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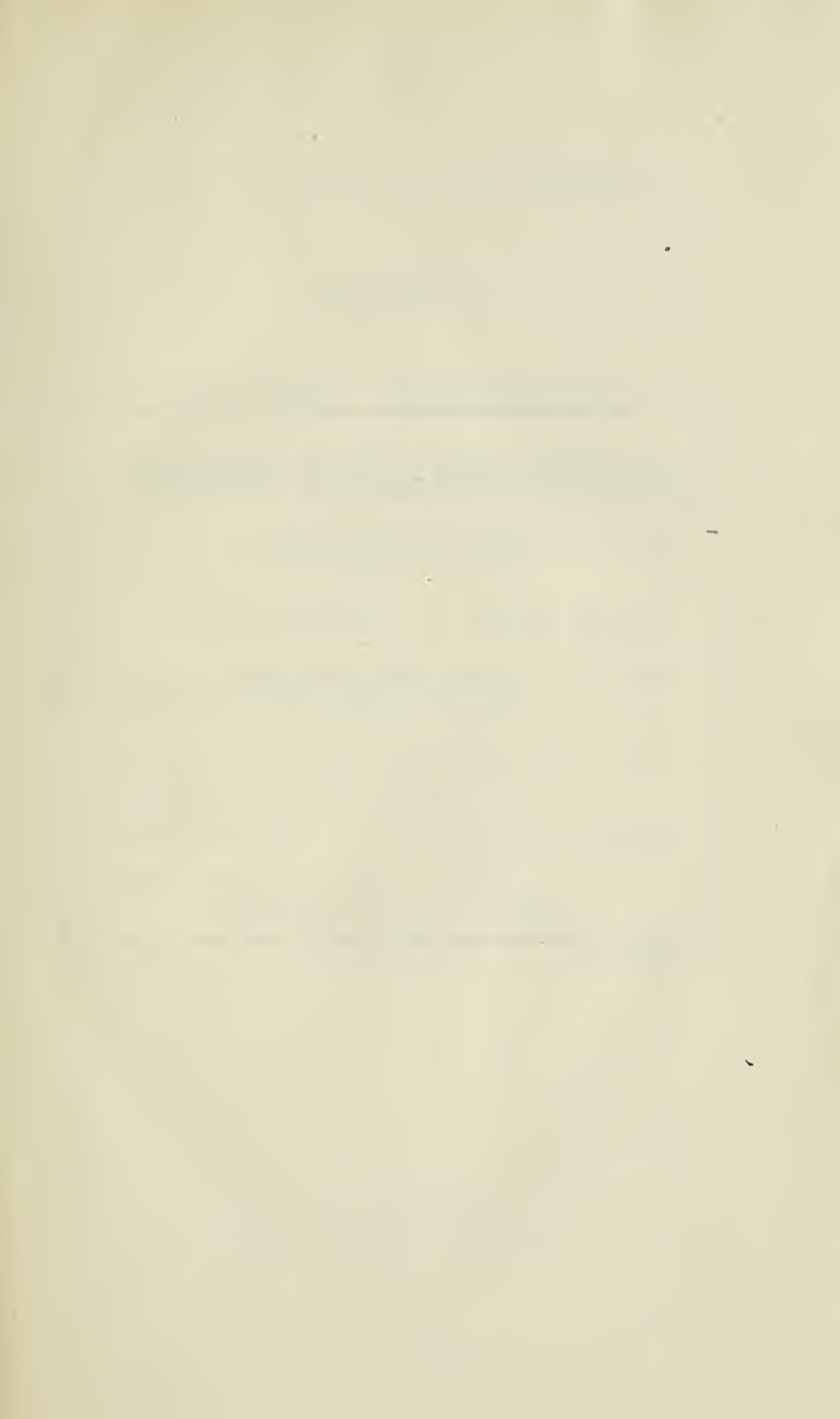


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CASES ON THE LAW OF PROPERTY

VOL. I. PERSONAL PROPERTY.

By Harry A. Bigelow, Professor of Law in the University of Chicago.

VOL. II. RIGHTS IN ANOTHER'S LANDS.

By Harry A. Bigelow.

VOL. III. TITLES TO REAL PROPERTY.

By Ralph W. Aigler, Professor of Law in the University of Michigan.

VOL. IV. FUTURE INTERESTS.

By Albert M. Kales, of the Chicago Law, formerly Professor of Law in Harvard University.

VOL. V. WILLS, DESCENT, AND ADMINISTRATION.

By George P. Costigan, Jr., Professor of Law in Northwestern University.

CASES ON THE LAW OF PROPERTY

VOLUME 4

FUTURE INTERESTS
AND
ILLEGAL CONDITIONS AND
RESTRAINTS

BY ALBERT M. KALES

OF THE CHICAGO BAR

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1918

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1918

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

“To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country.”

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on “The Case Method in American Law Schools.” Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis

and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.	Evidence.
Agency.	Insurance.
Bills and Notes.	International Law.
Carriers.	Jurisprudence.
Contracts.	Mortgages.
Corporations.	Partnership.
Constitutional Law.	Personal Property.
Criminal Law.	Real Property. { ^{1st Year.}
Criminal Procedure.	{ 2d "
Common-Law Pleading.	{ 3d "
Conflict of Laws.	Public Corporations.
Code Pleading.	Quasi Contracts.
Damages.	Sales.
Domestic Relations.	Suretyship.
Equity.	Torts.
Equity Pleading.	Trusts.
	Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published, or put in press, books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law in the University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law in the University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law in the University of Wisconsin, and William U. Moore, Professor of Law in the Columbia University.

Carriers. By Frederick Green, Professor of Law in the University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law in the University of Minnesota.

Constitutional Law. By James Parker Hall, Dean of the Faculty of Law in the University of Chicago.

Corporations. By Harry S. Richards, Dean of the Faculty of Law in the University of Wisconsin.

Criminal Law. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Criminal Procedure. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Damages. By Floyd R. Mechem, Professor of Law in the University of Chicago, and Barry Gilbert, Professor of Law in the University of Illinois.

Equity. By George H. Boke, Professor of Law in the University of California.

Insurance. By W. R. Vance, Dean of the Faculty of Law in the University of Minnesota.

Legal Ethics, Cases and Other Authorities on. By George P. Costigan, Jr., Professor of Law in the Northwestern University.

Partnership. By Eugene A. Gilmore, Professor of Law in the University of Wisconsin.

Persons (including Marriage and Divorce). By Albert M. Kales, Professor of Law in the Northwestern University, and Chester G. Vernier, Professor of Law in the University of Illinois.

- Pleading (Common Law)*. By Clarke B. Whittier, Professor of Law in the Stanford University, and Edmund M. Morgan, Professor of Law in the University of Minnesota.
- Property (Titles to Real Property)*. By Ralph W. Aigler, Professor of Law in the University of Michigan.
- Property (Personal)*. By Harry A. Bigelow, Professor of Law in the University of Chicago.
- Property (Wills, Descent, and Administration)*. By George P. Costigan, Jr., Professor of Law in the Northwestern University.
- Property (Future Interests)*. By Albert M. Kales, Professor of Law in the Northwestern University.
- Quasi Contracts*. By Edward S. Thurston, Professor of Law in the University of Minnesota.
- Sales*. By Frederic C. Woodward, Professor of Law in the University of Chicago.
- Suretyship*. By Crawford D. Hening, Professor of Law in the University of Pennsylvania.
- Torts*. By Charles M. Hepburn, Professor of Law in the University of Indiana.
- Trusts*. By Thaddeus D. Kenneson, Professor of Law in the University of New York.
- Wills and Administration*. By George P. Costigan, Jr., Professor of Law in the Northwestern University.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

The following well-known teachers of law are at present actively engaged in the preparation of casebooks on the subjects indicated below:

- Edward W. Hinton, Professor of Law in the University of Chicago. Subject, *Evidence*.
- Arthur L. Corbin, Professor of Law in the Yale University. Subject, *Contracts*.
- James Brown Scott, Professor of International Law in the Johns Hopkins University. Subject, *International Law*.
- A. M. Cathcart, Professor of Law in the Stanford University. Subject, *Code Pleading*.
- Harry A. Bigelow, Professor of Law in the University of Chicago. Subject, *Property (Rights in Another's Lands)*.

WILLIAM R. VANCE,
General Editor.

JANUARY, 1918.

*

AUTHOR'S PREFATORY NOTE

THIS collection of cases for the American Casebook Series is an abridgment of a larger casebook, also published by the West Publishing Company, covering more fully the same subjects as are here presented. The larger edition contains approximately twice as many pages and is designed to serve a course for which two lectures a week are assigned. This abridged edition is suitable for a course of two lectures each week for half a year.

Both the larger and smaller editions are designed for use with Professor Aigler's casebook on Titles, published in the American Casebook Series. Professor Aigler's collection includes the subjects of dower, curtesy, joint ownership, fraudulent conveyances, and registration, and these subjects have therefore been omitted from both the larger and the abridged edition of this casebook on Future Interests.

The compiler of these cases in this preface (as also in the preface to the larger edition) acknowledges his great indebtedness to the Harvard Law School, first, for the privilege of using Mr. Gray's collection of cases in preparing the manuscript for this work; and, second, the opportunity of giving at the Harvard Law School during the year 1916-1917, the course known as Property III, and in this way testing with the class the effectiveness of the arrangement and cases now presented.

It is the desire of the compiler, through this abridged edition, as well as through the larger edition, that Mr. Gray's collection of cases and his analysis of the subjects dealt with should continue to live and serve the great body of law students of the country, and that the present work, in the abridged edition as well as the larger one, while it must bear another's name, should play an important part in achieving that end.

ALBERT M. KALES.

CAMBRIDGE, June 1, 1917.

TABLE OF CONTENTS

PART I

CLASSIFICATION OF FUTURE INTERESTS

CHAPTER I

RIGHTS OF ENTRY FOR CONDITION BROKEN

Section	Page
1. Validity and Construction.....	1
2. Who may Take Advantage of the Breach of Condition.....	5
3. Mode of Perfecting a Forfeiture.....	10
4. Relief Against Forfeiture.....	12
I. License	12
II. Waiver	15

CHAPTER II

ESCHEAT AND POSSIBILITIES OF REVERTER.....	26
--	----

CHAPTER III

REVERSIONS, VESTED REMAINDERS AND EXECUTORY INTERESTS.....	30
--	----

CHAPTER IV

CONTINGENT REMAINDERS

1. Validity	41
2. Construction	66
3. Alienability	81

CHAPTER V

LIMITATIONS TO CLASSES.....	96
-----------------------------	----

CHAPTER VI

FREEHOLD INTERESTS SUBJECT TO A TERM.....	103
---	-----

CHAPTER VII

RULE IN SHELLEY'S CASE.....	110
-----------------------------	-----

CHAPTER VIII

FUTURE INTERESTS IN PERSONAL PROPERTY

1. Chattels Real.....	145
2. Personal Property Other than Chattels Real.....	171
4 KALES PROP.	(xiii)

Section	CHAPTER I	Page
INTRODUCTION		184
	CHAPTER II	
MEANING OF HEIRS IN A LIMITATION TO THE TESTATOR'S HEIRS OR THE HEIRS OF A LIVING PERSON.....		190
	CHAPTER III	
"SURVIVOR" CONSTRUED VS. "OTHER".....		197
	CHAPTER IV	
VESTING OF LEGACIES.....		204
	CHAPTER V	
GIFTS OVER UPON THE DEATH OF A PREVIOUS TAKER SIMPLICITER, OR WITHOUT CHILDREN, OR WITHOUT ISSUE SURVIVING THE FIRST TAKER		235
	CHAPTER VI	
GIFTS ON FAILURE OF ISSUE.....		245
	CHAPTER VII	
IMPLICATION OF CROSS-LIMITATIONS.....		256
	CHAPTER VIII	
DETERMINATION OF CLASSES.....		257
	CHAPTER IX	
DIVESTING CONTINGENCIES AND CONDITIONS PRECEDENT TO THE TAKING EFFECT OF EXECUTORY DEVISES AND BEQUESTS		
1. Failure of Executory Devise or Bequest.....		279
2. Failure of Preceding Interest.....		292
3. Acceleration		298

PART III

POWERS

Section	Page
CHAPTER I	
OPERATION, CLASSIFICATION, RELEASE AND DISCHARGE.....	301
CHAPTER II	
CONTRACTS TO APPOINT AND APPOINTMENTS IN FRAUD OF THE POWER..	315
CHAPTER III	
SURVIVAL OF POWERS.....	323
CHAPTER IV	
POWERS IN TRUST AND GIFTS IMPLIED IN DEFAULT OF APPOINTMENT..	344
CHAPTER V	
APPOINTED PROPERTY AS ASSETS.....	357
CHAPTER VI	
DEFECTIVE EXECUTION.....	365
CHAPTER VII	
WHAT WORDS EXERCISE A POWER.....	379
CHAPTER VIII	
POWERS IN LIFE TENANTS TO DISPOSE OF THE FEE.....	401

PART IV

RULES AGAINST PERPETUITIES

CHAPTER I	
THE RULE AND ITS COROLLARIES.....	408
CHAPTER II	
INTERESTS SUBJECT TO THE RULE.....	461
CHAPTER III	
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.....	497

Section		Page
	CHAPTER IV	
LIMITATIONS TO CLASSES.....		519
	CHAPTER V	
SEPARABLE LIMITATIONS, INDEPENDENT GIFTS, AND LIMITATIONS TO A SERIES		533
	CHAPTER VI	
MODIFYING CLAUSES.....		557
	CHAPTER VII	
POWERS		563
	CHAPTER VIII	
CHARITIES		578
	PART V	
	ILLEGAL CONDITIONS AND RESTRAINTS	
	CHAPTER I	
	FORFEITURE OF ESTATES OF INHERITANCE	
1. On Alienation.....		597
2. On Failure to Alienate.....		607
	CHAPTER II	
FORFEITURE ON ALIENATION OF ESTATES FOR LIFE AND FOR YEARS....		636
	CHAPTER III	
RESTRAINTS ON THE ALIENATION OF ESTATES OF INHERITANCE.....		648
	CHAPTER IV	
RESTRAINTS ON THE ALIENATION OF ESTATES FOR LIFE AND FOR YEARS		662
	CHAPTER V	
INDESTRUCTIBLE TRUSTS OF ABSOLUTE AND INDEFEASIBLE EQUITABLE INTERESTS		695
	CHAPTER VI	
ILLEGAL AND IMPOSSIBLE CONDITIONS.....		703

TABLE OF CASES

[TITLES OF CASES PRINTED HEREIN ARE SET IN ORDINARY TYPE. CASES CITED IN FOOTNOTES ARE INDICATED BY ITALICS.]

	Page		Page
Abbyss v. Burney.....	449	<i>Attorney General v. Corporation of</i>	
<i>Abbott v. Bradstreet</i>	192, 193	<i>South Moulton</i>	3
<i>Abbott v. Essex Co.</i>	246	<i>Attorney General v. Gleg</i>	343
<i>Abbott v. Jenkins</i>	45, 77	<i>Attorney General v. Hall</i>	608
<i>Abel's Case</i>	110	<i>Attorney General v. Merrimack</i>	
<i>Abrams v. Watson</i>	25	<i>Mfg. Co.</i>	4
<i>Adams v. Savage</i>	106	<i>Attorney General v. Wax Chand-</i>	
<i>Adams v. Valentine</i>	3	<i>lers Co.</i>	3
<i>Adams' Trust</i>	237	<i>Attwater v. Attwater</i>	599
<i>Adamson, In re</i>	651	<i>Atwaters v. Birt</i>	334
<i>Ætna Life Ins. Co. v. Hoppin</i> ..	SS, 136	<i>Augustus v. Scabolt</i>	299
<i>Ætna Life Ins. Co. v. Hoppin</i> ..	32, 45	<i>Austin v. Cambridge Port Parish</i> ..	4, 10
<i>Airey v. Boicer</i>	399	<i>Averill, In re</i>	276
<i>Alexander v. Masonic Aid Ass'n</i> ..	193	<i>Avern v. Lloyd</i>	446
<i>Allen, Matter of</i>	264	<i>Avery v. New York Cent. etc., R.</i>	
<i>Allison v. Allison</i>	192, 193	<i>Co.</i>	3
<i>Ambler v. Woodbridge</i>	23	<i>Avery v. U. S.</i>	4
<i>Ames v. Cadogan</i>	391	<i>Ayer v. Ayer</i>	634
<i>Amory v. Meredith</i>	396	<i>Ayling v. Kramer</i>	3
<i>Amory v. Meredith</i>	399	<i>Ayton v. Ayton</i>	260
<i>Anderson v. Anderson</i>	136	<i>Bacon, In re</i>	343
<i>Anderson v. Cary</i>	651	<i>Badger v. Gregory</i>	198
<i>Anderson v. Jackson</i>	246	<i>Baggett v. Meux</i>	650
<i>Anderson v. Menefee</i>	232	<i>Bagshaw v. Spencer</i>	113
<i>Andrew v. Andrew</i>	297	<i>Bailey v. Morris</i>	45
<i>Andrews v. Lincoln</i>	204, 232	<i>Bails v. Davis</i>	116
<i>Andrews v. Partington</i>	265	<i>Bainton v. Ward</i>	362
<i>Andrews v. Yoye</i>	611, 630	<i>Balch v. Pickering</i>	201
<i>Angus v. Noble</i>	506	<i>Ballance v. Fortier</i>	2
<i>Annin's Ex'rs v. Vandoren's Adm'r</i>	626	<i>Bangs v. Smith</i>	399
<i>Anonymous</i>	175	<i>Banks v. Haskie</i>	468
<i>Anonymous</i>	171, 600, 635	<i>Barber's Will, In re</i>	192
<i>Archer v. Brockschmidt</i>	143	<i>Barclay v. Platt</i>	32
<i>Archer v. Jacobs</i>	99	<i>Barker v. Barrows</i>	4
<i>Archer's Case</i>	43, 116	<i>Barlow v. Barlow</i>	136
<i>Archer's Case</i>	42, 45	<i>Barlow v. Salter</i>	255
<i>Armstrong v. Barber</i>	517	<i>Barnitz v. Casey</i>	86
<i>Armstrong v. Kent</i>	635	<i>Barr v. Gardner</i>	55
<i>Arnold v. Woodhams</i>	651	<i>Barrett v. Barrett</i>	291
<i>Ashforth, In re</i>	485	<i>Bartholomew, In re</i>	204
<i>Ashley v. Ashley</i>	444	<i>Barton v. Barton</i>	617
<i>Ashley v. Ashley</i>	257	<i>Barton v. Briscoe</i>	314, 651
<i>Ashmore's Trusts, In re</i>	225	<i>Barton v. Thaw</i>	475
<i>Ashton's Estate, In re</i>	193	<i>Bastard v. Proby</i>	115
<i>Askew v. Askew</i>	198, 257	<i>Bateman v. Faber</i>	651
<i>Astley v. Micklethwait</i>	50, 58	<i>Bateman v. Gray</i>	265
<i>Atkins v. Hiccocks</i>	207	<i>Bates v. Gillett</i>	67
<i>Atkinson v. Barton</i>	257	<i>Batsford v. Kebbell</i>	218
<i>Atkinson v. Douling</i>	307, 312		

