above cases is inconsistent with decisions already made and adhered to, and contrary to the weight of authority: The one holding that seems secure is that a restraint on alienation attached to a *legal fee* is void.[74] On the other hand, it is equally well settled in this State that a restraint on alienation attached to an *equitable life estate* is valid.[75] The same rule has been applied to legal life estates in this state, the position being taken that there was no logical difference in the application of a rule of public policy

regarded as having an equitable charge upon the life estate of her husband for such part of the income as the trustees shall determine, then a merger, which destroyed the life estate, would prejudice the rights of the wife. So a merger might destroy the restraint on alienation attached to Howard's life estate because the life estate to which the restraint was attached would have been extinguished and ceased to exist by reason of the merger. These reasons would lead to the conclusion that no merger would occur, (*ante*, § 440), and that Howard's equitable life estate would stand subject to the rights of his wife and the restraint on alienation and Howard would have a separate and distinct equitable remainder in fee not subject to any restraint on alienation. In this view the ultimate remainder in fee of Howard must have passed by the bankruptcy sale. The court denied this conclusion, it is believed, only by assuming that the restraint on alienation was applicable to the *equitable fee* which Howard took by the Rule in Shelley's Case.

[73] 284 Ill. 11.

[74] *Ante*, § 727.

[75] *Ante*, §§ 730 *et seq.*

to the restraint on the alienation of a legal life estate and the restraint on an equitable life estate.[76] In view of these known results, what should the court do with the restraint on the alienation of an indefeasible equitable fee? As far as logical deduction is concerned one would have supposed it impossible to reach any other conclusion than that the restraint was void. Such, it is believed, was the unanimous result of the authorities[77] prior to the recent Massachusetts and Illinois cases. The latter represent an innovation in the law. Every case relied upon by our Supreme Court where the restraint was held valid, was one where the restraint was placed upon an equitable life estate.[78] In *Wagner v. Wagner*[79] it is true that the restraint on alienation was attached to an absolute equitable interest. In that case, however, no creditor or alienee was attempting to enforce the conveyance from the *cestui*. The only point actually involved was the attempt to make the trust of an absolute and indefeasible equitable interest indestructible for a time so that the *cestui* could not terminate the trusts without the consent of the trustee. The rights of creditors or involuntary alienees of the *cestui* were not in the slightest degree involved or under consideration. The holding of the court that the trust was indestructible by the *cestui* was placed upon the precise ground that such a provision was valid as against the *cestui*. To such a holding there cannot well be any sound objection.[80] The language of the court which referred to the trust as a spendthrift trust and intimated that there was a restraint on alienation which would be valid as against creditors or alienees was entirely uncalled for and outside the scope of the decision. It was mere *dictum*.

[76] Christy *v.* Pulliam, 17 Ill. 59; Pulliam *v.* Christy, 19 Ill. 331; Christy *v.* Ogle, 33 Ill. 295; Emerson *v.* Marks, 24 Ill. App. 642.

[77] Gray, Restraints on Alienation, 2nd ed. §§ 105, 106, 113 *et seq.* See also Sears *v.* Putnam, 102 Mass. 5, 9; Sanford *v.* Lackland, 2 Dill. (U. S.) 6; Havens *v.* Healy, 15 Barb. (N. Y.) 296. For a discriminating report upon the Pennsylvania cases see Foulke's Rule against Perpetuities in Pennsylvania, §§ 245-254.

[78] Stambaugh's Estate, 135 Pa. St. 585; Baker *v.* Brown, 146 Mass. 369; Patten *v.* Herring, 9 Tex. Civ. App. 640; Steib *v.* Whitehead, 111 Ill. 247; Bennett *v.* Bennett, 217 Ill. 434.

[79] 244 Ill. 101.