	Page		Page
<i>Bax v. Whitbread</i>	332	<i>Boicles, In re</i>	460
<i>Bayley v. Morris</i>	116	<i>Bowen, In re</i>	650
<i>Beachcroft v. Broome</i>	608	<i>Boyce v. Boyce</i>	706
<i>Beard v. Westcott</i>	297	<i>Boyd v. Strahan</i>	175
<i>Beckton v. Barton</i>	237	<i>Boyes v. Cook</i>	399
<i>Belding v. Parsons</i>	55	<i>Boykin v. Anerum</i>	95
<i>Belfield v. Booth</i>	532	<i>Brackenbury v. Gibbons</i>	57, 60, 99
<i>Bell v. Bair</i>	651	<i>Bradford v. Griffin</i>	35
<i>Belmont v. O'Brien</i>	343	<i>Bradford v. Monks</i>	343
<i>Bence, In re</i>	548	<i>Bradley v. Peixoto</i>	602
<i>Bengough v. Edridge</i>	430	<i>Bradly v. Westcott</i>	635
<i>Bennett v. Bennett</i>	143	<i>Bradshaw, In re</i>	323
<i>Bennett v. Morris</i>	45, 55	<i>Bradshaw v. Bradshaw</i>	323
<i>Benton, In re</i>	650	<i>Bradstreet v. Clark</i>	24
<i>Bergman v. Arnhold</i>	75	<i>Brandon v. Robinson</i>	662
<i>Berrien v. Berrien</i>	335	<i>Brant v. Virginia Coal & Iron</i>	
<i>Berry v. Williamson</i>	115	<i>Co.</i>	401
<i>Beverley's Case</i>	110	<i>Brassey v. Chalmers</i>	335
<i>Beyfus v. Lawley</i>	332, 361	<i>Bray v. Bree</i>	564
<i>Beyfus v. Lawley</i>	364	<i>Brechbeller v. Wilson</i>	80
<i>Bibbens v. Potter</i>	237	<i>Bredenburg v. Bardin</i>	335
<i>Bickley v. Guest</i>	311	<i>Brennan v. Brennan</i>	706
<i>Bigelow v. Cady</i>	505	<i>Brian v. Caucasens</i>	608
<i>Bilderback v. Boyce</i>	390	<i>Brickenden v. Williams</i>	356
<i>Bindon (Lord) v. Earl of Suffolk</i>		<i>Bristow v. Boothby</i>	563
.....	237, 238	<i>Broadway Bank v. Adams</i>	687
<i>Bingham's Appeal</i>	390	<i>Brokaw v. Ogle</i>	88
<i>Bird v. Luckie</i>	196	<i>Bromley v. Smith</i>	88
<i>Blackmore v. Boardman</i>	468	<i>Brook, In re</i>	192
<i>Blakeman v. Miller</i>	493	<i>Brook v. Pearson</i>	647
<i>Blanchard v. Blanchard</i>	88	<i>Brookman v. Smith</i>	296
<i>Blanchard v. Brooks</i>	87	<i>Broomfield v. Crowder</i>	69
<i>Blanchard v. Detroit, L. & L. M.</i>		<i>Brown v. Brown</i>	32, 192, 193
<i>R. Co.</i>	3	<i>Brown v. Chicago & N. W. R.</i>	
<i>Bland v. Bland</i>	608, 669	<i>Co.</i>	3
<i>Blatchford v. Newberry</i>	299	<i>Brown v. Higgs</i>	345, 350
<i>Blecker v. Smith</i>	24	<i>Brown v. Keller</i>	2
<i>Blomfield v. Eyre</i>	284	<i>Brown v. Lyon</i>	136
<i>Blore v. Sutton</i>	369	<i>Brown v. Macgill</i>	694
<i>Blunt's Trusts, In re</i>	588	<i>Brown v. Renshaw</i>	305
<i>Boatman v. Boatman</i>	88	<i>Brown v. Tilley</i>	4
<i>Boehm v. Baldwin</i>	96	<i>Browne, In re</i>	468
<i>Bolding v. Strugnell</i>	225	<i>Browne v. Browne</i>	52, 78
<i>Bolls v. Winton</i>	35	<i>Bruce v. Charlton</i>	204
<i>Bond v. Moore</i>	61	<i>Brummell v. Macpherson</i>	14
<i>Bond v. Moore</i>	55, 95, 196	<i>Brummet v. Barber</i>	178
<i>Bonnicwell v. Madison</i>	24	<i>Bryan v. Spires</i>	35
<i>Booth, In re</i>	241	<i>Buck v. Lantz</i>	86
<i>Booth v. Booth</i>	209	<i>Buckley v. Simonds</i>	34
<i>Boothby v. Boothby</i>	88	<i>Bucklin v. Creighton</i>	115, 143
<i>Boraston's Case</i>	42, 45, 69	<i>Buckton v. Hay</i>	497
<i>Boscawen v. Bliss</i>	14	<i>Bull v. Kingston</i>	609
<i>Boston Safe Deposit & Trust Co.</i>		<i>Bull v. Pritchard</i>	52, 78, 234
<i>v. Collier</i>	657	<i>Bullard v. Goffe</i>	116
<i>Boston Safe Deposit & Trust Co.</i>		<i>Bullock, In re</i>	676
<i>v. Luke</i>	690	<i>Bulleet v. Plummer</i>	323
<i>Bourke's Trusts, In re</i>	237	<i>Bunn, In re</i>	225
<i>Bowen, In re</i>	586	<i>Burleigh v. Clough</i>	45, 390, 635
<i>Bowen v. Lewis</i>	124	<i>Burrough v. Fosier</i>	246
<i>Bowen v. Sconcroft</i>	238	<i>Burrough v. Phileox</i>	347
<i>Bowes v. Goslett</i>	609	<i>Burton v. Gagnon</i>	84, 196
<i>Bowler v. Bowler</i>	67		

TABLE OF CASES

xix

	Page		Page
<i>Bushby v. Dixon</i>	105	<i>Clarke v. Fay</i>	94
<i>Butcher v. Butcher</i>	332	<i>Clark's Trusts, In re</i>	651
<i>Butcher v. Leach</i>	226	<i>Clay, In re</i>	338
<i>Butterfield v. Reed</i>	690	<i>Clay v. Clay</i>	193
<i>Cadell v. Palmer</i>	430	<i>Clay v. Hart</i>	335
<i>Callison v. Morris</i>	94	<i>Clemens v. Heckscher</i>	143
<i>Cambridge v. Rous</i>	237	<i>Clere's Case</i>	36, 301, 379
<i>Camp v. Cleary</i>	598, 603	<i>Clerk v. Day</i>	116
<i>Candey v. Haskins</i>	116	<i>Clifford v. Clifford</i>	369
<i>Cantillon's Minors, In re</i>	208	<i>Clinfelter v. Ayres</i>	335
<i>Caraher v. Lloyd</i>	87, 88	<i>Clive v. Carew</i>	651
<i>Carpenter v. Hubbard</i>	115	<i>Clobberie's Case</i>	204
<i>Carpenter v. Sangamon Loan & Trust Co</i>	238	<i>Cloberry v. Lampen</i>	204
<i>Carroll v. Burns</i>	136	<i>Close v. Railroad</i>	4
<i>Carter v. Bloodgood's Ex'rs</i>	201	<i>Coates Street, In re</i>	87, 88
<i>Carter v. Carter</i>	32	<i>Cole v. Creyon</i>	264
<i>Carter's Heirs v. Carter's Adm'rs</i>	716	<i>Cole v. Scwell</i>	45, 198
<i>Carthev v. Euraght</i>	346	<i>Cole v. Wade</i>	343
<i>Cartledge, In re</i>	204	<i>Coleman, In re</i>	670
<i>Carcardine v. Carcardine</i>	45	<i>Collins v. Brackett</i>	4
<i>Cashman's Estate, In re</i>	407	<i>Columbia Trust Co. v. Christopher</i>	314
<i>Caskell's Trusts, In re</i>	650	<i>Comberbach v. Perryn</i>	260
<i>Cassidy v. Mason</i>	4	<i>Combs v. Combs</i>	635
<i>Casterton v. Sutherland</i>	346	<i>Com. v. Crowley</i>	193
<i>Cattlin v. Brown</i>	550	<i>Com. v. Duffield</i>	301, 364
<i>Chadock v. Cowley</i>	245	<i>Compton v. McMahan</i>	338
<i>Chadwick v. Parker</i>	11	<i>Conduitt v. Soane</i>	261
<i>Chaffers v. Abell</i>	204	<i>Conklin v. Egerton's Adm'r</i>	338
<i>Challis v. Doe</i>	57	<i>Connolly v. O'Brien</i>	94
<i>Challis v. Doe d. Evers</i>	536	<i>Conner v. Johnson</i>	264
<i>Chamberlain v. Hutchinson</i>	356	<i>Conrad v. Long</i>	704
<i>Chamberlain v. Runkle</i>	143	<i>Constable v. Bull</i>	237
<i>Chamberlayne v. Brockett</i>	591	<i>Cook v. Cook</i>	97, 101
<i>Chambers v. Tulane</i>	335	<i>Cook v. Councilman</i>	135
<i>Chandos v. Talbot</i>	205	<i>Cook v. Hammond</i>	86
<i>Chapin v. Crow</i>	81	<i>Cook's Estate, In re</i>	299
<i>Chapin v. Nott</i>	84	<i>Cookes' Contract, In re</i>	343
<i>Chapman v. Blissett</i>	261	<i>Coombes, In re</i>	650
<i>Chapman v. Cheney</i>	95	<i>Cooper v. Cooper</i>	198
<i>Chapman v. Pingree</i>	3	<i>Cooper v. Marlin</i>	367, 378
<i>Chency v. Teese</i>	67	<i>Cooper v. Stuart</i>	484
<i>Chetwood v. Winston</i>	250	<i>Coover's Appeal</i>	299
<i>Child v. Baylie</i>	150, 408	<i>Corbel's Case</i>	600
<i>Child v. Baytie</i>	151	<i>Corporation of Bristol v. Westcott</i>	15
<i>Cholmondley v. Meyrick</i>	205	<i>Corr v. Corr</i>	208
<i>Christ's Hospital v. Grainger</i>	578	<i>Cory v. Cory</i>	24
<i>Chudleigh's Case</i>	42	<i>Cote's Appeal</i>	86, 87
<i>Cincinnati v. Babb</i>	705	<i>Cotton v. Heath</i>	153
<i>City of Peoria v. Darst</i>	41, 81	<i>Courtenay, In re</i>	265
<i>Clach's Case</i>	257	<i>Cox v. Cunningham</i>	2
<i>Clafin v. Clafin</i>	698	<i>Craft v. Indianapolis, D. & W. R. Co.</i>	41
<i>Clafin v. Clafin</i>	657, 702	<i>Craig v. Warner</i>	55
<i>Clapp v. Fogleman</i>	248	<i>Craren v. Brady</i>	299
<i>Clapp v. Ingraham</i>	357	<i>Crawford v. Wearn</i>	143
<i>Clark v. Henry</i>	237	<i>Creery v. Lingwood</i>	237
<i>Clark v. Middlesworth</i>	407	<i>Crigan v. Baines</i>	237
<i>Clark v. Neves</i>	136, 143	<i>Crocker v. Old South Society</i>	24
<i>Clark v. Shawen</i>	32	<i>Croughton's Trust, In re</i>	650

	Page		Page
<i>Crozier v. Crozier</i>	284, 299	<i>Doe d. Frceman v. Bateman</i>	2
<i>Cruger v. Phelps</i>	704	<i>Doe d. Gallini v. Gallini</i>	124
<i>Crump v. Norwood</i>	55, 136	<i>Doe d. Gorges v. Webb</i>	256
<i>Cummings v. Hamilton</i>	95, 96	<i>Doe d. Herbert v. Selby</i>	45, 534
<i>Cumston v. Bartlett</i>	399	<i>Doe d. Mussell v. Morgan</i>	45
<i>Cunliffe v. Bruncker</i>	52, 58	<i>Doe d. Norfolk v. Hawke</i>	604
<i>Cunningham v. Moody</i>	72, 75	<i>Doe d. Nowell v. Roake</i>	390
<i>Currey, In re</i>	651	<i>Doe d. Pilkington v. Spratt</i>	193
<i>Curtis v. Lukin</i>	596	<i>Doe d. Planner v. Scudamore</i>	76
<i>Curtis v. Pricc</i>	113	<i>Doe d. Planner v. Scudamore</i>	45
<i>Cuthbert v. Purrier</i>	635	<i>Doe d. Scott v. Roach</i>	45
		<i>Doe d. Stevenson v. Glover</i>	609
<i>Dale v. Bartley</i>	299	<i>Doe d. Tanner v. Dorvell</i> ...72, 75,	256
<i>Daniel v. Thomson</i>	250, 251	<i>Doe d. Willis v. Martin</i>	70
<i>Dart v. Dart</i>	87	<i>Doe ex dem. Wigan v. Jones</i>	302
<i>Daubency v. Cockburn</i>	364	<i>Dommett v. Bedford</i>	641
<i>Davenport v. Queen, The</i>	20	<i>Donnelly v. Eastes</i>	24
<i>Davids' Trusts, In re</i>	385	<i>Dorr v. Lovering</i>	556
<i>Davidson v. Dallas</i>	267	<i>Dott v. Cunningham</i>	143
<i>Davies, Ex parte</i>	252	<i>Doty v. Burdick</i>	2
<i>Davies v. Huguenin</i>	314	<i>Douglas v. Congreve</i>	115
<i>Davies v. Morcton</i>	25	<i>Dove v. Torr</i>	192, 193
<i>Davies v. Thorns</i>	384	<i>Doyley v. Attorney General</i>	345
<i>Davies' Trusts, In re</i>	356	<i>Drake v. Attorney General</i>	363
<i>Davis v. Christian</i>	335	<i>Druecker v. McLaughlin</i>	3
<i>Davis v. Ripley</i>	96	<i>Drummond's Ex'r v. Drummond</i> ..	291
<i>Darwin, In re</i>	651	<i>Drury v. Drury</i>	96, 264
<i>Deadman v. Yantis</i>	32	<i>Ducker v. Burnham</i>	67, 88, 94
<i>Dean v. Dean</i>	60	<i>Dugdale, In re</i>	603
<i>Dean v. Handley</i>	237	<i>Duke v. Dyches</i>	175
<i>Dec v. Dec</i>	96	<i>Duke of Norfolk's Case</i>	153, 408
<i>Delaney v. McCormack</i>	196	<i>Dull's Estate, In re</i>	143
<i>Deu v. Allaire</i>	246	<i>Dumpor's Case</i>	12
<i>Dendy v. Nicholl</i>	16	<i>Dumpor's Case</i>	14
<i>Denn d. Nowell v. Roake</i>	387	<i>Duncan v. Bluett</i>	115
<i>Denn d. Nowell v. Roake</i>	390	<i>Duppa v. Mayo</i>	11
<i>Dennett v. Dennett</i>	55, 115	<i>Dusenberry v. Johnson</i>	284
<i>De Peyster v. Michael</i>	598	<i>D'Wolf v. Gardiner</i>	87
<i>Detwold, In re</i>	647		
<i>Devisme v. Mello</i>	259	<i>Eales v. Drake</i>	356
<i>Dewar v. Brooke</i>	232	<i>Early v. Early</i>	86
<i>De Wolf v. Middleton</i>	196	<i>Earnhart v. Earnhart</i>	135
<i>Dick v. Harby</i>	335, 336	<i>Eaton v. Boston Trust Co</i>	690
<i>Diffenderfer v. Board of Public Schools</i>	468	<i>Eaton v. Brown</i>	189
<i>Dillard v. Dillard</i>	343	<i>Eaton v. Smith</i>	343
<i>Dixon, In re</i>	616	<i>Eaton v. Strac</i>	297, 634
<i>Doe v. Baker</i>	11	<i>Eavestaff v. Austin</i>	298
<i>Doe v. Considine</i>	67	<i>Eccles v. Birkett</i>	230
<i>Doe v. Eyre</i>	287	<i>Eckhart v. Irons</i>	3
<i>Doe v. Frost</i>	196	<i>Eddowes v. Eddowes</i>	101
<i>Doe v. Gludwin</i>	24	<i>Edie v. Babington</i>	359
<i>Doe v. Laming</i>	136	<i>Edward Clerc's Case</i>	36, 301, 379
<i>Doe v. Peck</i>	24	<i>Edwards v. Burt</i>	88
<i>Doe v. Pearson</i>	599	<i>Edwards v. Edwards</i>	237, 238
<i>Doe v. Pritchard</i>	14	<i>Edwards v. Hammond</i>	69
<i>Doe v. Provoost</i>	67	<i>Edwards v. Varick</i>	87
<i>Doe d. Ambler v. Woodbridge</i>	23	<i>Egerton v. Massey</i>	53
<i>Doe d. Blomfield v. Eyre</i>	284	<i>Egerton v. Massey</i>	55
<i>Doe d. Boscawen v. Bliss</i>	14	<i>Eichelberger v. Barnitz</i>	250
<i>Doe d. Comberbach v. Perryn</i>	260	<i>Elliott v. Elliott</i>	269
		<i>Elliott v. Smith</i>	237