[80] *Ante*, §§ 732 *et seq.*

§ 741. The recent cases sustaining the restraint on alienation attached to absolute and indefeasible equitable interests are contrary to sound public policy: Six centuries ago the great feudal landowners of England, by the Statute *De Donis*, secured for themselves the right to create an estate in A and the heirs of his body which would descend to A's heirs as long as his issue continued and would be inalienable by any holder of the estate so as to bar the right of the issue to inherit. For a century the estate tail so created remained inalienable. Then the courts brought the intolerable evil of such a restraint on alienation to an end by allowing the estate tail to be aliened in fee by the common recovery.[81] A few years later by statutes the same effect was given to the levying of a fine by the tenant in tail.[82] Ever since, the fee tail has been freely alienable in fee simple by fines and recoveries, and, more recently, by modern disentailing conveyances. In the 16th century the effort to place a condition of forfeiture on any attempt to bar the entail by a fine or recovery was held invalid.[83] The attempt was branded as an effort to create a *perpetuity*—meaning a perpetually inalienable estate. Have we not in effect returned to the state of the law as it was originally made in favor of the great feudal land owners by the Statute De Donis? We cannot, of course, in Illinois today create an estate tail. We can do better. We can have an equitable fee or an absolute equitable interest in personal property which can be made inalienable during the life of the owner. His interest cannot be taken for his debts and he cannot part with his interest. The obvious thing which he can do is to pass it on to the next generation with the same restraint and so on *in infinitum*. If such a practice becomes popular will not the distribution of wealth in Illinois in time be about as satisfactory as it was in England in the 15th century after the Statute De Donis had been in force for a hundred years?

We had supposed that the courts were traditionally interested in the freedom of alienation and the continuous redistribution of wealth, and against decisions which aid the perpetuation of great fortunes in the hands of the few. We had supposed that one of the reasons urged to mitigate the evil of large

[81] *Ante*, § 17; Gray, Rule against Perpetuities, 2nd ed. § 141.

[82] *Id.*

[83] *Ante*, § 17; Gray, Restraints on Alienation, 2nd ed. § 77.

fortunes in the hands of individuals was that in a few generations they would all be redistributed by natural processes. We had supposed that a rule which, when taken advantage of, tended to stop this process of redistribution, was in the highest degree inimical to the interests of the public. We had supposed that this was the well recognized basis upon which courts had for centuries held the restraint on alienation attached to a legal or equitable fee to be void.

TITLE VI.

CONSTRUCTION—WHAT WORDS ARE SUFFICIENT TO CREATE RESTRAINTS ON ALIENATION OR A SO-CALLED SPENDTHRIFT TRUST.

§ 742. **Introductory**: A mere trusteeship, even though it is for the protection of the beneficiaries, ought not, as a matter of taste, if for no other reason, to be called a "spendthrift trust." Only where there is added to the trusteeship express restraints on alienation is it justifiable to call the creation a spendthrift trust. Whether restraints on alienation, voluntary or involuntary, or both, are added ought to be determined by the application of the usual principles of construction to the language used. If the restraint is not expressed, no amount of extrinsic evidence or speculation and conjecture as to the testator's or settlor's inducement ought to be permitted to inject it into the will or settlement. The fact is, however, that our Supreme Court has applied the term "spendthrift trust" to trusts where there were no express restraints on alienation. A more detailed analysis of these cases and the extent to which they go is important.

§ 743. **Bennett v. Bennett**: [84] The precise question at issue in this case was whether a legacy in trust at the legatee's age of forty could be required to be paid to the legatee before he reached forty. The fact that there was a gift over if the legatee died under forty settled any such contention in the negative. But the court went on to hold that the legacy was contingent in the sense of being subject to a condition precedent that the legatee survive the age of forty and in aid of that interpretation insisted that the testator had expressed the spendthrift trust purpose. The real argument, it is submitted, was not that there was a

[84] 217 Ill. 434, 442.

restraint on alienation by implication, but that the spendthrift trust purpose made an argument in favor of the contingency of the legacy because it was only by holding the legacy contingent that the spendthrift trust purpose could be effected in the absence of express restraints on alienation. Nevertheless, the court said: "It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances." There was no discretion vested in the trustee with regard to the payment of income or principal to the beneficiary. All the court had before it upon which to find a spendthrift trust was the trusteeship and the gift of income. The court said: "The fact that a trustee was appointed and vested with the estate and the beneficiary was given the income only is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred."

§ 744. Wagner v. Wagner:[85] Here the question was whether the *cestui,* who was of age, could terminate the trusteeship of his absolute and indefeasible equitable interest before the time fixed by the testator. It was held that he could not, following the Rule of *Claflin v. Claflin.*[86] This decision is believed to be sound.[87] The court had no occasion to pass on the question whether there was a spendthrift trust in the sense of restraints on alienation of the absolute equitable interest. Nevertheless, although there were no express restraints on alienation the court insisted that there was a spendthrift trust. It said: "To create a valid spendthrift trust it is not necessary that the *cestui que trust* should be denominated a spendthrift in the will or that the testator should give his reasons for the creation of it. Nor is it necessary that the will shall in express terms contain all the restrictions and qualifications incident to such trusts. If, upon a consideration of the will, it appears the intention of the testator was to create such a trust, effect will be given to the intention. Where the language used is sufficient to create a spendthrift trust, we think no inquiry can be made whether the

[85] 244 Ill. 101, 111.

[86] *Ante,* § 732.

[87] *Ante,* §§ 732 *et seq.*

person for whose use it was created was, in fact, a spendthrift, and the allegations of the bill in this case that the sons were *sui juris, compos mentis* and sober and industrious business men cannot be considered in construing the codicil." It is, of course, possible that the court was here using "spendthrift trust" only in the sense of an indestructible trust without restraints on alienation. The later cases, however, make this improbable.

§ 745. **Wallace v. Foxwell**: [88] Here the court held that the interest in question was not subject to a sale in bankruptcy and this was based upon the fact that a spendthrift trust was created. Thus the existence of a valid restraint on involuntary alienation was directly involved. There was, it is submitted, no language expressly creating any such restraint on alienation. The language of the will was "to pay over to my son, Howard H. Spaulding, and to his wife, Florence B. Spaulding, one-half of the net income of my estate in such proportions as they may see fit, paying more or less to the other, as they may deem best, during the lifetime of my son, Howard H. Spaulding, and upon the decease of my said son, Howard H. Spaulding, to convey one-half of my estate to the right heirs of my son, Howard H. Spaulding." What the court did was to find by reference to the extrinsic circumstances, an intent of the testator's inducement to place the property beyond the reach of Howard's creditors. This appears from the following language of the court: "Considering, in connection with the will, the financial condition of Howard, which was known to his father, and the fact that Howard was a married man twenty-nine years old and then had one child, we find reasons why the testator might have desired to conserve the property by placing it beyond the reach of Howard's creditors and leaving it so his family might receive the income from it. * * * [Quoting from *Bennett v. Bennett.*] It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances."

[88] 250 Ill. 616, 618, 626, 628.

§ 746. **O'Hare v. Johnston:**[89] This case is consistent with the other decisions of the court. There the question was whether a gift to grandchildren thirty years after the testator's death was contingent on the grandchildren surviving that period. One of the arguments in favor of the contingency of the gift was that a spendthrift trust was created, or at least that there was a spendthrift trust purpose manifested. The court held that if such were the fact, nevertheless, the arguments in favor of vesting overcame it. But the court intimated in this case that there was no spendthrift trust purpose. It said: "There is nothing in the wording of the will itself as to this trust that indicates that it is of a spendthrift character. We find no restraint on alienation and no discretion as to the payment of income or principal." Then the court weighed and balanced the extrinsic evidence as follows: "It is true there is evidence tending to show that the testator had expressed doubts as to the son settling down to business and as to whether he would be able to take care of himself, and stated that the daughter, while in school, had been accustomed to spend a good deal of money which the father had provided; that she was under age at the time the will was drawn and that both the son and daughter had depended on their father for support. But it is also true that this fund referred to the grandchildren as well as the children, and the testator, naturally, could not form any idea as to whether they would need the protection of a spendthrift trust. It is the intention of the testator that decides, under the authorities, the character of the trust. If it is shown that his intention indicates a spendthrift trust, the court will not inquire whether the beneficiary is, in fact, a spendthrift. This will does not indicate that the testator thought his children were spendthrifts. He gave to each of them valuable real estate and a large amount of other property. In addition to this he gave them the income from the trust fund, which tends strongly to show that he had no suspicions or apprehensions as to their ability to handle their own property * * * the giving of large sums directly to them [the children] indicates that the trust was not of a spendthrift character. There is another reason that could be urged against the view that the testator considered this a spendthrift trust. He would hardly have appointed his son one of