TABLE OF CASES

xxi

	Page		Page
<i>Ellis's Trusts, In re</i>	651	<i>Galland v. Leonard</i>	237
<i>Elyton Land Co. v. South & N. A. R. Co.</i>	3	<i>Gallinger v. Farlinger</i>	599
<i>Emmet's Estate, In re</i>	265	<i>Gallini v. Gallini</i>	124
<i>Emperor v. Rolfe</i>	205	<i>Game, In re</i>	592
<i>Equitable Trust Co. v. Fisher</i>	41	<i>Garde Browne, In re</i>	468
<i>Evans v. Evans</i>	135	<i>Garfoot v. Garfoot</i>	337
<i>Evans v. Scott</i>	205	<i>Garland v. Smyth</i>	198
<i>Evans v. Walker</i>	172, 449	<i>Garrison v. Hill</i>	86
<i>Evans v. Weatherhead</i>	143	<i>Garler v. Standerwick</i>	205
<i>Exc, In re</i>	204	<i>Genet v. Hunt</i>	574
<i>Eyres v. Faulkland</i>	170	<i>Gibson v. Doeg</i>	24
		<i>Giles v. Austin</i>	25
<i>Faber v. Police</i>	45	<i>Giles v. Little</i>	407
<i>Faith v. Boucles</i>	4	<i>Gill v. Worrall</i>	257
<i>Faloon v. Simshauser</i>	97	<i>Gilman v. Bell</i>	359
<i>Fargo v. Miller</i>	196	<i>Gilmore v. Severn</i>	264
<i>Farnam v. Farnam</i>	80	<i>Gimblett v. Purton</i>	265
<i>Farrar v. McCue</i>	336	<i>Girard Trust Co. v. Fussell</i>	595
<i>Farwell v. Easton</i>	24	<i>Glover v. Conell</i>	40
<i>Faulkner v. Lowe</i>	343	<i>Glover v. Stillson</i>	407
<i>Faulkner v. Wynford</i>	347	<i>Gluck v. Elkan</i>	24
<i>Ferneley's Trusts, In re</i>	502	<i>Godfrey v. Davis</i>	261
<i>Festing v. Allen</i>	50, 78	<i>Godfrey v. Harben</i>	360
<i>Festing v. Allen</i>	57	<i>Golder v. Bressler</i>	343
<i>Field v. Providence</i>	4	<i>Golladay v. Knock</i>	81
<i>Fifer v. Allen</i>	238	<i>Gooch v. Gooch</i>	101
<i>Finch v. Lane</i>	77	<i>Goodier v. Edmunds</i>	577
<i>Fitchie v. Brown</i>	422	<i>Goodill v. Brigham</i>	37
<i>Fitzgerald v. Standish</i>	335	<i>Goodrich v. Goodrich</i>	96
<i>Flanders v. Clark</i>	608	<i>Goodright v. Davids</i>	16
<i>Fleming v. Buchanan</i>	359, 364	<i>Goodtitle v. Billington</i>	45
<i>Flinn v. Davis</i>	250, 626	<i>Goodtitle v. White</i>	55
<i>Flower, In re</i>	577	<i>Goodtitle d. Gurnall v. Wood</i>	417
<i>Forbes v. Peacock</i>	335	<i>Goodwin v. Clark</i>	562
<i>Forsythe v. Lansing's Ex'rs</i>	94	<i>Gore v. Gore</i>	107
<i>Fortescue v. Satterthwaite</i>	87	<i>Gorges v. Webb</i>	256
<i>Forth v. Chapman</i>	248	<i>Gorman v. Byrne</i>	301
<i>Fortier v. Ballance</i>	2	<i>Gotch v. Foster</i>	234
<i>Fosdick v. Fosdick</i>	444	<i>Goulder, In re</i>	606
<i>Foster v. Roberts</i>	88	<i>Gowland v. De Faria</i>	88
<i>Fothergill v. Fothergill</i>	369	<i>Gozzard v. Jobbins</i>	606
<i>Foulkes v. Williams</i>	399	<i>Gracff v. De Turk</i>	332
<i>Fowler v. Black</i>	143	<i>Grant v. Lyman</i>	386
<i>Fox v. Fox</i>	227	<i>Gray v. Blanchard</i>	3
<i>Fox v. Fox</i>	232	<i>Gray v. Chicago, M. & St. P. R. Co.</i>	4, 10
<i>Fox's Estate</i>	201	<i>Gray v. Lynch</i>	343
<i>Frazer v. Board of Sup'rs</i>	55	<i>Greated v. Greated</i>	297
<i>Freeland v. Pearson</i>	349	<i>Greaves v. Simpson</i>	116
<i>Freeman v. Bateman</i>	2	<i>Green v. Bridges</i>	25
<i>Frith, In re</i>	196	<i>Green v. Harvey</i>	616, 635
<i>Frogmorton v. Holyday</i>	292	<i>Green v. Hewitt</i>	32
<i>Frogmorton v. Wharrey</i>	45, 117	<i>Green v. Spieer</i>	663
<i>Frost, In re</i>	490	<i>Green's Case</i>	16
<i>Fuller v. Chamier</i>	116	<i>Greene v. O'Connor</i>	4
<i>Funk v. Eggleston</i>	399	<i>Greenough v. Welles</i>	338
<i>Furness v. Fox</i>	204	<i>Greenwood v. Verdon</i>	246
<i>Furnish v. Rogers</i>	88	<i>Gretton v. Howard</i>	136
<i>Fusselman v. Worthington</i>	2	<i>Grey's Settlements, In re</i>	650
		<i>Grimshaw's Trusts, In re</i>	232
<i>Gaines v. Fender</i>	343	<i>Grimwood v. Moss</i>	16
<i>Gainsford v. Dunn</i>	332		

	Page		Page
<i>Gross v. Sheeler</i>	143	<i>Heard v. Read</i>	193, 196
<i>Grosvenor v. Bowen</i>	307, 314	<i>Henderson v. Cross</i>	609
<i>Guernsey v. Lazar</i>	690	<i>Henderson v. Hill</i>	88
<i>Gulliver v. Vaux</i>	616	<i>Herbert v. Selby</i>	45, 534
<i>Gulliver v. Wickett</i>	292	<i>Herbert v. Webster</i>	502
<i>Gurnall v. Wood</i>	417	<i>Herrell v. Sizeland</i>	2
<i>Gutman v. Buckler</i>	343	<i>Hervey v. McLaughlin</i>	228
<i>GrWilliam v. Rowcl</i>	337	<i>Hess v. Lakin</i>	116
<i>Hudcox v. Cody</i>	264	<i>Hicks v. Pegues</i>	86
<i>Hadley, In re</i>	363	<i>Hide v. Parrat</i>	171
<i>Hadley v. Hadley</i>	343	<i>Higinbotham v. Holme</i>	647
<i>Hagar, Adm'r, v. Buck</i>	25	<i>Hill v. Barclay</i>	25
<i>Hagger v. Payne</i>	259	<i>Hill v. Chapman</i>	258
<i>Haight, In re</i>	719	<i>Hill v. Chapman</i>	97
<i>Hall v. Bliss</i>	400	<i>Hill v. Hill</i>	88, 94, 183
<i>Hall v. La France Fire Engine</i> <i>Co.</i>	45, 94	<i>Hill v. Schwarz</i>	328
<i>Hall v. Nute</i>	67	<i>Hillhouse v. Chester</i>	86
<i>Hall v. Priest</i>	246	<i>Hincksman v. Smith</i>	88
<i>Hall v. Robinson</i>	635	<i>Hind v. Poole</i>	343
<i>Hall v. Terry</i>	204	<i>Hindson v. Wood</i>	196
<i>Hall v. Thayer</i>	136	<i>Hinrichsen v. Hinrichsen</i>	94
<i>Hamel v. Minneapolis St. P. & S.</i> <i>S. M. Ry.</i>	4	<i>Hoare v. Parker</i>	172
<i>Hamilton v. Wentworth</i>	116	<i>Hoath v. Hoath</i>	218
<i>Hamlet, In re</i>	244	<i>Holford, In re</i>	276
<i>Hammond v. Port Royal & A. R.</i> <i>Co.</i>	3	<i>Holland, In re</i>	647
<i>Hampton v. Rather</i>	143	<i>Holland v. Alsop</i>	198
<i>Hancock, In re</i>	548	<i>Holland v. Wood</i>	264
<i>Hanna v. Haues</i>	45, 115	<i>Hollander v. Central Metal Co.</i> ...	492
<i>Hannaford v. Hamaford</i>	256	<i>Hollis' Hospital, In re</i>	475
<i>Hanson v. Graham</i>	219	<i>Hollister v. Shaw</i>	390
<i>Hardin v. Forsythe</i>	2	<i>Holloway v. Holloway</i>	190
<i>Harding v. Glyn</i>	344	<i>Holmes, In re</i>	650
<i>Hargreaves, In re</i>	453	<i>Holmes v. Coghill</i>	359, 364
<i>Harman v. Dickenson</i>	197	<i>Holmes v. Godson</i>	612
<i>Harrington v. Harte</i>	364	<i>Holmes v. Gordon</i>	617
<i>Harrie's Trust, In re</i>	356	<i>Holmes v. Penny</i>	692
<i>Harris v. Davis</i>	297	<i>Holmes v. Prescott</i>	52, 57, 78
<i>Harris v. Shaw</i>	3	<i>Hooper v. Cummings</i>	3, 24
<i>Harris v. Smith</i>	250	<i>Hopkins v. Grimshaw</i>	588
<i>Harrison v. Foreman</i>	279	<i>Hopkins v. Phelps</i>	533
<i>Harrison v. Harrison</i>	198, 427	<i>Horne v. Lyeth</i>	143
<i>Hart's Trusts, In re</i>	218	<i>Horner v. Chicago, M. & St. P. R.</i> <i>Co.</i>	4
<i>Hartshorne v. Watson</i>	11, 16	<i>Horner v. Swan</i>	312
<i>Harvard College v. Balch</i>	75, 390	<i>Horton v. New York Cent. & H. R.</i> <i>Co.</i>	25
<i>Harvey v. Ballard</i>	113	<i>Hoskins' Trusts, In re</i>	363
<i>Harwood v. Shoe</i>	704	<i>Houell v. Barnes</i>	335
<i>Hassam v. Hazen</i>	399	<i>Houghton, In re</i>	238
<i>Howard v. Peavey</i>	80, 94	<i>Houghton v. Brown</i>	238
<i>Hawden v. Hawden</i>	115	<i>House v. Jackson</i>	94
<i>Hawke v. Euyart</i>	723	<i>Houston & T. C. R. Co. v. Ennis-</i> <i>Calvert Co.</i>	4
<i>Hawkins v. Kemp</i>	334	<i>Howe v. Hodge</i>	95
<i>Hawley v. Kafitz</i>	4	<i>Howe v. Morse</i>	506
<i>Hawthorn v. Ulrich</i>	332	<i>Hoyt v. Ketcham</i>	4
<i>Hayes v. Oatley</i>	363	<i>Hubbard v. Rawson</i>	633
<i>Hays v. St. Paul Church</i>	3	<i>Hubbird v. Goin</i>	260
<i>Hayward, In re</i>	237	<i>Hudson, In re</i>	257
<i>Hayward v. Spaulding</i>	45, 65	<i>Hudson v. Hudson</i>	257
		<i>Hudsons, In re</i>	205

TABLE OF CASES

xxiii

	Page		Page
Hughes v. Ellis.....	296	<i>Jull v. Jacobs</i>	78, 299
<i>Hughes v. Ellis</i>	297	<i>Kean's Lessee v. Hoeffcker</i>	86
Hughes v. Sayer.....	248	<i>Keop's Will, In re</i>	198
Hughes v. Turner.....	385	<i>Kellett v. Shepard</i>	55, 192
Hulburt v. Emerson.....	250	<i>Kelley v. Meins</i>	626, 635
Hull v. Palmer.....	690	<i>Kemp v. Kemp</i>	332
<i>Humane Society v. McMurtrie</i> ...	238	<i>Kendall v. Gleason</i>	193
<i>Humphrey v. Campbell</i>	359	<i>Kenard v. Kenard</i>	67
Hunter v. Galliers.....	636	<i>Kennedy v. Kingston</i>	347
<i>Hurry v. Morgan</i>	198	<i>Kepler v. Larson</i>	136
<i>Hurst v. Hurst</i>	291, 647	<i>Kepler v. Reeves</i>	116
<i>Hurto v. Grant</i>	24	<i>Kessner v. Phillips</i>	656
<i>Hutchings, In re</i>	650	<i>Kevern v. Williams</i>	269
<i>Hutchinson v. Maxwell</i>	694	<i>Kew v. Trainor</i>	14
<i>Ide v. Ide</i>	252, 626, 634	<i>Keyser's Appeal</i>	656
<i>Incorporated Village of Ashland v. Greiner</i>	4	<i>Kilpatrick v. Mayor</i>	4
<i>Inderwick v. Tatchell</i>	203	<i>Kinch v. Ward</i>	136
<i>Ingham v. Ingham</i>	237	<i>King v. Burchell</i>	600
Innes v. Sayer.....	371	<i>King v. Norfolk & W. R. Co.</i>	4
<i>Innes v. Sayer</i>	375	<i>King v. Shelton</i>	702
<i>Iredell v. Iredell</i>	265	<i>Kingman v. Harmon</i>	88
<i>Irish v. Antioch College</i>	41	<i>Kirkpatrick v. Kirkpatrick</i>	75
<i>Irvine v. Newlin</i>	45, 52	<i>Klingman v. Gilbert</i>	444
<i>Jackson v. Allen</i>	24	<i>Knight v. Browne</i>	647
<i>Jackson v. Bull</i>	626	<i>Knight v. Pottgiesser</i>	32, 67
<i>Jackson v. Hobhouse</i>	651	<i>Knox v. Barker</i>	143
<i>Jackson v. Jackson</i>	369	<i>Kountz's Estate, In re</i>	204, 232
<i>Jackson v. Noble</i>	282	<i>Kron v. Kron</i>	40, 41
<i>Jackson v. Noble</i>	286, 288	<i>Kuhn v. Webster</i>	634
<i>Jackson v. Robins</i>	622	<i>Lake v. Brown</i>	41
<i>Jackson v. Von Zedlitz</i>	694	<i>Lakey v. Scott</i>	86
<i>Jackson v. Waldron</i>	87	<i>Lambert v. Thwaites</i>	347
<i>Jarvis v. Wyatt</i>	45	<i>Lampet's Case</i>	87, 88, 149
<i>Jeanneret v. Polack</i>	651	<i>Lane v. Debenham</i>	338
<i>Jee v. Audley</i>	413	<i>Lane v. Goudge</i>	222
<i>Jeffers v. Lampson</i>	87, 94	<i>Lanesborough v. Fox</i>	564
<i>Jeffreys v. Conner</i>	241	<i>Lantsbery v. Collier</i>	577
<i>Jenkins v. Bonsal</i>	86, 87	<i>Large's Case</i>	606
Jenkins' Trusts, In re.....	297, 621	<i>Lassells v. Lord Cornwallis</i>	362
<i>Jenny v. Andrews</i>	363	<i>Latimer v. Latimer</i>	34
Jesson v. Wright.....	118	<i>Latimer v. Waddell</i>	603
<i>Jesson v. Wright</i>	124	<i>Lawrence v. Lawrence</i>	506
<i>Johnson v. Askey</i>	196	<i>Lawrence v. Pitt</i>	86
<i>Johnson v. Battelle</i>	75	<i>Lawrence's Estate, In re</i>	574
<i>Johnson v. Jacob</i>	45	<i>Lawton v. Corlies</i>	193
<i>Johnson v. Touchet</i>	375	<i>Leake v. Robinson</i>	232, 234, 519
<i>Jones, In re</i>	621	<i>Lechmere & Lloyd, In re</i>	58
<i>Jones v. Carter</i>	16	<i>Lechmere & Lloyd, In re</i>	58, 60
<i>Jones v. Clifton</i>	359	<i>Lee v. Lee</i>	192
<i>Jones v. Morgan</i>	113	<i>Lee v. Simpson</i>	399
<i>Jones v. Picketts</i>	88	<i>Leggett v. Doremus</i>	303
<i>Jones v. Rees</i>	143	<i>Lemacks v. Glover</i>	45
<i>Jones v. Tucker</i>	382	<i>Le Maitre v. Bannister</i>	608
<i>Jones v. Westcomb</i>	292	<i>Leng v. Hodges</i>	415
<i>Jones v. Westcomb</i>	292	<i>Leonard v. Haworth</i>	506
<i>Jones v. Winwood</i>	303	<i>Leonard v. Sussex</i>	113
<i>Jordan v. Adams</i>	124	<i>Lester v. Garland</i>	647
<i>Joslin v. Hammond</i>	237	<i>Letchworth v. Vaughan</i>	4
<i>Jourolmon v. Massengill</i>	690	<i>Lewin v. Killey</i>	237
		<i>Lewis v. Claiborne</i>	246

	Page		Page
<i>Lewis v. Lerrellyn</i>	391	<i>Mandelbaum v. McDonell</i>	606, 656
<i>Lewis v. Palmer</i>	407	<i>Manderville's Case</i>	41
<i>Liddy v. Kennedy</i>	11	<i>Mann v. Thompson</i>	270
<i>Lighburne v. Gill</i>	609	<i>Manning's Case</i>	145
<i>Lilley v. Fifty Associates</i>	25	<i>Marten, In re</i>	356
<i>Littlefield v. Mott</i>	40	<i>Martin, In re</i>	227
<i>Little Rock Granite Co. v. Shall</i> ..	25	<i>Martin v. Margham</i>	595
<i>Lloyd v. Carew</i>	408	<i>Marvin v. Ledwith</i>	32
<i>Lloyd v. Tweedy</i>	621	<i>Maryland Mut. Ben. Soc. v. Clendenin</i>	390
<i>Locke v. Lamb</i>	232	<i>Mary Portington's Case</i>	11, 600
<i>Lockyer v. Savage</i>	636	<i>Mason v. Bloomington Library Ass'n</i>	506
<i>Locton v. Locton</i>	337, 338	<i>Mason v. Pat's Ex'r</i>	143
<i>Loddington v. Kime</i>	49	<i>Mason v. Wheeler</i>	390
<i>Lofton v. Murchison</i>	96	<i>Matthews v. Temple</i>	99
<i>London & S. W. R. Co. v. Gomm</i> ..	461	<i>Maundrell v. Maundrell</i>	37
<i>Long v. Blackall</i>	416	<i>May v. Boston</i>	3
<i>Long v. Moore</i>	4	<i>May v. Joynes</i>	621
<i>Longhead d. Hopkins v. Phelps</i> ..	533	<i>Mead v. Ballard</i>	3
<i>Lord v. Bunn</i>	666	<i>Meadous v. Parry</i>	292
<i>Lord v. Comstock</i>	143	<i>Measure v. Gee</i>	115, 136
<i>Lord Bindon v. Earl of Suffolk</i>	237, 238	<i>Mebane v. Mebane</i>	656
<i>Lord Stratheden, In re</i>	594	<i>Meeker v. Brintnall</i>	390
<i>Lord Townshend v. Windham</i>	362, 364	<i>Methodist Church v. Young</i>	10
<i>Los Angeles University v. Swarth</i>	3	<i>Mellichamp v. Mellichamp</i>	99
<i>Loval v. Lord Ranclagh</i>	25	<i>Melson v. Cooper</i>	626
<i>Low v. Burron</i>	412	<i>Merkel's Appeal</i>	175
<i>Loice v. Land</i>	198	<i>Merrifield v. Cobleigh</i>	24
<i>Lozman, In re</i>	297	<i>Merrill v. Trimmer</i>	25
<i>Luddy, In re</i>	237	<i>Mervin, In re</i>	232
<i>Lunt v. Lunt</i>	702	<i>Mctzen v. Schopp</i>	250
<i>Luxford v. Cheeke</i>	67	<i>Middleton v. Messenger</i>	261
<i>Lyle v. Richards</i>	45	<i>Mifflin's Appeal</i>	566
<i>Lyons v. Bradley</i>	556	<i>Mildmay's Case</i>	35, 599, 600, 601
		<i>Miles v. Harford</i>	535
		<i>Miles v. Jarvis</i>	58
<i>McBee, Ex parte</i>	136	<i>Milhollen's Adm'r v. Rice</i>	356
<i>McCall v. Lee</i>	178	<i>Miller v. Emans</i>	87
<i>McCampbell v. Mason</i> ...41, 45, 81,	95	<i>Miller v. McAllister</i>	102
<i>McCartney v. Hunt</i>	2	<i>Miller v. Riddle</i>	29
<i>McConnell v. Stewart</i>	67	<i>Mills, In re</i>	391
<i>McCreary v. Coggeshall</i>	55	<i>Mills v. Mills</i>	399
<i>McCue v. Barrett</i>	24	<i>Mills v. Seattle, etc., R. Co.</i>	3
<i>McElhce v. Wheeler</i>	45	<i>Mills v. Seward</i>	136
<i>McFall v. Kirkpatrick</i>	305	<i>Minard v. Delaware Co.</i>	3
<i>McGaughey's Adm'r v. Henry</i>	356	<i>Minard v. Delaware Ry.</i>	4
<i>McGinnis v. Fernandes</i>	2	<i>Minnig v. Batdorff</i>	67
<i>McGlynn v. Moore</i>	24	<i>Minot v. Tappan</i>	193
<i>Machen v. Machen</i>	143	<i>Mittel v. Karl</i>	88
<i>MacKenzie v. Trustees of Presbytery of Jersey City</i>	581	<i>Mogg v. Mogg</i>	101
<i>Mackimmon v. Sewell</i>	292	<i>Montefiore v. Browne</i>	334
<i>Macley, In re</i>	599	<i>Monypenny v. Dering</i>	297
<i>McQuesten v. Morgan</i>	12	<i>Moore, In re</i>	706
<i>Maetier v. Osborn</i>	25	<i>Moore, In re</i>	363, 422, 429
<i>Madden v. Taylor</i>	257	<i>Moore v. Ffolliot</i>	349
<i>Madison v. Larmon</i> ...67, 88, 95,	444	<i>Moore v. Littell</i>	94
<i>Maher v. Maher</i>	204	<i>Moore v. Parker</i>	113
<i>Mainwaring v. Beevor</i>	271	<i>Moore v. Rake</i>	86
<i>Manchester v. Durfee</i>	136	<i>Moore v. Reddel</i>	143
		<i>Moore v. Sanders</i>	617