[89] 273 Ill. 458, 468-469.

the executors if he had considered him a person not to be trusted with business matters. We think the conclusion might well be drawn that the reason for creating this trust was based on the desire of the testator to keep his property in his own descendants and prevent it from going, in the next generation, to strangers to his blood. This trust was certainly an appropriate method for bringing about this result."

§ 747. **Hopkinson v. Swaim**[90] **and Newcomb v. Masters**:[91] In the former case the main question was whether an indestructible trust was void because it was required to continue too long. Incidentally it was argued that there were restraints on alienation of absolute equitable interests which were void. There was here an express restraint on alienation for the payment of debts. The court, however, seem to have found from the whole context and the "object" of the testator a restraint on voluntary alienation also.

In *Newcomb v. Masters* there was a devise to trustees for the life of the life tenant with no active duties, but with express provisions of forfeiture on alienation by the life tenant. It was held that the presence of the provision of forfeiture on alienation did not create a spendthrift trust so as to give rise to active duties in the trustee which would prevent the Statute of Uses from executing the so-called trust, or to create restraints on alienation which would make void a lease made by the life tenant without the perfecting of a forfeiture. This conclusion is sound. A provision of forfeiture on alienation cannot, it is believed, be turned into a mere restraint on alienation, and the presence of a provision of forfeiture on alienation certainly does not provide active duties in the trust so as to prevent the execution of a use by the Statute of Uses.

§ 748. **Conclusion**: Taken as a whole the foregoing cases show as well marked an instance as any where our Supreme Court actually interprets the instrument by finding, not what the testator expressed in words, but what was the intention of his inducement. The object and purpose of the inducement is in these cases apparently made not merely the standard of interpretation but the very subject-matter to be interpreted. This

[90] 284 Ill. 11, 22-23.

[91] 287 Ill. 26.

position has been taken without any apparent appreciation by the court of the complete departure from the fundamental principles of interpreting writings which it involves.[92]

[92] *Ante*, § 123.

CHAPTER XXVIII.

ILLEGAL AND IMPOSSIBLE CONDITIONS.

§ 749. When the condition is subsequent and impossible of fulfillment or illegal: Under these circumstances the preceding estate is never divested.[1] But the later breach of a condition subsequent is not excused because the fulfillment of the condition has become no longer possible,[2] unless this impossibility of performance arise because of the act of the person for whose benefit the performance was imposed.[3]

§ 750. Where the condition is precedent and illegal or impossible: In such a case the future interest can never vest.[4]

In *Goff v. Pensenhafer*,[5] there is a suggestion of the recognition of the rule laid down in Jarman on Wills,[6] that when the condition precedent is impossible, the gift upon a condition precedent takes effect in spite of the non-fulfillment 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. This can hardly be an exception of any great practical importance.

Jarman states as a further exception to the general rule, that the fulfillment 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

[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] Sherman *v.* Town of Jefferson, 274 Ill. 294.

[3] Jones *v.* Bramblet, 1 Scam. (Ill.) 276; Jennings *v.* Jennings, 27 Ill. 518; Chicago v. Chicago & W. Ind. R. R. Co., 105 Ill. 73.

[4] Jennings *v.* Jennings, 27 Ill. 518, 522, *semble;* Goff *v.* Pensenhafer, 190 Ill. 200, 210.

[5] 190 Ill. 200, 210.

[6] 6th ed. (Bigelow), vol. 2, star page 852.

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.[7] In *Ransdell v. Boston*,[8] 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 authority is to be found countenancing any distinction between conditions *malum prohibitum* and *malum in se*.

§ 751. What conditions are illegal—Conditions in restraint of marriage: One case in our Supreme Court, *Shackelford v. Hall*,[9] 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.[10] 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 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,[11] "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

[7] Brown *v.* Peck, 1 Eden 140; Wren *v.* Bradley, 2 DeG. & S. 49; *In re* Moore, 39 Ch. Div. 116.

[8] 172 Ill. 439.

[9] 19 Ill. 212.

[10] Becker *v.* Becker, 206 Ill. 53 (gift over on widow's remarrying valid).

[11] Jarman on Wills, 6th ed. (Bigelow), vol. 2, star page 853.

by descent, it is not necessarily to be presumed from his entry on the land, that he is cognizant of the condition." [12]

[12] 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 *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 respective proportions 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. Shackleford 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

§ 752. Conditions to induce husband and wife to live apart or to get a divorce: Such conditions are illegal in general.

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, although 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."

This was the *dictum* of *Ransdell v. Boston*.[13] 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.[14]

[13] 172 Ill. 439, 445.

[14] 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.

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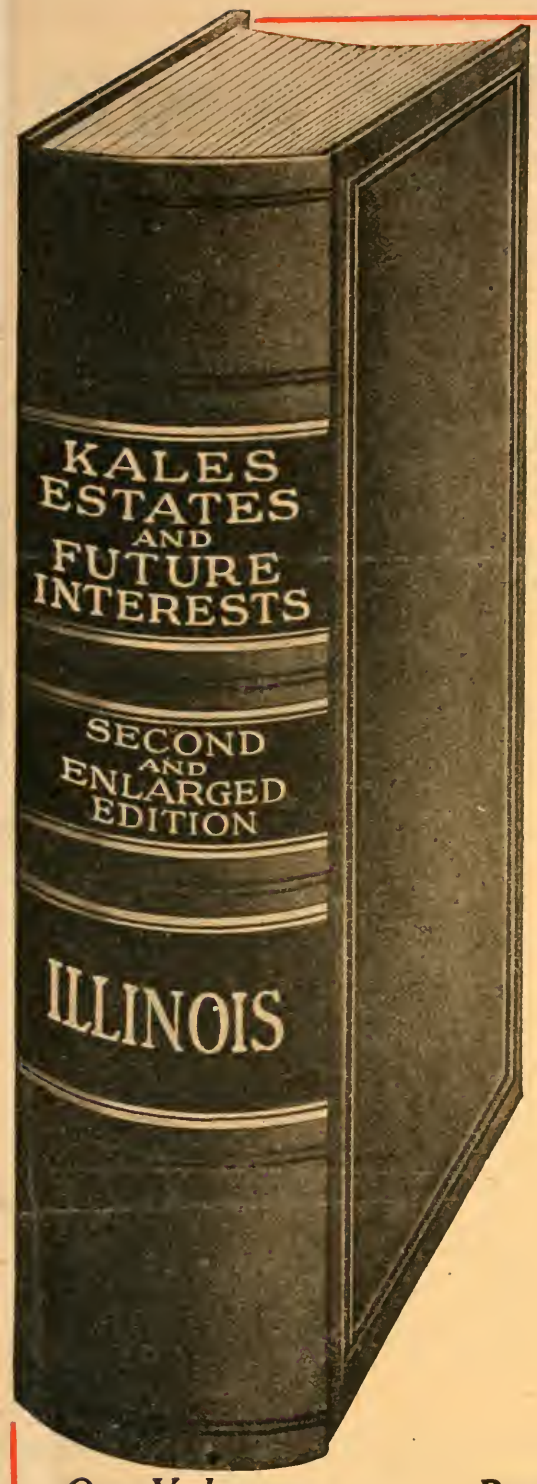

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