TABLE OF CASES

XXV

	Page		Page
<i>Moore v. Ullcoats Min. Co.</i>	11	<i>Orr v. Yates</i>	84
<i>Moore v. Hare</i>	94	<i>Ortmayer v. Elcock</i>	88
<i>Moot Case</i>	55	<i>Osgood v. Bliss</i>	399
<i>Moran's Will, In re</i>	94	<i>Osgood v. Franklin</i>	335
<i>Morhouse v. Cothcal</i>	250	<i>Overton v. Lea</i>	599
<i>Morcton v. Lees</i>	301	<i>Owen v. Gibbons</i>	43
<i>Morgan v. Gronow</i>	566	<i>Pacific Bank v. Windram</i>	690
<i>Morgan v. Milman</i>	371	<i>Packham v. Gregory</i>	222
<i>Morgan v. Morgan</i>	208	<i>Palmer v. Locke</i>	316
<i>Morris, In re</i>	226	<i>Palmer's Trusts, In re</i>	198
<i>Morrison v. Kelly</i>	41	<i>Papillon v. Voice</i>	113, 115
<i>Morse v. Martin</i>	368	<i>Papst v. Hamilton</i>	3
<i>Mortimer, In re</i>	300	<i>Parish's Heirs v. Ferris</i>	250
<i>Mortlock's Trust, In re</i>	617	<i>Parker, In re</i>	230
<i>Morton v. Babb</i>	41	<i>Parker v. Bolton</i>	115
<i>Mosley's Trusts, In re</i>	532	<i>Parker v. Cobc</i>	702
<i>Moss v. Chappell</i>	4	<i>Parker v. Ross</i>	67, 80
<i>Mott v. Ackerman</i>	338	<i>Parker v. Scars</i>	343
<i>Mott v. Danville Seminary</i>	29	<i>Parkin, In re</i>	328
<i>Moyston v. Bacon</i>	407	<i>Parsons v. Miller</i>	3
<i>Mudge v. Hammill</i>	45	<i>Paschall v. Passmore</i>	3
<i>Muldrow's Heirs v. Fox's Heirs</i> ..	335	<i>Patterson v. Lawrence</i>	359, 364
<i>Munson v. Berdan</i>	384	<i>Payne v. Rosser</i>	86
<i>Murkin v. Phillipson</i>	205	<i>Pearec v. Forwell</i>	265
<i>Murray v. Jones</i>	292	<i>Pearec v. Loman</i>	207
<i>Mussell v. Morgan</i>	45	<i>Peard v. Morton</i>	237
<i>Mussett v. Bingle</i>	506	<i>Pearson, In re</i>	647
<i>Nannock v. Horton</i>	390	<i>Pearson v. Dolman</i>	232
<i>Napier v. Napier</i>	391	<i>Pedder v. Hunt</i>	116
<i>Nearp's Estate, In re</i>	237	<i>Peer v. Hennion</i>	135
<i>Nesbitt v. Berridge</i>	88	<i>Pells v. Brown</i>	38, 245
<i>Newhall v. Whceler</i>	634	<i>Pelletreau v. Jackson</i>	87
<i>Nichol v. Levy</i>	686	<i>Pemberton v. Barnes</i>	10
<i>Nichols v. Eaton</i>	678	<i>Pennant's Case</i>	15
<i>Nichols v. Guthrie</i>	88	<i>Pennock v. Lyons</i>	14
<i>Nichols v. Hooper</i>	246	<i>Pennsylvania Co. v. Bauerle</i>	343
<i>Nicholson v. Bettie</i>	245	<i>Pennsylvania Co. v. Price</i>	506
<i>Nicoll v. Scott</i>	32	<i>People v. Byrd</i>	96
<i>Nicolls v. Sheffield</i>	562	<i>People v. Peoria</i>	238
<i>Nightingale v. Phillips</i>	115	<i>Peoria v. Darst</i>	41, 81
<i>Nodine v. Greenfield</i>	80	<i>Pepper's Will</i>	375
<i>Norfolk (Duke) Case</i>	408	<i>Perceval v. Perceval</i>	55, 57
<i>Norfolk v. Hawke</i>	604	<i>Perrin v. Blake</i>	117
<i>Norfolk's Case (Duke of)</i>	153	<i>Perry v. Merritt</i>	609
<i>Norman v. Kynaston</i>	284	<i>Peter v. Beverly</i>	335
<i>North v. Graham</i>	29, 87	<i>Phayer v. Kennedy</i>	88
<i>Northern Trust Co. v. Wheaton</i> ..	94	<i>Phene's Trusts, In re</i>	345
<i>Nowell v. Roake</i>	387	<i>Philbrick's Settlement, In re</i> ...	363
<i>Nowell v. Roake</i>	390	<i>Phippis v. Ennismore</i>	647
<i>O'Brien v. Barkley</i>	704	<i>Pickard v. Booth</i>	241
<i>O'Brien v. Battle</i>	343	<i>Picken v. Matthews</i>	530
<i>O'Callaghan v. Swan</i>	616	<i>Pickworth, In re</i>	284
<i>Odell v. Odell</i>	596	<i>Pierce v. Brooks</i>	102
<i>O'Hare v. Johnston</i>	264	<i>Piercy v. Roberts</i>	648
<i>Oliver v. Powell</i>	86	<i>Pilkington v. Spratt</i>	193
<i>O'Mahoney v. Burdett</i>	235, 291	<i>Pingrey v. Rulon</i>	94
<i>O'Melia v. Mullarky</i>	32, 67, 88	<i>Pinkham v. Blair</i>	196
<i>Oppenheim v. Henry</i>	268, 695	<i>Pirbright v. Salvey</i>	506
<i>O'Grady v. Wilmot</i>	362	<i>Pitt v. Pelham</i>	337
		<i>Pitzel v. Schneider</i>	78, 532
		<i>Planner v. Scudamore</i>	76

	Page		Page
<i>Planner v. Scudamore</i>	45	<i>Richards v. Bergavenny</i>	116
<i>Platt v. Routh</i>	363, 364	<i>Ricketts v. Loftus</i>	332
<i>Plunket v. Holmes</i>	55	<i>Rickner v. Kessler</i>	32
<i>Polk v. Faris</i>	143	<i>Riddick v. Cohoon</i>	626
<i>Pollock v. Booth</i>	468	<i>Ridge's Trusts, In re</i>	257
<i>Porter, In re</i>	606	<i>Ridley, In re</i>	497
<i>Porter v. Fox</i>	530	<i>Ring v. Hardwick</i>	557
<i>Portington's Case</i>	11, 600	<i>Ringrose v. Bramham</i>	269
<i>Portland v. Terwilliger</i>	3	<i>Roach v. Wadham</i>	301
<i>Post v. Weil</i>	3	<i>Roake v. Denn</i>	390
<i>Potter v. Couch</i>	603, 606	<i>Robertson v. Gaines</i>	335
<i>Powell, In re</i>	276	<i>Robertson v. Garrett</i>	264
<i>Powell v. Boggis</i>	606	<i>Robertson v. Guenther</i>	88
<i>Powell v. Brandon</i>	143	<i>Robeson v. Cochran</i>	81
<i>Powell v. Howells</i>	256	<i>Robinson v. Allison</i>	335, 336
<i>Powell's Trusts, In re</i>	572	<i>Robinson v. Le Grande & Co.</i>	135
<i>Pownall v. Graham</i>	422, 429	<i>Robinson v. Wood</i>	289
<i>Presbyterian Church v. Venable</i> ..	29	<i>Rochford v. Hackman</i>	642
<i>Pressgrove v. Comfort</i>	143	<i>Rochfort v. Fitz Maurice</i>	115
<i>Price v. Hall</i>	78	<i>Roddy v. Fitzgerald</i>	124
<i>Price v. Hall</i>	57	<i>Rodin v. Smith</i>	204
<i>Price v. Worwood</i>	16	<i>Roe v. Traumer</i>	34
<i>Priestley v. Holgate</i>	703	<i>Roe d. Hunter v. Galliers</i>	636
<i>Proctor v. Bishop of Bath and Wells</i>	534	<i>Roe ex dem. Sheers v. Jeffery</i>	253
<i>Proctor v. Tows</i>	2	<i>Rogers v. Eagle Fire Ins. Co.</i>	34
<i>Provost of Beverley's Case</i>	110	<i>Rogers v. Mutch</i>	270
<i>Prouse v. Abingdon</i>	207	<i>Rogers v. Randall</i>	183
<i>Pulitzer v. Livingston</i>	507	<i>Rogers v. Rogers</i>	238, 356
<i>Pushman v. Filliter</i>	609	<i>Rogers' Estate, In re</i>	94
<i>Putnam v. Fisher</i>	343	<i>Rolfe v. Harris</i>	25
<i>Putnam v. Story</i>	338	<i>Roome v. Phillips</i>	69
<i>Rabbeth v. Squire</i>	257	<i>Rosher, In re</i>	599
<i>Rabbins, In re</i>	257	<i>Ross v. Ross</i>	607
<i>Radcliffe, In re</i>	305	<i>Ross v. Ross</i>	609, 635
<i>Railroad v. Hood</i>	4	<i>Roundtree v. Roundtree</i>	88
<i>Railsback v. Lovejoy</i>	75, 88	<i>Rous v. Jackson</i>	574
<i>Ramsdell v. Ramsdell</i>	407	<i>Row's Estate, In re</i>	198
<i>Rand v. Butler</i>	196	<i>Royal v. Aultman & Taylor Co.</i>	24
<i>Randolph v. Wright</i>	634	<i>Ruddell v. Wren</i>	84, 96
<i>Ransdell v. Boston</i>	718	<i>Russell, In re</i>	143, 238
<i>Rawley v. Holland</i>	107	<i>Russell v. Russell</i>	232
<i>Raulinson v. Wass</i>	196	<i>Ryan v. Mahan</i>	359
<i>Rawson v. Rawson</i>	193	<i>St. John v. Chew</i>	246
<i>Rawson v. School District</i>	4	<i>St. Paul's Church v. Attorney General</i>	596
<i>Rede v. Farr</i>	11	<i>Salisbury v. Petty</i>	238
<i>Redfern v. Middleton's Ex'rs</i>	45	<i>Salter v. Bradshaw</i>	88
<i>Reeve v. Long</i>	47	<i>Sanders v. Pope</i>	25
<i>Reichenbach v. Washington, etc., R. Co.</i>	3	<i>Sanford v. Lackland</i>	695
<i>Reid v. Gordon</i>	305	<i>Sarel, In re</i>	651
<i>Reid v. J. F. Wiessner Brewing Co.</i>	14	<i>Satterfield v. Mayes</i>	264
<i>Reid v. Reid</i>	237, 343	<i>Saunders v. Edwards</i>	115
<i>Reid v. Shergold</i>	367	<i>Saunders v. Vautier</i>	214, 695
<i>Reid v. Voorhees</i>	204	<i>Sayer v. Sayer</i>	371
<i>Reith v. Seymour</i>	635	<i>School v. Whitney</i>	581
<i>Requa v. Graham</i>	692	<i>Scotney v. Lomer</i>	225
<i>Reynolds v. Pitt</i>	25	<i>Scott v. Bargeman</i>	256
<i>Rhodes v. Whitehead</i>	52, 57, 78	<i>Scott v. Harwood</i>	97
<i>Rice v. Boston & W. R. Corp.</i>	7	<i>Scott v. Roach</i>	45
		<i>Scovill v. McMahon</i>	24

TABLE OF CASES

xxvii

	Page		Page
<i>Sears v. Russell</i>	193	<i>Standen v. Standen</i>	379
<i>Seaver v. Fitzgerald</i>	173	<i>Stanley v. Cott</i>	3
<i>Security Co. v. Pratt</i>	407	<i>Stansbury v. Hubner</i>	601
<i>Sergeson v. Sealey</i>	368	<i>Starcher Bros. v. Duty</i>	475
<i>Sewall v. Wilmer</i>	399	<i>Starr v. Willoughby</i>	80
<i>Seymour v. Bowles</i>	96	<i>State v. Savin</i>	175
<i>Shackelton v. Sebree</i>	34	<i>Stead v. Platt</i>	234
<i>Shannon v. Bradstreet</i>	369	<i>Stephen v. Cunningham</i>	244
<i>Sharington v. Strotten</i>	34	<i>Stevenson v. Glover</i>	609
<i>Sharman v. Jackson</i>	45	<i>Stewart v. Stewart</i>	40, 41
<i>Shaw v. Ford</i>	618	<i>Stiles v. Cummings</i>	260
<i>Shaw v. Robinson</i>	116	<i>Stitwell v. S. L. & H. R. Co.</i>	3
<i>Shee v. Hale</i>	640	<i>Stockton v. Weber</i>	706
<i>Sheers v. Jeffery</i>	253	<i>Stokes v. Van Wyck</i>	196
<i>Shelley's Case</i>	115, 116, 123, 124, 135, 136, 143	<i>Stoller v. Doyle</i>	40
<i>Shelton v. Homer</i>	335	<i>Stone v. Forbes</i>	399
<i>Shepherd v. Ingram</i>	97	<i>Stoner v. Curwen</i>	115
<i>Shepherd v. Ingram</i>	257	<i>Stores v. Benbow</i>	549
<i>Shrimpton v. Shrimpton</i>	204	<i>Storrs Agricultural School v. Whitney</i>	581
<i>Siceloff v. Redman's Adm'r</i>	143	<i>Storrs v. Benbow</i>	270
<i>Siddons v. Cockrell</i>	94	<i>Strain v. Sweeney</i>	41
<i>Siegwald v. Siegwald</i>	40	<i>Strange v. Barnard</i>	609
<i>Siemers v. Morris</i>	690	<i>Stratheden (Lord), In re</i>	594
<i>Simonds v. Simonds</i>	65	<i>Stretton v. Fitzgerald</i>	297
<i>Singleton, Ex parte</i>	173	<i>Striker v. Mott</i>	88
<i>Singleton v. Gilbert</i>	97	<i>Stringer's Estate, In re</i>	297
<i>Sinnett v. Herbert</i>	589	<i>Stuart v. Babington</i>	577
<i>Sir Edward Clerc's Case</i>	36, 301, 379	<i>Stump v. Findlay</i>	45
<i>Slade v. Patten</i>	502	<i>Sturgess v. Pearson</i>	284
<i>Slocum v. Hagaman</i>	299	<i>Styan, In re</i>	57
<i>Smaw v. Young</i>	94	<i>Style's Case</i>	117
<i>Smell v. Dec</i>	204	<i>Summers v. Smith</i>	40, 246
<i>Smith, In re</i>	343	<i>Sunday Lake Min. Co. v. Wakefield</i>	25
<i>Smith v. Ashton</i>	365	<i>Supervisors Warren Co. v. Patterson</i>	3
<i>Smith v. Butcher</i>	143	<i>Surman v. Surman</i>	635
<i>Smith v. Camelford</i>	72, 75	<i>Sutton's Hospital Case</i>	34
<i>Smith v. Colman</i>	237	<i>Swain, In re</i>	596
<i>Smith v. Curtis</i>	393	<i>Sykes's Trusts, In re</i>	650
<i>Smith v. Death</i>	311	<i>Synge v. Synge</i>	647
<i>Smith v. Floyd</i>	356	<i>Taber, In re</i>	651
<i>Smith v. Kimbell</i>	41, 241, 250	<i>Taft v. Taft</i>	75
<i>Smith v. McCormick</i>	143	<i>Tainter v. Clark</i>	338
<i>Smith v. Pendell</i>	87	<i>Tallman v. Wood</i>	115
<i>Smith v. Plummer</i>	311	<i>Tanner v. Dorvell</i>	72, 75, 256
<i>Smith v. Snow</i>	634	<i>Tarback v. Tarback</i>	294
<i>Smith v. West</i>	94	<i>Tarver v. Haines</i>	335
<i>Smith v. Winsor</i>	193	<i>Taylor v. Cedar Rapids & St. P. R. Co.</i>	3
<i>Smither v. Willock</i>	284	<i>Taylor v. Cleary</i>	135
<i>Sneed v. Sneed</i>	367	<i>Taylor v. Lambert</i>	208
<i>Snowdon v. Dales</i>	664	<i>Taylor v. Stainton</i>	237
<i>Sohier v. Trinity Church</i>	3	<i>Taylor v. Taylor</i>	88
<i>Southampton v. Hertford</i>	596	<i>Teague's Settlement, In re</i>	566
<i>Southard v. Central R. Co.</i>	10	<i>Teal v. Richardson</i>	143
<i>Southern v. Wollaston</i>	445	<i>Tcape's Trust, In re</i>	391
<i>Southwell & Wade's Case</i>	26	<i>Teed v. Morton</i>	264
<i>Spencer v. Spencer</i>	332	<i>Temple v. Scott</i>	88, 95
<i>Spencer, In re</i>	650, 651		
<i>Spencer v. Wilson</i>	227		
<i>Spengler v. Kuhn</i>	88		
<i>Springer v. Savage</i>	32		

	Page		Page
<i>Tenant v. Browne</i>	338	<i>Wait, In re</i>	390
<i>Tharp's Estate, In re</i>	198	<i>Waite v. Littlewood</i>	198
<i>Thellusson v. Woodford</i>	418	<i>Wake v. Varah</i>	198
<i>Thomas v. Howell</i>	704	<i>Wakefield v. Wakefield</i>	80
<i>Thomasson v. Wilson</i>	2	<i>Wales' Adm'r v. Bowdish's Ex'r</i> ..	359
<i>Thompson, In re</i>	572	<i>Walker v. Mackie</i>	385
<i>Thompson v. Adams</i>	80, 95	<i>Walker v. Mackie</i>	385
<i>Thompson v. Becker</i>	88	<i>Walker v. Shore</i>	260
<i>Thompson v. Sanford</i>	87	<i>Wall v. Goodenough</i>	2
<i>Thompson's Estate, In re</i>	635	<i>Wallace v. Foxwell</i>	661
<i>Thomson's Ex'rs v. Norris</i>	314	<i>Walpole v. Conway</i>	72, 75
<i>Thorington v. Thorington</i>	307, 314	<i>Walsh v. Wallinger</i>	349
<i>Thornton v. Natchez</i>	4	<i>Warden v. Richards</i>	335
<i>Thornton v. Thornton</i>	391	<i>Wardwell v. McDowell</i>	335
<i>Thurston, In re</i>	356	<i>Ware v. Cam</i>	603
<i>Thurston v. Thurston</i>	45	<i>Ware v. Rowland</i>	193
<i>Tillinghast v. Bradford</i>	676	<i>Warner v. Connecticut Mut. Life</i> <i>Ins. Co</i>	399
<i>Tinkler v. Forbes</i>	4	<i>Warwick v. Gerrard</i>	35
<i>Tippetts & Newbould's Contract</i> ..	650	<i>Waters v. Waters</i>	237
<i>Tollet v. Tollet</i>	366	<i>Watkins v. Williams</i>	609
<i>Tollett v. Armstrong</i>	651	<i>Watson v. Dodd</i>	88
<i>Tolman v. Portbury</i>	16	<i>Watson v. Hayes</i>	208
<i>Tomlinson, In re</i>	364	<i>Watson v. Watson</i>	237
<i>Townshend v. Windham</i>	362, 364	<i>Watson v. Young</i>	548
<i>Treasure, In re</i>	363	<i>Watts v. Clardy</i>	143
<i>Tredennick v. Tredennick</i>	569	<i>Webb v. Hearing</i>	66
<i>Treharne v. Layton</i>	242	<i>Webb v. Honor</i>	384, 385, 387
<i>Tritton, In re</i>	173	<i>Weekes' Settlement, In re</i>	350
<i>Trotter v. Oswald</i>	252	<i>Wehrhane v. Safe Deposit Co</i>	115
<i>Troughton v. Troughton</i>	362	<i>Weinreich v. Weinreich</i>	3
<i>Trustees of Hollis' Hospital, In re</i>	475	<i>Welch v. Brimmer</i>	196
<i>Trustees of Union College v. New</i> <i>York</i>	4	<i>Welch v. Episeopal Theological</i> <i>School</i>	702
<i>Tucker v. Adams</i>	45, 143	<i>Weld v. Bradbury</i>	257
<i>Tugman v. Hopkins</i>	364	<i>Weld v. Bradbury</i>	99
<i>Turnbull v. Hayes</i>	399	<i>Welsh v. Woodbury</i>	634
<i>Turner v. Hause</i>	2	<i>Wenmoth's Estate, In re</i>	274
<i>Turner v. Moor</i>	237	<i>Wescott v. Mecker</i>	143
<i>Turney, In re</i>	230	<i>Wescott's Case</i>	55
<i>Tyler, In re</i>	582	<i>West v. Berney</i>	308
<i>Tyler v. Theilig</i>	196	<i>West v. Fitz</i>	41
<i>Tyrrell's Estate, In re</i>	475	<i>Whall v. Converse</i>	193
 		<i>Wharton v. Masterman</i>	695
<i>Underhill v. Saratoga & W. R. Co</i> ..	3	<i>Wharton v. Masterman</i>	596
<i>Union College v. New York</i>	4	<i>Wheable v. Withers</i>	237
<i>Union Pac. R. Co. v. Cook</i>	705	<i>Whitaker v. Whitaker</i>	95
<i>Uppington v. Corrigan</i>	10	<i>Whitby v. Mitchell</i>	456
 		<i>Whitby v. Mitchell</i>	460
<i>Vanatta v. Carr</i>	407	<i>White v. Collins</i>	116
<i>Vanderplank v. King</i>	257, 446	<i>White v. Hicks</i>	384
<i>Van Grutten v. Foxwell</i>	113, 136	<i>White v. McPheters</i>	88
<i>Van Hagan, In re</i>	356	<i>White v. Mass. Inst. of Tech</i>	359
<i>Van Horne v. Campbell</i>	626	<i>White v. Summers</i>	61
<i>Varley v. Coppard</i>	15	<i>White v. Taylor</i>	335
<i>Vestal v. Garrett</i>	32	<i>White v. Warner</i>	25
<i>Vinson v. Vinson</i>	34	<i>White's Trusts, In re</i>	346
<i>Vize v. Stoney</i>	225	<i>Whitehead v. Bennett</i>	560
 		<i>Wicker v. Ray</i>	115
<i>Waddell v. Rattew</i>	45	<i>Wigan v. Jones</i>	302
<i>Wafer v. Mocato</i>	25	<i>Wiggin v. Perkins</i>	67
<i>Wainman v. Field</i>	556	<i>Wight v. Thayer</i>	136

TABLE OF CASES

xxix

	Page		Page
<i>Wileocks' Settlement, In re</i>	609	<i>Wolfe v. Hines</i>	335
<i>Wilcoxon v. Reese</i>	338	<i>Wollaston v. King</i>	569
<i>Wild's Case</i>	96	<i>Wood, In re</i>	650
<i>Wild's Case</i>	96	<i>Wood v. Burnham</i>	115
<i>Wilkes v. Holmes</i>	368	<i>Wood v. Morton</i>	2
<i>Wilkes v. Lion</i>	562	<i>Wood v. Robertson</i>	80
<i>Wilkinson v. Duncan</i>	569	<i>Woodall v. Bruen</i>	475
<i>Wilks v. Burns</i>	331	<i>Woodall v. Clifton</i>	468
<i>Willard v. Ware</i>	399	<i>Woodbridge v. Jones</i>	404
<i>Williams, In re</i>	396	<i>Woodruff v. Water Power Co.</i>	4
<i>Williams, In re</i>	230	<i>Woodruff v. Woodruff</i>	3
<i>Williams v. Ash</i>	606	<i>Woodruff's Heirs v. Watkins</i> ...	335
<i>Williams v. Elliott</i>	630	<i>Wooster v. Cooper</i>	393
<i>Williams v. Esten</i>	87, 88	<i>Worthing Corp. v. Heather</i>	595
<i>Williams v. Herrick</i>	506	<i>Worthing Corporation v. Heath-</i>	
<i>Williams v. Lomas</i>	363	er	490
<i>Williams v. Tealc</i>	446	<i>Wrey, In re</i>	225
<i>Willing v. Baine</i>	293	<i>Wright v. Pearson</i>	113, 136
<i>Willis v. Hiscox</i>	116	<i>Wright v. Stephens</i>	238
<i>Willis v. Martin</i>	70	<i>Wright v. Wilken</i>	3
<i>Willis v. Martin</i>	72, 75	<i>Wrightson, In re</i>	60
<i>Wills v. Cowper & Parker</i>	338	<i>Wrightson v. Macaulay</i>	196
<i>Wilmer's Trusts, In re</i>	417	<i>Wyman v. Brown</i>	34
<i>Wilson v. Cockrill</i>	183	<i>Wyndham v. Wyndham</i>	261
<i>Wilson v. Duguid</i>	347	<i>Wynne v. Hawkins</i>	608
<i>Wilson v. Jones & Tapp</i>	25	<i>Yalden, In re</i>	609
<i>Wilson v. Knox</i>	230	<i>Yates v. Compton</i>	536
<i>Wilson v. Piggott</i>	332	<i>Young v. Turner</i>	244
<i>Wilson v. Wilson</i>	252, 502, 555	<i>Young v. Waterpark</i>	332
<i>Winsor v. Mills</i>	506	<i>Young v. Young</i>	88
<i>Winter v. Dibble</i>	143	<i>Younghusband v. Gisborne</i>	669
<i>Wintle, In re</i>	230		

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CASES ON PROPERTY

FUTURE INTERESTS

PART I

CLASSIFICATION OF FUTURE INTERESTS

CHAPTER I

RIGHTS OF ENTRY FOR CONDITION BROKEN

SECTION I.—VALIDITY AND CONSTRUCTION

LIT. § 325. Estates which men have in lands or tenements upon condition are of two sorts, viz., either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts per annum, on condition that if the rent be behind, &c., that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, &c., that then it shall be lawful to the feoffor and his heirs to enter, &c. In these cases if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition be not performed, &c.

LIT. § 326. In the same manner it is if lands be given in tail, or let for term of life or of years, upon condition, &c.¹

¹ The same ruling occurs where a term for years is assigned subject to a condition subsequent and right of re-entry for condition broken, so that no reversion remains in the assignor. *Doe d. Freeman v. Bateman*, 2 B. & Ald. 165.

A fortiori, where there is a reversion in the creator of a particular estate, the interest created may be made subject to forfeiture in favor of the reversioner for the breach of a condition subsequent.

NOTE ON CONDITIONS IN LAW.—*Lit.* § 378. Estates which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will, &c. And such condition as is intended by the law to be annexed to anything, is as strong, as if the condition were put in writing.

Co. Lit. 233 b. As to conditions in law, you shall understand they be of two natures, that is to say, by the common law, and by Statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next section mentioned, and the like.

Touching conditions in law without skill, &c., some be by the common law and some by the statute. By the common law as to every estate of tenant by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by elegit, guardian, &c., there is a condition in law secretly annexed to their estates, that if they alien in fee, &c., that he in the reversion or remainder may enter, et sic de similibus, or if they claim a greater estate in court of record, and the like.

IN CASE OF LEASEHOLDS—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. *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). It seems, also, that the giving up of possession by a tenant to a stranger who takes on 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. *Hardin v. Forsythe*, 99 Ill. 312; *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432. 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. *Fusselman v. Worthington*, 14 Ill. 135; *McGinnis v. Fernandes*, 126 Ill. 228, 19 N. E. 44; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Herrell v. Sizeland*, 81 Ill. 457; *Wood v. Morton*, 11 Ill. 547. The attempt by a tenant to transfer more than he has operates as an assignment of his interest. *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445. *Quære*: Does such a conveyance by itself furnish a ground of forfeiture? It has been said that any conveyance by a tenant at sufferance will forfeit the tenancy. *Proctor v. Tows*, 115 Ill. 138, 150, 3 N. E. 569. The owner, however, is always entitled to possession as against a tenant at sufferance.

For the form and effect of statutes making every breach of a covenant in a lease a ground of forfeiture, see *Kales, Future Interests*, §§ 24, 25.

LIT. § 328. Also, divers words (amongst others) there be, which by virtue of themselves make estates upon condition; one is the word sub conditione: as if A. infeoff B. of certain land, to have and to hold to the said B. and his heirs, upon condition (sub conditione), that the said B. and his heirs do pay or cause to be paid to the aforesaid A. and his heirs yearly such a rent, &c. In this case without any more saying the feoffee hath an estate upon condition.

Words of condition

LIT. § 329. Also, if the words were such, Provided always, that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent, &c., or these, So that the said B. do pay or cause to be paid to the said A. such a rent, &c., in these cases without more saying, the feoffee hath but an estate upon condition; so as if he doth not perform the condition, the feoffor and his heirs may enter, &c.²

LIT. § 330. Also, there be other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c., and afterward this word is put into the deed,

² Accord: Gray v. Blanchard, 8 Pick. (Mass.) 284 (1829); Hays v. St. Paul Church, 196 Ill. 633, 63 N. E. 1040; Supervisors Warren Co. v. Patterson, 56 Ill. 111, 120; Harris v. Shaw, 13 Ill. 456; Blanchard v. Detroit, Lansing & Lake Michigan R. Co., 31 Mich. 43, 18 Am. Rep. 142; Hammond v. Port Royal and Augusta Railway Co., 15 S. C. 10; Taylor v. Cedar Rapids and St. Paul R. R. Co., 25 Iowa, 371; May v. Boston, 158 Mass. 21, 32 N. E. 902; Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10; Adams v. Valentine (C. C.) 33 Fed. 1; Reichenbach v. Washington, etc., Ry. Co., 10 Wash. 357, 38 Pac. 1126; Mills v. Seattle, etc., Ry. Co., 10 Wash. 520, 39 Pac. 246; Brown v. Chicago & N. W. Ry. Co. (Iowa) 82 N. W. 1003; Underhill v. Saratoga and Washington R. R. Co., 20 Barb. (N. Y.) 455; Mead v. Ballard, 74 U. S. (7 Wall.) 290, 19 L. Ed. 190; 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; Littleton, §§ 328-331.

Contra: Elyton Land Co. v. South and North Alabama R. R. Co., 100 Ala. 396, 14 South. 207; Druecker v. McLaughlin, 235 Ill. 367, 85 N. E. 647.

Compare, however, Post v. Weil, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422; 12 Am. St. Rep. 809 (1889); Avery v. New York Central, etc., R. R. Co., 106 N. Y. 142, 12 N. E. 619; Stilwell v. S. L. & H. Ry. Co., 39 Mo. App. 221; Ayling v. Kramer, 133 Mass. 12.

If the words of condition required the grantor instead of the grantee to do something, they have been held to create only a covenant. Paschall v. Passmore, 15 Pa. 295, 307-309; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380. 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. Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502; Wright v. Wilken, 2 B. & S. 232 (110 Eng. Com. Law Reports); Atty. Gen. v. Corporation of South Moulton, 14 Beav. 357; Atty. Gen. v. Wax Chandlers Co., 42 L. J. Ch. 425; Sohler v. Trinity Church, 109 Mass. 1. The cases of unclassified special contexts where the word "condition" has been construed to create a covenant are legion. Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687; Portland v. Terwilliger, 16 Or. 465, 19 Pac. 90; Minard v. Delaware Co. (C. C.) 139 Fed. 60; Los Angeles University v. Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262.

That if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c., this is a deed upon condition.³

LIT. § 331. But there is a diversity between this word *si contingat*, &c., and the words next aforesaid, &c. For these words, *si contingat*, &c., are nought worth to such a condition, unless it hath these words following, That it shall be lawful for the feoffor and his heirs to enter, &c.⁴ But in the cases aforesaid, it is not necessary by the law to put such a clause, scilicet, that the feoffor and his heirs may enter, &c., because they may do this by force of the words aforesaid, for that they contain in themselves a condition, scilicet, that the feoffor and his heirs may enter, &c. Yet it is commonly used in all such cases aforesaid to put the clauses in the deeds, scilicet, if the rent be behind, &c., that it shall be lawful to the feoffor and his heirs to enter, &c. And this is well done, for this intent, to declare and express to the common people, who are not learned in the law, of the manner and condition of the feoffment, &c. As if a man seised of land letteth the same land to another by deed indented for term of years, rendering to him a certain

³ Where the conveyance is merely for certain express purposes, or upon a motive expressed, or upon a certain consideration, coupled with a re-entry clause, the estate is upon a condition subsequent. *Atty. Gen. v. Merrimack Manufacturing Co.*, 80 Mass. (14 Gray) 586; *Woodruff v. Water Power Company*, 10 N. J. Eq. 489; *Hamel v. Minneapolis*, St. P. & S. S. M. Ry., 97 Minn. 334, 107 N. W. 139.

A fortiori, where words of condition and a re-entry clause are both used, the estate conveyed is held subject to a condition subsequent. *Gray v. C. M. & St. P. Ry. Co.*, 189 Ill. 400, 59 N. E. 950; *Trustees of Union College v. City of New York*, 65 App. Div. 553, 73 N. Y. Supp. 51; *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968, 11 L. R. A. (N. S.) 398; *Minard v. Delaware Ry. (C. C.)* 139 Fed. 60; *Brown v. Tilley*, 25 R. I. 579, 57 Atl. 380; *Austin v. Cambridge Port Parish*, 21 Pick. (Mass.) 215; *Houston & T. C. R. Co. v. Ennis-Calvert Co.*, 23 Tex. Civ. App. 441, 56 S. W. 367; *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. 606.

⁴ Similarly, if there is no re-entry clause, the estate is not subject to a condition subsequent where the conveyance is merely declared to be for certain express purposes or upon a motive expressed (*Tinkler v. Forbes*, 136 Ill. 221, 239, 26 N. E. 503; *Thornton v. City of Natchez*, 88 Miss. 1, 41 South. 498; *Thornton v. City of Natchez*, 129 Fed. 84, 63 C. C. A. 526; *Barker v. Barrows*, 138 Mass. 578; *Long v. Moore*, 19 Tex. Civ. App. 363, 48 S. W. 43; *Faith v. Bowles*, 86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489; *Field v. Providence*, 17 R. I. 803, 24 Atl. 143; *Horner v. C. M. & St. P. Ry. Co.*, 38 Wis. 165, 175; *Rawson v. School District*, 7 Allen [Mass.] 125, 83 Am. Dec. 670. See also *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; *Avery v. U. S.*, 104 Fed. 711, 44 C. C. A. 161; *Kilpatrick v. Mayor*, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708); or "upon a certain consideration" (*Letchworth v. Vaughan*, 77 Ark. 305, 90 S. W. 1001. See, however, *Close v. Railroad*, 64 Iowa, 150, 19 N. W. 886; *Railroad v. Hood*, 66 Ind. 580); or "upon the express agreement" (*Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. [N. S.] 741, 113 Am. St. Rep. 282); or "provided, however, the grantee shall do thus and so" (*King v. Norfolk & Western Ry. Co.*, 99 Va. 625, 39 S. E. 701; *Cassidy v. Mason*, 171 Mass. 507, 50 N. E. 1027; *Incorporated Village of Ashland v. Greiner*, 58 Ohio St. 67, 50 N. E. 99).

rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a week or a month, &c., that then it shall be lawful to the lessor to distrain, &c., yet the lessor may distrain of common right for the rent behind, &c., though such words were not put into the deed, &c.

SHEP. TOUCH. 120. The nature of an express condition annexed to an estate in general, is this: that it cannot be made by nor reserved to a stranger; but it must be made by and reserved to him that doth make the estate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident. And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate or charge of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for 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 is it 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. 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.

Reserved to grantor
King, etc. bound by condition
Disseisor is subject to it

SECTION 2.—WHO MAY TAKE ADVANTAGE OF THE BREACH OF CONDITION

LIT. § 347: No entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs: and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c., if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn, &c., if the rent be after behind, the grantee of a reversion may distrain for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry is taken away forever; for the grantee of the reversion cannot enter.

Entry person
(to grantor and heirs)
Reversion in fee
attorn
cannot enter
oust tenant
if reversion continued
entry taken away forever
grantee of reversion cannot enter

causa qua supra. And the lessor nor his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, &c., and this may not be, because he hath aliened from him the reversion.

CO. LIT. 215 a: Another diversity is between conditions in deed, whereof sufficient hath been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like conditions in law, which do give an entry to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their own time. Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this day by force of the Statute of 32 H. 8, c. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c., and, if the rent be behind, a re-entry, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said Statute of 32 H. 8, the grantee may take advantage thereof, and upon demand of the rent, and non-payment, he may re-enter. By which Act it is provided, that as well every person which shall have any grant of the king of any reversion, &c., of any lands, &c., which pertained to monasteries, &c., as also all other persons being grantees or assignees, &c., to or by any other person or persons, and their heirs, executors, successors, and assignees shall have like advantage against the lessees, &c., by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c., as the said lessors or grantors themselves ought or might have had. Upon this Act divers resolutions and judgments have been given, which are necessary to be known.

1. That the said Statute is general, viz., that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions.

2. That the Statute doth extend to grants made by the successors of the king, albeit the king be only named in the Act.

3. That where the Statute speaketh of lessees, that the same doth not extend to gifts in tail.

4. That where the Statute speaks of grantees and assignees of the reversion, that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c., and the reversion is granted for life, &c. So if lessee for years, &c., be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect of this word (executors) in the Act.

5. That a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right.

6. That in the king's case, the condition in that case is not destroyed, but remains still in the king.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of borough English, the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents.

LIT. § 348: Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

RICE v. BOSTON & W. R. CORP.

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 141.)

Writ of entry to recover a parcel of land in Brighton.

At the trial in the Superior Court, before Vose, J., it appeared that on the 12th day of May, 1834, the demandant's father conveyed the demanded premises to the tenants by a deed of warranty, which stated that the conveyance was made upon the express condition that the corporation should forever maintain and keep in good repair a pass-way over the same, and also certain fences; the premises being land over which the railroad of the tenants passes. The demandant's father then in June, 1842, conveyed to the demandant a large tract of land, the description of which included the demanded premises, by a deed of warranty; and died intestate, before any breach of condition. The demandant offered evidence of a breach of condition after his father's death. No entry for breach of condition was made before bringing this action. The judge excluded the offered evidence, and instructed the jury that the demandant was not entitled to recover; and a verdict was accordingly returned for the tenants. The demandant alleged exceptions.

BIGELOW, C. J. It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by deed to a third person before entry for a breach. This rule is stated in Co. Lit. 214 a, in these words: "Nothing in action, entry, or re-entry can be granted over;" and the reason given is "for avoiding of maintenance, suppressing of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." This ancient doctrine had its origin in the early Statutes against maintenance and champerty in England, the last of which, 32 Henry VIII, c. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or as Coke expresses it, "the grantor and grantee (albeit the grant be merely void) are within the danger of the Statute." Co. Lit. 369 a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text-writers and courts of justice. 2 Cruise Dig. (Greenl. Ed.) tit. xiii, c. 1, § 15; 1 Washburn on Real Prop. 453; 2 Ib. 599; 1 Smith's Lead. Cas. (5th Ed.) 113; Nicoll v. New York & Erie Railroad, 12 N. Y. 133; Williams v. Jackson, 5 Johns. (N. Y.) 498; Hooper v. Cummings, 45 Me. 359; Guild v. Richards, 16 Gray, 309.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 157, 158: A condition "may be discharged by matter ex post facto; as in the examples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition (I, d 11), the rule is said to be, "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." See also 1 Washburn on Real Prop. 453; Hooper v. Cummings, 45 Me. 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities, it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the

possibility of reverter was extinguished, so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor aliens the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est hæres viventis*; and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever. Perkins, §§ 830-833; Lit. § 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities already cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of law. Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. Stearns on Real Actions, 226.

We know of no statute which has changed the rules of the common law in this commonwealth in relation to the alienation of a right of entry for breach of a condition in a deed. By these rules, without considering the other grounds of defence insisted upon at the trial, it is ap-

parent that the demandant cannot recover the demanded premises: not as heir, because he did not inherit that which his father had conveyed in his lifetime; nor as purchaser, because his deed was void.

Exceptions overruled.⁵

SECTION 3.—MODE OF PERFECTING A FORFEITURE

CO. LIT. 214 b: Hereupon is to be collected divers diversities. First, between a condition that requireth a re-entry, and a limitation that ipso facto determineth the estate without any entry. Of this first sort no stranger, as Littleton saith, shall take any advantage, as hath been said. But of limitations it is otherwise. As if a man make a lease quousque, that is, until I. S. come from Rome, the lessor grant the reversion over to a stranger, I. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined.

So it is if a man make a lease to a woman quamdiu casta vixerit, or if a man make a lease for life to a widow, si tamdiu in pura viduitate viveret. So it is if a man make a lease for a 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, causa qua supra.⁶

⁵ Rights of entry upon a fee for condition broken cannot be devised. Southard v. Central R. R. Co., 26 N. J. Law, 13; Upington v. Corrigan, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794; Methodist Church v. Young, 130 N. C. 8, 40 S. E. 691. Contra: Austin v. Cambridgeport Parish, 21 Pick. (Mass.) 215. See, also, Gray v. C., M. & St. P. Ry. Co., 189 Ill. 400, 59 N. E. 950.

Under the Wills Act of 1 Viet. c. 26, § 3, which makes devisable "all rights of entry for conditions broken, and other rights of entry," a right of entry for condition broken is devisable even before a breach has occurred and passes under a residuary devise all real estate. Pemberton v. Barnes, L. R. [1899] 1 Ch. 544. Where the act provided that the right of entry was devisable and transmissible by deed "although the contingencies upon which such right, estate, or interest are to vest may not have happened," it was regarded as clear that the right of entry was devisable before a breach. Southard v. Central R. R. Co., 26 N. J. Law, 13.

On the descent of rights of entry, see post, p. 86, note 31, on "Descent of Contingent Remainders."

⁶ "Apt words of limitation are quamdiu, dummodo, dum, quousque, durante, &c., v. 14 E. 2, Grant 92, a rent granted out of the manor of Dale, quamdiu the grantor shall dwell there. Vide 7 E. 4, 16, quamdiu fuer' amicabiles, 27 H. 8, 29 b; 3 E. 3, 15 a; and 3 Ass. p. 9. A man leases land dummodo the lessee shall pay twenty pounds, 37 H. 6, 27. A lease is made to a woman dum sola fuerit, 9 E. 4, 29 b. A man made a feoffment in fee until, s. quousque the feoffor had paid him certain money, 21 Ass. p. 18. Vide 13 El. Dy, 290, acc' Pl. Com. 414; 35 Ass. p. 14. A lease for years, if the lessee shall so long live, 14 H. 8, 13. A lease of lands till he be promoted to a benefice, &c., Lit. chap. Condit. 90, during the coverture. All these, and many others, are words of limitation, by force of which, the estate is determined without entry or claim: words of condition are sub conditione, ita quod, si contingat, proviso, &c. Vide Lit. c. Condit. 74 and 75; 3 H. 6, 7 a, b; 27 H. 8, 15, Dy., 28 H. 8, 13; 4 M. Dy. 139; 15 El. Dy. 318; 32 H. 8, Dy. 47. But

2. Another diversity is between a condition annexed to a freehold, and a condition annexed to a lease for years.

For if a man make a gift in tail or a lease for life upon condition, that if the donee or lessee goeth not to Rome before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entry; but if the lease had been but for years, there the grantee should have taken advantage of the like condition, because the lease for years ipso facto by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing a stranger may take benefit, but not of a voidable estate by entry.

LEAKE, PROPERTY IN LAND (2d Ed.) p. 170: "A lease for years may begin without ceremony, and so may end without ceremony," being at common law a mere matter of contract. Therefore a condition to defeat it does not require an actual entry, unless expressly stipulated.⁷ According to the older cases, a condition that in a certain event a lease should cease or be void was construed as a conditional limitation, and the term treated as ipso facto void; but the later cases show that in these circumstances the condition is construed to render the lease voidable at the option of the lessor, who must give notice, or do some other act showing his intention to avoid it.⁸ If the view expressed in the earlier cases had prevailed, it would have permitted the lessee to put an end to the term by his own default. And where a right of re-entry is expressed to be given upon an antecedent notice, the election of the lessor to resume possession is finally exercised by notice given, and it is unnecessary to make an actual entry.⁹

these words ad affectum, ea intentione, ad solvendum, or other the like, do not make a condition in feoffments or grants, unless it be in the king's case, or in a last will, as it was resolved Pasc. 18 El. by all the justices of the common pleas." *Mary Portington's Case*, 10 Co. 35 a, 41 b.

⁷ *Doe v. Baker*, 8 Taunt. 241; Co. Lit. 214b. See *Liddy v. Kennedy*, L. R. 5 H. L. 134, 151, 154.

⁸ *Rede v. Farr*, 6 M. & S. 121; *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Moore v. Ullcoats Mining Co.*, [1908] 1 Ch. 575; notes to *Duppa v. Mayo*, 1 Wms. Saund. 442.

⁹ *Liddy v. Kennedy*, L. R. 5 H. L. 134.

NOTE ON THE DEMAND FOR RENT REQUIRED AS A CONDITION PRECEDENT TO FORFEITURE FOR THE NON-PAYMENT OF RENT.—Walker, C. J., in *Chadwick v. Parker*, 44 Ill. 326: Where the cause of forfeiture was default in the payment of rent, the common-law mode of forfeiture seems to have required "a demand of the precise amount of rent due, neither more nor less; that it be made upon precisely the day when due and payable by the terms of the lease or if a further day was specified within which it might be paid to save the forfeiture, then upon the last day of that time. It was required to be made at a convenient hour before sunset, upon the land, at the most con-

SECTION 4.—RELIEF AGAINST FORFEITURE

I. LICENSE

DUMPOR'S CASE.

(Court of Queen's Bench, 1603. 4 Coke, 119b.)

In trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the president and scholars of the College of Corpus Christi in Oxford, made a lease for years in anno 10 Eliz. of the land now in question, to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors by their deed anno 13 Eliz. licensed the lessee to alien or demise the land, or any part of it, to any person or persons quibuscunque. And afterwards, anno 15 Eliz. the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The president and scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought: and that upon the lease made to Bolde, the yearly rent of 33s. and 4d. was reserved, and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved: First, That the alienation by license to Tubbe, had determined the condition, so that no alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force

spicuous 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, should be pleaded and proved, to be availing. The tenant, however, had the entire day within which to make payment." Pages 330-331. See, also, 2 Taylor, Landlord and Tenant (9th Ed.) §§ 493, 494; McQuesten v. Morgan, 34 N. H. 400.

For statutory modes of forfeiture of leases, see Kales, Future Interests, §§ 32-40a.

of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256 in Com' Banco, inter Leeds and Crompton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two without license, and it was adjudged that in this case the condition being determined as to one person (by the license of the lessor) was determined in all. And Popham, Chief Justice, denied the case in 16 Eliz. Dyer, 33+. That if a man leases land upon condition that he shall not alien the land or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or apportioned by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by license, and therefore the condition being determined in part, is determined in all. And, therefore, the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. Nota, reader, Paschæ 14 Eliz. Rot. 1015 in Com' Banco, that where the lease was made by deed indented for twenty-one years of three manors, A. B. C. rendering rent, for A. £6, for B. £5, for C. £10, to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one and his heirs, and afterwards, by another deed indented and enrolled, bargained and sold all the residue to another and his heirs; and if the second bargainee should enter for the condition broken or not, was the question: and it was adjudged, that he should not enter for the condition broken, because the condition being entire, could not be apportioned by the act of the parties, but by the severance of part of the reversion, it is destroyed in all. But it was agreed, that a condition may be apportioned in two cases. 1. By act in law. 2. By act and wrong of the lessee. By act in law, as if a man seised of two acres, the

one in fee, and the other in borough English, has issue two sons, and leases both acres for life or years rendering rent with condition: the lessor dies, in this case by this descent, which is in act in the law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created, and that he cannot have, when he has departed with the reversion of part: and with that reason agrees Lit. 80 b. And vide 4 & 5 Ph. & Mar. Dyer, 152, where a proviso in an indenture of lease was, that the lessee, his executors or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee: the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without license, for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the Statutes of 13 Eliz. cap. 10 and 18 Eliz. cap. 11, concerning leases made by deans and chapters, colleges, and other ecclesiastical persons, are general laws whereof the court ought to take knowledge, although they are not found by the jurors; and so it was resolved between Claypole and Carter in a writ of error in the King's Bench.¹⁰

¹⁰ In *Brummell v. Macpherson*, 14 Ves. 173, the rule in *Dumpor's Case* was applied where the license given was to assign the lease to a particular assignee. Lord Eldon said: "Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land at this date."

In *Pennock v. Lyons*, 118 Mass. 92, the rule of *Dumpor's Case* was applied, though, as is said in 5 *Gray's Cases on Prop.* (1st Ed.) p. 27, note 1, the papers in the case show that the condition was against assignment by the lessee, and not against assignment by the lessee and his assigns.

A mere waiver, however, of the breach of a condition arising by reason of one subletting is not equivalent to a license so as to make available the application of the rule in *Dumpor's Case*. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

In *Doe v. Pritchard*, 5 B. & Adol. 765, at 781, Patterson, J., appears to regard the rule of *Dumpor's Case* as inapplicable where a license is given to underlet as distinguished from assigning.

Where the landlord and the assignee mutually agree at the time of the assignment, and in consideration of the landlord's consent to the assignment, that the condition against any further assignment without permission shall not be abrogated, the condition has been held to be still operative and upon a further assignment without permission a cause of forfeiture arises. *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223 (1894).

For a criticism of the rule in *Dumpor's Case*, see 7 *Am. Law Rev.* 616. For a criticism of the extension of the rule to a covenant in *Reid v. J. F. Wiessner Brew. Co.*, 88 Md. 234, 40 Atl. 877, see 12 *Harv. Law Rev.* 272.

23 & 24 Vict. c. 38, § 6: "Where any actual Waiver of the Benefit of any

II. WAIVER

PENNANT'S CASE.

(Court of Queen's Bench, 1596. 3 Coke, 64a.)

In an *ejectione firmæ*, between Harvey, plaintiff, and Oswald, defendant, on a demise made 37 Eliz. by John Pennant to the plaintiff, of certain land in Ardeley, in the county of Essex, for three years, from the feast of All Saints, ann. 37. The defendant pleaded, that the said John Pennant was seised of the said land in fee, and anno 35, demised it to the defendant for ten years, yielding the yearly rent of £33 10s. at the feast of St. Michael, and the Annunciation of our Lady; and that he was possessed, till Pennant ousted him, and demised to the plaintiff, and he re-entered, &c. The plaintiff replied, and confessed the said lease, but further said, that the said lease was on condition, that if the defendant, his executors or administrators, at any time without the assent of the said John Pennant, his heirs or assigns, did grant, alien, or assign the said land or any part thereof, that then it should be lawful for the said Pennant and his heirs to re-enter: and that the defendant, anno 35, granted to one Taylor parcel of the said land for six years, without the assent of Pennant, for which he re-entered, and made the lease to the plaintiff, prout, &c.

The defendant, by way of rejoinder, said, that before the re-entry Pennant accepted the rent due at the feast of the Annunciation of our Lady, after the assignment by the hands of the defendant Walter Oswald. To which the plaintiff, by way of surrejoinder, said that Pennant before the receipt of the rent had no notice of the said demise to Taylor, on which plea the defendant did demur in law: and Trin. 39 Eliz. it was adjudged for the plaintiff. And in this case these points were resolved:

1st. That the condition being collateral, the breach of it might be so secretly contrived, as to be impossible for the lessor to come to the knowledge of it, and therefore notice in this case is material and issuable, for otherwise the lessee would take advantage of his own fraud, for he might make the grant or demise so secretly, and so near the

Covenant or Condition in any Lease on the Part of any Lessor, or his Heirs, Executors, Administrators, or Assigns, shall be proved to have taken place after the passing of this Act in any one particular Instance, such actual Waiver shall not be assumed or deemed to extend to any Instance or any Breach of Covenant or Condition other than that to which such Waiver shall specially relate, nor to be a general Waiver of the Breach of any such Covenant or Condition, unless an Intention to that Effect shall appear."

NOTE ON WHAT AMOUNTS TO AN ASSIGNMENT IN BREACH OF A CONDITION NOT TO ASSIGN: (1) As to assignments by an administrator or an executor: Williams' Executors (9th Ed.) 809-811. (2) As to effect of dissolution of a partnership or assignment by one partner to the other, Varley v. Coppard, L. R. 7 C. P. 505; Corporation of Bristol v. Westcott, L. R. 12 Ch. D. 461.

day on which the rent is to be paid, as to be impossible for the lessor to have notice of it: but if a man makes a lease for years rendering rent, on condition that if the rent be behind, that it shall be lawful for him to re-enter; in that case, if the lessor demands the rent, and it is not paid, and afterwards he accepts the rent, (before the re-entry made) at a day after, he hath dispensed with the condition,¹¹ for there the condition being annexed to the rent, and he having made a demand for the rent, he well knew that the condition was broke: but although in such a case he accepts the rent (due at the day for which the demand was made) yet he may re-enter,¹² for as well before as after his re-entry, he may have an action of debt for the rent, on the contract between the lessor and lessee,¹³ and that was the first difference between a collateral condition and a condition annexed to rent. Vide 45 Ass. 5.

The second difference was, that in case of a condition annexed to rent, if the lessor distrains for the same rent for which the demand was made, he hath thereby also affirmed the lease, for his distress for the rent received; for after the lease determined he cannot distrain for the rent. 14 Ass. 11. Accord.

The third was, that as well in case of a condition annexed to rent, as in case of a condition annexed to any collateral act, if the conclusion of the condition be, that then the lease for years shall be void; there, no acceptance of rent due at any day after the breach of the condition will make the void lease good. And so a difference between a lease which is ipso facto void without any re-entry, and a lease which is voidable by re-entry; for a lease which is ipso facto void by the breach of the condition cannot be made good by any acceptance afterwards. Plow. Com. in Browning and Beston's Case, 133.

The fourth was, as the affirmation of a voidable lease by parol for money (or other consideration) will not avail the lessee; so the acceptance of a rent, which is not in esse, nor due to him who accepts it, will not bind him: as if land be given to husband and wife, and to the heirs of the body of the husband, the husband makes a lease for forty years and dies, the issue in tail accepts the rent in the life of the wife, and afterward the wife dies; yet the issue shall avoid the lease; for at the time of the acceptance no rent was in esse, or due to him. Vide 32 H. 8, Br. Acceptance.

¹¹ Accord: *Goodright v. Davids*, Cowp. 803 (1778). So a right of entry for breach of condition is waived by the lessor bringing an action for rent accruing subsequent to the breach with knowledge of its existence. *Dendy v. Nicholl*, 4 C. B. N. S. 376.

But there can be no waiver by receipt of rent or by distress of a cause of forfeiture where the forfeiture has been perfected before the rent was received or the distress levied. *Jones v. Carter*, 15 M. & W. 718; *Tolman v. Portbury*, L. R. 6 Q. B. 245; L. R. 7 Q. B. 344; *Grimwood v. Moss*, L. R. 7 C. P. 360.

¹² Accord: *Green's Case*, Cro. Eliz. 3 (1582); *Price v. Worwood*, 4 H. & N. 512.

¹³ *Hartshorne v. Watson*, 4 Bing. N. C. 178.

The fifth was between a lease for life and a lease for years, for in the case of a lease for life, if the conclusion of a condition annexed to the rent (or other collateral act) be, that then the lease shall be void, there (because an estate of freehold created by livery, cannot be determined before entry) in such case acceptance of rent due at a day after shall bar the lessor of his re-entry, for this voidable lease may well be affirmed by acceptance of rent: and therefore, if a man makes a lease for years, on condition that if the lessee do not go to Rome, or any other collateral condition, with conclusion that the lease shall be void, in that case, if the lessor grants over the reversion, and afterwards the condition is broke, the grantee shall take benefit thereof; for the lease is void, and not voidable by re-entry; and therefore the grantee who is a stranger, may take benefit thereof; but if the lease be made for life with such condition, there the grantee shall never take benefit of it, for the estate for life doth not determine before entry, and entry or re-entry in no case (by the common law) can be given to a stranger, 11 H. 7, 17 a, Br. Cond. 245; 10 E. 3, 52, per Stone; 21 H. 7, 12 a. So if a parson, vicar, or prebend, makes a lease for years, rendering rent, and dies, the successor accepts the rent, it is nothing worth, for the lease was void by his death, otherwise is it of a lease for life: but if a bishop, abbot, prior or such like, makes a lease for years and dies, if the successor accepts the rent, he shall never avoid the lease, for the lease was only voidable, 11 E. 3, Abbot, 9; 8 H. 5, 19; 37 H. 6b; 24 H. 8, Br. Leases, 19; F. N. B. 50 C.

But note, reader, I conceive that in the case of a lease for life, if the lessor accepts the same rent which was demanded, he hath affirmed the lease, for he cannot receive it as due on any contract, as in the case of a lease for years, but he ought to receive it as his rent, and then he doth affirm the lease to continue; for when he accepted the rent, he could not have an action of debt for it, but his remedy then was by assize, if he had seisin, or by distress. And therefore I conceive in such case, the acceptance of the rent shall bar him of his re-entry; and it appears by Littleton, cap. Conditions, fol. 79 a, that in such case, if the lessor brings an assize for the rent, he relinquishes, and waives the benefit of his re-entry, although it be for the rent due at the same day; but if he re-enters first, then he may have an action of debt for the rent behind, 17 E. 3, 73; 18 E. 3, 10; 30 E. 3, 7; 38 E. 3, 10. And afterwards Mich. 39 and 40 Eliz. in the Common Pleas, which plea began Hil. 38 Eliz. Rot. 1302, in trespass between March and Curtis, for land in Essex, the like judgment was given by Anderson, Chief Justice, there, Walmsley, Justice, and the whole court, where a lease for years was made, rendering rent, and with condition that if the lessee should assign his term, that the lessor might re-enter, and the lessee assigned his term, that although the lessor had accepted

the rent by the hands of the lessee, yet, forasmuch as the lessor had not notice of the assignment, the acceptance of the rent did not conclude him of his entry; so this point hath been adjudged by both courts. See for the said differences (which lie obscurely in our books) 45 Ass. 5, the Case of Waste, 22 H. 6, 57; 6 H. 7, 3 b; F. N. B. 120, 122; Plow. Com. Browning and Beston's Case, 133, 545; 14 Ass. 11; 40 E. 3, Entry Congeable, 41; 11 H. 7, 17; 10 E. 3, 52; 21 H. 7, 12; 21 H. 6, 24; 39 H. 6, 27; 26 H. 8.

And in these two cases many good cases and differences were taken, when acceptance of rent (or other things) shall bar him who accepts it of the arrearages of the rent, of re-entry, of action, or of execution, and the reason of the old books briefly reported, and in an obscure manner, well explained. If he who hath a rent-service or a rent-charge, accept the rent due at the last day, and thereof makes an acquittance, all the arrearages due before are thereby discharged: and so was it adjudged between Hopkins and Morton in the Common Pleas, Hil. Rot. 950, vide 10 Eliz. Dyer, 271, but there the case is left at large; and therewith agrees 11 H. 4, 24, and 1 H. 5, 7 b. But note, it appears by the said record of 10 El. that the bar to the avowry ought to be in such case, with conclusion of judgment, if against this deed of acquittance he ought to make avowry; so that it appears that the acquittance is the cause of the bar of estoppel in such case. For it appears by 8 Ass. pl. ult.; 9 E. 3, 9; 29 E. 3, 34, that if a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind for two years; and afterwards the lessor, or the lord, disseises the ter-tenant, and afterwards the tenant recovers against him in assize, and the rent, which incurred during the disseisin is recouped in damages, yet the lord or lessor shall recover in the assize, the arrearages before the disseisin; and the bar of the latter years is no bar of the arrearages before. Vide 39 H. 6; Bar. 79, where the principal case of annuity may be good law, either because there the defendant pleaded the acquittance for the last day, and demanded judgment of action, where he ought to have relied upon the acquittance. Or because, in the case of annuity, he is not bound to pay the annuity without acquittance; but in the case of rent-service, or rent-charge, he who receives it is not compellable to make an acquittance, but the making thereof is his voluntary act, to which the law doth not compel him.

If there be lord and tenant, and the rent is behind, and the tenant makes a feoffment in fee, if the lord accepts the rent or service of the feoffee, he shall lose the arrearages in the time of the feoffor, although he makes no acquittance; for after such acceptance he shall not avow on the feoffor at all, nor on the feoffee, but for the services which incurred in his time, as appears in 4 E. 3, 22; 7 E. 3, 8; 7 E. 4, 27; 29 H. 8, Br. Avowry, 111. But in such case, if the feoffor dies, although the lord accepts the rent or service by the hand of the feoffee,

he shall not lose the arrearages, for now the lord cannot avow on other, but only on the feoffee: and that, to which the law compels a man, shall not prejudice him.

So, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behind, and afterwards the tenant doth forejudge the mesne, and the lord receives the services of the mesne, which now issue immediately out of the tenancy, yet he shall not be barred of the arrearages which issue out of the mesnalty: so, if the rent be behind, and the tenant dies, the acceptance of the services by the hands of the heir shall not bar him of the arrearages; for in these cases, although the person be altered, yet the lord doth accept the rent and services of him who only ought to do them; and all this appears in 4 E. 3, 22; 7 E. 3, 4; 7 E. 4, 27; 29 H. 8, Avowry Br. 111. But acceptance of rent or services by the hands of the feoffee shall not bar the lord of the relief before due, for relief is no service, but a fruit and approvement of services; for if it were part of the services, then an action of debt would not lie for it so long as the rent continues, but it is as a blossom of fruit fallen from the tree; and for relief, it is not necessary to avow on any person certain; and the book in 4 E. 3, 22, is to be intended, that the father made a feoffment in fee by collusion and died: and there it is held, that if the lord had accepted the services by the hands of the feoffee in the life of the father, he should lose his relief.

But note, reader, relief was not taken within the equity of the Statute of Marlebridge, as it is adjudged in 17 [27] E. 3, 63; but now it is remedied by the Statute of 32 and 34 H. 8 of Wills. But in the case before, the lord (before acceptance of the rent or service by the hands of the feoffee) might have avowed on the feoffor for all the arrearages incurred, as well in the time of the feoffor, as in the time of the feoffee, as it is in 7 H. 4, 14; 19 E. 2, Avowry, 222. And by what hath been said it appears, that the acceptance of homage or any other service of the heir, shall not bar the lord of relief. Vid. temp. E. 1, Relief, 13; 15 E. 3 Ib. 5; 16 E. 3 Ib. 10; 3 E. 2 Avow. 190.¹⁴ * * *

¹⁴ Balance of case omitted.

DAVENPORT v. THE QUEEN.

(Privy Council, 1877. 3 App. Cas. 115.)

Appeal ¹⁵ from an order of the Supreme Court of Queensland, discharging a rule to set aside a verdict found for her Majesty, and to enter a nonsuit or a verdict for Davenport, or for a new trial in an action of ejectment brought in the name of her Majesty, on the fiat of her Attorney-General for Queensland, to recover land in the Darling Downs District in Queensland.

In 1868 her Majesty leased a tract of land to one Meyer for a term of eight years, from September 23, 1867. The rent was to be paid annually in advance, and on payment of the last year's rent the lessee was entitled to a deed of the land in fee. Meyer transferred the lease to Davenport, the appellant, in June, 1869, and Davenport to D'Abeydill in 1870. Davenport was in possession as tenant to D'Abeydill when this suit was brought.

Meyer failed to cultivate or improve the demised premises within a year from the date of the lease. The first question which arose was whether this failure, under the provisions of the lease, made the lease either voidable at the option of the Crown, or absolutely void, and if so, which. The Privy Council was of opinion that the lease was voidable at the option of the Crown. This part of the case is omitted.

SIR MONTAGUE E. SMITH. * * * The principal facts are undisputed. The rent payable on the 1st of January, 1869, was duly paid into the colonial treasury, but there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment. However, on the 1st of February in that year the surveyor of the Darling Downs district, who had been directed by the Surveyor-General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by the Surveyor-General to Mr. Taylor, the Minister for Lands of the colony. Mr. Taylor, who was examined at the trial, deposed that having made himself acquainted with the report, he laid it before his colleagues in the ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. Taylor says he thereupon told the Surveyor-General to take no action on this report, adding, "we could not afford it."

Accordingly, Mr. D'Abeydill paid the subsequent yearly rents in advance as they became due, viz., on the 1st of January in the years 1870, 1871, and 1872; and on the 31st of May, 1873, he paid in advance the whole of the remaining rent accruing under the lease. He paid at the same time the fees chargeable on the issue of deeds of grant.

¹⁵ Only part of the case is given, and the following short statement is substituted for that in the report.

It is not denied that the Minister for Lands was made acquainted with these payments, nor that they were paid "as rent;" and it cannot be doubted that the minister knew they were so paid.

Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On the 23d of December, 1869, a notice headed "Payment of Rents under the Leasing Act, 1866," was published in the Gazette. After giving notice to lessees living at a distance from Brisbane that the local land agents had been instructed to receive "the rents," it contains the following note:

"The accompanying schedule contains all selections made under the Leasing Act of 1866, excepting those which have been forfeited for non-payment of rent. Rents which may be received upon such of these selections as may have been forfeited by operation of law, will be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Act in that behalf."

The schedule contained the name of the appellant (who was then the assignee of the lease), the allotment No. 196, and the amount due was described as "third year's rent, £40."

Similar notices were published in the Gazette on the 18th of November, 1870, and the 31st of October, 1871.

After the rent for the whole term of eight years had been fully paid, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectionment was commenced.

The writ bears date the 16th of September, 1874, and alleges the title of the Crown to have accrued on the 3rd of May, 1869, treating the lessee and his transferees as trespassers from that date.

Upon the trial of the action, in which the above facts were admitted or proved, the judge directed the verdict to be entered for the Crown; one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the court, which, by the judgment under appeal, sustained the verdict. * * *

If then the Crown could treat the lease as voidable, the further question to be considered is, Has it elected so to treat it and waived the forfeiture?

On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the Government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the ministers of the Crown in the colony, come to after mature deliberation, that the Government of the colony wanted the money, and could not afford to insist upon the forfeiture.

It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above. This notification appeared in the Gazette in three successive years, the last year being as far as appears 1871. After that year the publication was apparently abandoned. It is therefore very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due.

But, supposing this notice is to be regarded as pointing to all future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in Croft v. Lumley, 6 H. L. C. 672. In that case the facts were much more favorable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the judges, except Mr. Justice Crompton, was that the receipt of the money under these circumstances operated as a waiver. In the present case the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord Wensleydale, who was disposed to agree with Mr. Justice Crompton in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent, the waiver is complete. A very learned judge, Mr. Justice Williams, gave his opinion in the following terms: "It was established as early as Pennant's Case, 3 Rep. 64 a, that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."

Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

The finding of the jury that there was no waiver appears from the notes of the learned judge who tried the cause to have been founded

on his direction, "that the intention of the party receiving the rent, and not of the party paying it, must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents were received after the 23d of May, 1869, unconditionally and unreservedly, they should find no waiver." In their Lordships' view of the law which has just been stated, this direction is erroneous. They do not, however, deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been less convincing than they have found it to be, they would have hesitated to come to the conclusion that the ministers of the Crown took this money wrongfully, and without any color of right, as they would have done if it had not been accepted as rent.

Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the defendant.

In the result, their Lordships will humbly advise her Majesty to reverse the judgment of the Supreme Court, discharging the rule nisi of the 11th of December, 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict found for the plaintiff, and to enter the verdict for the defendant, with costs.

The defendant (appellant) will also have the costs of this appeal.

DOE d. AMBLER v. WOODBRIDGE.

(Court of King's Bench, 1829. 9 Barn. & C. 376.)

Ejectment for a house in the city of London. Plea, Not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary Term, it appeared that the lessor of the plaintiff was owner of the house in question, which the defendant occupied under a lease, containing a covenant that the tenant should not alter, convert, or use the rooms thereof then used as bed-rooms, or either of them, into or for any other use or purpose than bed or sitting rooms, for the occupation of himself, his executors, &c., or his or their family, without the license of the lessor in writing; and the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied up to the time of the trial the rooms specified in the covenant above set out; but the lessor had, after he knew of such occupation, received rent under the lease: and the only question was, Whether by so doing he had waived the forfeiture? Lord Tenterden, C. J., thought there was a continuing breach as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Denman now moved accordingly, and contended, that the receipt of rent by the landlord was a waiver of the forfeiture. In *Doe v. Allen*,

3 Taunt. 78, ejection was brought for a forfeiture incurred by carrying on a trade prohibited by the lease. The defendant could not prove any payment of rent after the business was commenced, but it appears to have been admitted by the court that such proof would have been an answer to the action. In *Doe v. Banks*, 4 B. & A. 401, the payment of rent was held not to be a waiver, because the breach of covenant, which consisted in ceasing to work a coal-mine for a certain period, was not complete at the time of the payment.

PER CURIAM. The conversion of a house into a shop, is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage; and the verdict, which proceeded on the particular words of this covenant, was right.

Rule refused.¹⁶

¹⁶ Accord: *Farwell v. Easton*, 63 Mo. 446; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446 (keep a stairway open); *Bleecker v. Smith*, 13 Wend. (N. Y.) 530 (to plant apple trees and replace those destroyed); *Jackson v. Allen*, 3 Cow. (N. Y.) 220 (give unobstructed enjoyment of a way); *Doe v. Gladwin*, 6 Ad. & E. (N. S.) 953 (51 Eng. Com. Law Rep.) ("insure and continue insured"); *Doe v. Peck*, 1 B. & Ad. 428 ("insure and keep insured").

In *Bonniwell v. Madison*, 107 Iowa, 85, 89, 77 N. W. 530, the Court said, by Deemer, C. J.: "Moreover, while it is a general rule that no demand for performance [of covenant to maintain a fence] is necessary, yet where, as in this case, there is an evident waiver of performance by defendant's immediate grantor, it seems to us that demand is necessary, before the right of re-entry exists. See *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178; *Bradstreet v. Clark*, 21 Pick. (Mass.) 389; *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157; *Cory v. Cory*, 86 Ind. 567; *Royal v. Aultman & Taylor Co.*, 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526; *Hurto v. Grant* [90 Iowa, 414, 57 N. W. 899] supra."

In *Crocker v. Old South Society*, 106 Mass. 489, in Boston, the condition of forfeiture of a pew, if the owner left the meeting house without first offering the pew for a certain price, was held to be a continuing covenant, so that a waiver of a breach occurring at one time did not prevent the condition being subsequently broken and a forfeiture enforced.

In *McGlynn v. Moore*, 25 Cal. 384, a covenant to build within a given time on the demised premises was held not to be a continuing covenant.

ON THE EXTINGUISHMENT OF THE RIGHT OF ENTRY FOR CONDITION BROKEN BY LIMITATION.—See *Gibson v. Doeg*, 2 Hurl. & U. 615 (1857); *Hooper v. Cummings*, 45 Me. 359; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350. See also *McCue v. Barrett*, 99 Minn. 352, 109 N. W. 594.

NOTE ON RELIEF FROM FORFEITURE IN EQUITY.—Act 4 Geo. II, c. 28, § 2, provided that a landlord in place of making an entry for forfeiture for non-payment of rent might serve a declaration in ejection and that six months after execution executed in the ejection by the landlord against the tenant, the tenant should be barred and foreclosed from all relief or remedy in equity against the forfeiture. Section 3 provided the terms upon which relief in equity from the forfeiture for non-payment of rent would be given within the six months. Section 4 provided for the termination of the ejection suit by the tender of rent or its payment into court and that if relief were given to the tenant in equity, said tenant should enjoy the demised premises according to the lease without any new lease being made to said tenant.

For a similar statute in New York, see the provisions of the Code of Civil

Procedure, §§ 1504-1509, quoted *Horton v. New York Cent. & H. R. Co.*, 12 Abb. N. C. (N. Y.) 31-33.

It seems to have been assumed that the act of 4 Geo. II, *supra*, merely regulated the manner in which equity was to exercise jurisdiction and was not in the least necessary to confer that jurisdiction: *Hill v. Barclay*, 18 Ves. 56, 60, per Lord Chancellor Eldon; *Sanders v. Pope*, 12 Ves. 282, 289, per Lord Chancellor Erskine. A similar view was taken of the New York statute referred to *supra*. *Horton v. N. Y. Cent., etc.*, R. R. Co., 12 Abb. N. C. (N. Y.) 30, 40.

In various states of the United States, where no statute is in force, the jurisdiction of equity to relieve against forfeiture for non-payment of rent has been asserted. *Abrams v. Watson*, 59 Ala. 524; *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562; *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, 39 N. W. 136; *Merrill v. Trimmer*, 2 Pa. Co. Ct. Rep. 49. The same rule has been followed where the forfeiture was for non-payment of taxes and assessments. *Giles v. Austin*, 62 N. Y. 486.

In *Sanders v. Pope*, 12 Ves. 282, it was held that equity would relieve against a forfeiture for the breach of a condition in not laying out a specific sum in repairs, 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.

In *Hagar, Adm'r, v. Buck*, 44 Vt. 285, 8 Am. Rep. 368, however, equity did relieve against a forfeiture for the breach of a condition to keep the demised premises in repair, where the breach had been waived up to a time immediately prior to the re-entry and the tenant had an option to purchase the fee for \$500 and tendered the sum and the rent due.

Equity will not in general relieve against a forfeiture founded upon the breach of a covenant not to assign or sublet. *Wafer v. Mocato*, 9 Modern, 112; *Davies v. Moreton*, 2 Cas. in Chancery, 127; *Lovat v. Lord Ranelagh*, 3 Ves. & B. 24, 31; or to insure: *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. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323.

CHAPTER II

ESCHEAT AND POSSIBILITIES OF REVERTER

CO. LIT. 13b: And it is to be well observed that our author saith, if he hath no heir, &c., the land shall escheat. In which words is implied a diversity (as to the escheat) between fee simple absolute, which a natural body hath, and fee simple absolute, which a body politic or incorporate hath. For if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have against this land, and not the lord by escheat.¹ And so if land be given in fee simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politic or incorporate is dissolved, the donor shall have again the land, and not the lord by escheat. And the reason and the cause of this diversity is, for that in the case of a body politic or incorporate the fee simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politic or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath been said) no writ of escheat lieth but in the three cases aforesaid, and not where a body politic or incorporate is dissolved.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 48: In early times conveyances to corporations were generally gifts to ecclesiastical corporations, and gifts to ecclesiastical corporations were usually in frankalmoign. Upon the dissolution of a corporation, land held by it in frankalmoign escheated to the donor, for the donor was the lord. Hence, one may suspect, arose the notion that on the dis-

¹ Vid. tamen Mich. 20 Jac. C. B. Johnson and Morris, that it shall escheat. Hal. MSS., which also cites 21 E. 4, 1, and 21 H. 7, 9. See further on this subject, Godb. 211, and Mo. 283, which are with Lord Coke. But the case of Johnson and Norway, in Win. 37 [1622], which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch that the judges finally decided the point. See also contra Lord Coke, the case of Southwell and Wade, in 1 Ro. Abr. 816 A, pl. 1, and s. c. in Poph. 91. —*Hargrave's Note ad loc.*

solution of any corporation all its land came back to the donor, the fact being that what made this true in case of land held in frankalmoign did not apply to land held on other tenures by corporations.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 50: But the notions which Lord Coke imposed upon his brethren did not always long survive his retirement. In Johnson v. Norway² (1622) arose the precise question whether, on the dissolution of a corporation, its land went to the donor or escheated to the lord. Hobart, C. J., said: "The great doubt of the case will be upon the barre of the defendant, whether by the death of the abbot and the monks, the land escheat to the lords of whom that was holden, or whether that shall go to the donors, and to the founders, and he thought that the land shall escheat, to which Winch seemed to agree." The report adds that the Judges said they would advise of the case, and gave order to argue it again; but Lord Hale's MSS.³ say that it was held that the land escheated. This is the only English case in which the question has been decided.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 13: (3) Possibilities of Reverter.—Some estates were terminable by special or collateral limitations; for instance, an estate to A. till B. returned from Rome; or an estate to A. and his heirs until they ceased to be tenants of the Manor of Dale. On the happening of the contingency, the feoffor 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 such a fee it has commonly been supposed that there could be no remainder; but there was a so-called possibility of reverter to the feoffor and his heirs which was not alienable.

§ 14. An estate in "fee simple conditional," so called, was by far the most common of these estates with special limitations. This was an estate to the donee and the heirs of his body (either all the heirs of his body or some special class of them), with a provision that on the failure of such heirs the land should revert to the donor and his heirs. Sometimes this provision was expressed; but, even though not expressed, yet on a gift in frankmarriage, or simply to A. and the heirs of his body, it was tacitly implied. If the donee of such an estate had issue born, then he could alienate the land so as to pass a fee simple. If he never had issue born, or if he alienated before issue born, or if his issue, though born, had all died before there had been

² Winch, 37.

³ Cited Co. Lit. 13 b, Harg. note.

any alienation of the estate, then, on his death, or the subsequent failure of his issue, the land reverted to the donor and his heirs. This possibility of reverter was alienable; but it could be released to the tenant of the fee simple conditional. There could be no remainder after a fee simple conditional.

§ 18. In 1285, by St. Westm. II, 13 Edw. I, c. 1, De Donis Conditionalibus, estates in fee simple conditional were turned into estates tail, the donor's possibility of reverter became a reversion, and a remainder could be created after the fee tail as after a life estate. Interests were thus secured to future generations of a family, and, failing these, to the remainderman or donor, which could not be destroyed by the tenant for the time being of the estate.

§ 19. By the gradual operation of (1) the doctrine of Collateral Warranty; (2) the allowance, by the courts, of Common Recoveries as a means of barring estates tail; and (3) the Statutes of Fines, 4 Hen. VII, c. 24, and 32 Hen. VIII, c. 36, estates tail became alienable, and the reversions and remainders after them destructible. The alienation of estates tail is at present regulated in England by St. 3 & 4 Wm. IV, c. 74, by which fines and recoveries were abolished and simpler modes of assurance substituted. Wherever in any of the United States estates tail have been preserved, simpler forms of conveyance have also generally taken the place of fines and recoveries.

§ 20. At common law a tenant in fee could either, (1) with the consent of the lord, substitute another in his own place to hold the fee of the lord; or (2) by subinfeudation, grant the land to be held of himself. But the former mode could be employed only when the feoffee was to hold the same fee that the feoffor had held; and, therefore, when the feoffor conveyed a part only of his land the feoffee had to hold of him; and so, when the feoffor conveyed a life estate, or a fee with a special limitation (e. g. to A. and his heirs, tenants of the Manor of Dale), or (after the Statute De Donis) an estate tail, the feoffee held directly of him. All reversions and possibilities of reverter were therefore always in the hands of the persons of whom land was held; for though a reversion could be alienated, it carried with it the lordship of the particular estate; and a possibility of reverter could not be alienated. Land in frankalmoign also could not be held of any one but the grantor.

§ 21. The St. Westm. III, 18 Edw. I, c. 1 (1289), known as the Statute Quia Emptores Terrarum, enacts that on all conveyances in fee the tenant shall not hold of the grantor, but of the grantor's lord. This put an end to subinfeudation. The Statute does not affect gifts in tail or for life. We have here to consider its effects on the future interests allowed by the common law.

§ 31. (3). *Possibilities of Reverter.*—These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute Quia Emptores put an end to tenure between

the feoffor of an estate in fee simple and the feoffee. Therefore, since the Statute, there can be no possibility of reverter remaining in the feoffor upon the conveyance of a fee; or, in other words, since the Statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid. The distinction between a right of entry for condition broken and a possibility of reverter is this: after the statute, a feoffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest,—a returning of the land to the lord of whom it was held, because the tenant's estate had determined.

§ 32. In accordance with the doctrine of the foregoing section, no possibility of reverter after a determinable fee has been sustained in England since the Statute Quia Emptores.⁴ A fee simple subject to a conditional limitation, that is, to a shifting use or executory devise, is sometimes called a determinable fee; but this is not technically exact. A determinable fee 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. 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 assurance of a determinable 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. Determinable fees were good at common law, but were done away with by the Statute Quia Emptores. Conditional limitations were not good at common law; they were first introduced by the Statutes of Uses and of Wills.⁵

⁴ But see *Mott v. Danville Seminary et al.*, 129 Ill. 403, 21 N. E. 927 (1889); *Presbyterian Church v. Venable*, 159 Ill. 215, 42 N. E. 836, 50 Am. St. Rep. 159 (1896); *Miller v. Riddle*, 227 Ill. 53, 81 N. E. 48, 118 Am. St. Rep. 261 (1907); *North v. Graham*, 235 Ill. 178, 85 N. E. 267, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (1908).

⁵ See, also, Gray, *Rule against Perpetuities* (2d and 3d Eds.) §§ 774-788.

CHAPTER III

REVERSIONS, VESTED REMAINDERS AND EXECUTORY INTERESTS

2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 21, 22: Two technical terms are becoming prominent, namely, "revert" and "remain." For a long time past the word "reverti" alternating with "redire" has been in use both in England and on the mainland to describe what will happen when a lease of land expires: The land will "come back" to the lessor. We find this phrase in those "three life leases" which Bishop Oswald of Worcester granted in King Edgar's day. But occasionally in yet remote times men would endeavour to provide that when one person's enjoyment of the land had come to an end, the land should not "come back" to the donor or lessor, but should "remain," that is, stay out for, some third person. The verb "remanere" was a natural contrast to the verb "reverti" or "redire"; the land is to stay out instead of coming back. Both terms were in common use in the England of the thirteenth century, and though we may occasionally see the one where we should expect the other, they are in general used with precision. Land can only "revert" to the donor or those who represent him as his heirs or assigns; if after the expiration of one estate the land is not to come back to the donor, but to stay out for the benefit of another, then it "remains" to that other. Gradually the terms "reversion" and "remainder," which appear already in Edward I's day, are coined and become technical; at a yet later date we have "reversioner" and "remainderman."

When creating a life estate it was usual for the donor to expressly say that on the tenant's death the land was to revert to him. But there was no need to say this; if he said nothing the land went back to the donor who had all along been its lord. But the donor when making the gift was free to say that on the death of the life tenant the land should remain to some third person for life or in fee. As a matter of fact this does not seem to have been very common; but in all probability the law would have permitted the creation of any number of successive life estates, each of course being given to some person living at the time of the gift.

WILLIAMS ON REAL PROPERTY (21st Ed.) 332, 333: If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expira-

Reversion.
Come back

Remainder:
Stay out

tion of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will revert to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the particular estate, being only a part, or particula, of the estate in fee. And during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his reversion.

If at the same time with the grant of the particular estate, he should also dispose of this remaining interest or reversion, or any part thereof, to some other person, it then changes its name, and is termed, not a reversion but a remainder. Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a remainder, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties.

ID. 342: A remainder chiefly differs from a reversion in this,—that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But as all estates must be holden of some person,—in the case of a grant of a particular estate with a remainder in fee simple,—the particular tenant and the remainderman both hold their estates of the same chief lord as their grantor held before. It consequently follows, that no rent service is incident to a remainder, as it usually is to a reversion; for rent service is an incident of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder we have already noticed, namely, that a reversion arises necessarily from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 113: *Reversions.*—All reversions are vested interests. From their nature they are always ready to take effect in possession whenever and however the preceding estates determine.

FEARNE'S CONTINGENT REMAINDERS, Vol. 1, p. 216: The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.

WILLIAMS ON REAL PROPERTY (21st Ed.) 345: But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine,—it is then a vested remainder, and recognised in law as an estate grantable by deed. It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or perhaps may entirely prevent possession being taken by the remainderman. The gift is immediate; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 101: 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.¹

LEAKE ON PROPERTY IN LAND (2d Ed.) 230, 231: If a grant be made to A. for life, and after the lapse of a day after his death to B. for life or in fee, the limitation to B. is not a remainder, because it does not commence in possession immediately on the determination of the particular estate; it is a limitation of a freehold estate to commence in futuro, which in a common law conveyance is void, and the reversion of A.'s estate remains in the grantor.

¹ See definition of vested remainders adopted by Mr. Justice Cartwright in his opinion in *Brown v. Brown*, 247 Ill. 528, 93 N. E. 357, and that announced by Mr. Justice Baker in *Ætna Life Ins. Co. v. Hoppin*, 214 Fed. 928, 131 C. C. A. 224, post, p. 136; also the distinction between vested and contingent remainders as announced by Mr. Justice Dunn in *Carter v. Carter*, 234 Ill. 507, 511, 85 N. E. 292.

The plainest case of a vested remainder is where the limitations are to A. for life, with remainder to B. and his heirs. *Brown v. Brown*, 247 Ill. 528, 93 N. E. 357; *Deadman v. Yantis*, 230 Ill. 243, 82 N. E. 592, 120 Am. St. Rep. 291; *Marvin v. Ledwith*, 111 Ill. 144; *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102; *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116; *Rickner v. Kessler*, 138 Ill. 636, 28 N. E. 973. See also *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *Nicoll v. Scott*, 99 Ill. 529, 548; *Springer v. Savage*, 143 Ill. 301, 32 N. E. 520; *O'Melia v. Mullarky*, 124 Ill. 506, 509, 17 N. E. 36; *Barclay v. Platt*, 170 Ill. 384, 48 N. E. 972.—*Ed.*

Also a limitation which is to take effect in defeasance of a preceding estate, without waiting for the regular determination of that estate according to the terms of its limitation, is not a remainder; and such a limitation is void at common law. But the preceding particular estate may be made determinable by a conditional limitation, and the estate limited to take effect in possession immediately upon its determination, whether that happen under the conditional limitation or by the expiration of the full term of limitation, is a remainder.

*less than a
fee simple
^*

The particular estate and the remainder must be created at the same time by one conveyance or instrument; for if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its character of a reversion, to which the tenure of the particular estate is incident.

ID. p. 33: A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A. for life or in tail, and upon the determination of his estate to B., the future limitation takes effect as a remainder immediately expectant upon A.'s estate. (Co. Lit. 143 a; Williams, Seisin, 67, 169.) But upon a feoffment to A. in fee or for life, and after one year to B. in fee; or to A. in fee, and upon his marriage to B. in fee; or to A. in fee or for life, and upon B. paying A. a sum of money to B. in fee,—the limitations shifting the seisin from A. to B. at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law. (Co. Lit. 378, et seq.; Fearne, Cont. Rem. 307.) Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title. (Butler's note (1), Co. Lit. 342b.)

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin,

that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. (*Buckler's Case*, 2 Co. 55a; Co. Lit. 217a.)

As a consequence of the same rule if a feoffment were made to A. for life and after his death and one day after to B. for life or in fee, the limitation to B. was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A. (*Fearne*, Cont. Rem. 307.)

GRAY, RULE AGAINST PERPETUITIES (2d Ed.): § 136. Springing uses seem to have been first recognized in *Anon.* (Bro. Ab. Feoff. al Uses, 340, pl. 50) (1538), where a covenant to stand seised to the use of B. on the performance of an act by B. was held to raise the use on the happening of the contingency. (See *Gilb. Uses* (Sugd. Ed.) 164, note. So *Wood's Case*, in the Court of Wards (1560), cited 1 Co. 99a; and see *Mutton's Case*, *Dyer*, 274b; 2 Leon. 223; Dal. 91; *Moore*, 96, 376; 1 And. 42 (1573); *Woodliff v. Drury*, Cro. El. 439; sub nom. *Woodlet v. Drury*, 2 Roll. Ab. 791, pl. 1 (1595); *Mills v. Parsons*, *Moore*, 547 (1595); *Blackbourn v. Lassels*, Cro. El. 800 (1600); *Wood v. Reigold*, Cro. El. 764, 854 (1601); *Lewis*, Perp. 57, 58.)²

² Accord: *Roe v. Trimmer*, 2 Wils. 75 (release to uses); *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. (N. Y.) 611 (bargain and sale); *Wyman v. Brown*, 50 Me. 139, 151-159; *Vinson v. Vinson*, 4 Ill. App. 138, 140. See, also, *Shackleton v. Sebree*, 86 Ill. 616; *Latimer v. Latimer*, 174 Ill. 418, 429, 430, 51 N. E. 548.—*Ed.*

Gilbert
 "IS A BARGAIN AND SALE TO A PERSON NOT IN ESSE GOOD?—It is clear that a use, either in possession or remainder, may be raised by bargain and sale to one man, on a consideration paid by another. (*Sharlington v. Stroten*, Plowd. 298, 307. 2 Roll. Ab. 784, pl. 6, 7, 2 Inst. 672. *Buckley v. Simonds*, Winch. 59, 61. *Case of Sutton's Hospital*, 10 Co. 23, 34a.) In *Gilbert on Uses* (Sugd. Ed.) 398, it is said: 'If a man bargains and sells lands to one for life, then to his first son in tail, who is not yet born, it seems this is a good contingent remainder, rising out of the estate of the bargainor; but 'tis said by *Newdigate* (2 Sid. 158) that by bargain and sale only, no contingent use can be supported, it seems he means by the estate of the bargainee; but, quære, whether it may not, ut ante, but it seems a feoffment or fine is the surest way, and so to put it out of the power of the owner of the land to destroy the future uses. Quære, whether the consideration given by the party in uses will create a use to one not in esse.' To this passage the editor, Mr. Sugden, has appended a note: 'It seems clear that a contingent use to a person not in esse cannot be raised by a bargain and sale; because of course the intended cestui que use cannot pay a consideration, and a consideration paid by the tenant for life would not, it is conceived, extend to the unborn son.' In the same book (page 91) *Gilbert* says that a man cannot in a bargain and sale reserve to himself a power of making leases, because 'no uses will rise without consideration, therefore not to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration.' To this the editor adds in a note: 'But although a general power of leasing cannot be reserved, yet a power may be reserved in a bargain and sale to grant a lease to a person from or on behalf of whom a valuable consideration moved at the execution of the deed.' (See also *Sugd. Pow.* [8th Ed.] 138, 139.) In *Sanders on Uses* (2 Sand. Uses [5th Ed.] 62) it is said that 'if there be a bargain and sale for the life of the bargainee, with a power

Sugden

§ 137. In *Anon.* (Bro. Ab. Feoff. al Uses, 339, pl. 30) (1552), there was a feoffment to the use of W. and his heirs until A. paid a sum of money, and then to A. and his heirs. It was assumed by all that this was a good shifting use. (See *Brent v. Gilbert*, Dal. 111 (1574); *Brent's Case*, 2 Leon. 14; *Dyer*, 340 a (1575); *Manning v. Andrews*, 1 Leon. 256 (1576); *Bracebridge's Case*, 1 Leon. 264; sub nom. *Harwell v. Lucas*, Moore, 99 (1578); *Stonley v. Bracebridge*, 1 Leon. 5 (1583); *Smith v. Warren*, Cro. El. 688 (1599); *Anon. Moore*, 608; *Anon.* 13 Co. 48 (1609); s. c., *semble*, Jenk. 328; *Sympson v. Sothern*, Cro. Jac. 376; 2 Bulst. 272; sub nom. *Simpson's Case*, Godb. 264; sub nom. *Simpson v. Southwood*, 1 Roll. R. 109, 137, 253 (1615); *Allen's Case*, Ley, 55 (1617); *Lewis*, Perp. 58-60.)³

§ 142. No difference on the score of destructibility was at first felt to exist between remainders limited by way of use and conditional limitations. In *Brent v. Gilbert*, Dal. 111 (1574), there was a feoffment to the use of A. and of such woman as should be his wife at his death, for their lives, with remainders over. A. levied a fine, married B., and died. The feoffees entered. It was held by the Court of Queen's Bench that the entry of the feoffees revived the shifting use to B. The same result would have followed had B. had a remainder limited by way of use. In *Brent's Case*, 2 Leon. 14; *Dyer*, 340a (1575), the facts were the same, except that it appeared that A., before levying the fine, made a feoffment in which the feoffees joined. In the Common Pleas, *Dyer*, C. J., *Manwood*, and *Monson*, JJ. (*Harper*, J., dissenting), held that if the entry of the feoffees was necessary to revive the use, they were debarred from entry; and *Dyer*, C. J., and *Manwood*, J., thought such entry was necessary. There is no indication that the opinions of the judges would have been altered if B. had had a remainder instead of a shifting use. Indeed it is said that B. "shall take by way of remainder." (2 Leon. 16. See *Dillon v. Fraine*, Pop. 70, 76; 1 Sugd. Pow. [7th Ed.] 13-15; and cf. *Hoe v. Garrell* (1591), cited in *Pells v. Brown*, 2 Roll. R. 216, 220; *Palm*, 131, 136.)

for him to make leases, a lease made under that power cannot operate as an appointment of the use to the lessee.'

"The statement of these eminent lawyers appears to have little support either in principle or authority. As a consideration paid by one person can raise a use, and even a future use, to another, there seems no reason why it should not raise a use to a person not in esse. If the cestui que use had to pay or promise the consideration, that would be a reason for requiring him to be in esse; but as the consideration can be paid or promised by a stranger, the reason fails. A man may covenant to stand seized to the use of relatives not in esse, e. g. to the use of the covenantor's unborn children. (See *Bolls v. Winton*, Noy, 122; *Mildmay's Case*, 1 Co. 175, 176b, 177a; *Warwick v. Gerrard*, 2 Vern. 7; 2 *Hayes*, Conv. [5th Ed.] 89 et seq.; Sugd. Pow. [5th Ed.] 138, 139. But cf. *Bradford v. Griffin*, 40 So. Car. 468, 471, § 398a, post; 4 *Kent*, Com. 496.) And it would seem that if a use can be raised to an unborn person by a covenant to stand seized, it can be raised to such person by a bargain and sale." Gray, *Rule against Perpetuities* (2d Ed.) §§ 61, 62.

Gray

³ Accord: *Bryan v. Spires*, 3 *Brewst.* (Pa.) 580.—*Ed.*

SIR EDWARD CLERE'S CASE.

(Court of Queen's Bench, 1599. 6 Coke, 17b.)

In an assize by Parker against Sir Edward Clere, Knight, of lands in the county of Norfolk, the case in effect was such. Clement Harwood seised of three acres of land, each of equal value, held in capite, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing, and afterwards by his last will in writing he devised the said third acre to one in fee (under whom the plaintiff claimed). And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole, was the question. And in those cases four points were resolved by POPHAM, Chief Justice, and BARON CLARK, Justices of Assize of the said county, upon conference had with the other Justices: 1. If a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. Vide Lit. fol. 109 a. When a man makes a feoffment to the use of his last will, he has the use in the mean time. 2. If in such case the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case the land being held in capite, the devise is good for two parts, and void for the third part. For as the owner of the land he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part: for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held in capite. 3. If a man makes a feoffment in fee of lands held in capite, to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for a third part: for a feoffment to the use of his will, and to the use of him and his heirs is all one. 4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he could not as owner of the land

Feoffment to such
uses as feoffor
shall appoint
by will

Election to devise
land or to exercise
power

A devise without
reference to the power
is as owner.

Land in capite
1/3 not devisable

devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land, and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case at bar, having, as owner of the land, conveyed two parts to the use of his wife ut supra) he could not make any devise (thereof) therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void; and judgment was given accordingly for the plaintiff for the whole land so devised. And afterwards on the said judgment Sir Edward Clere brought a writ of error in the King's Bench, sed non prævaluit, but the judgment was affirmed.⁴

Construed as
Devise of residue
power; otherwise
it would be void.

GRAY, RULE AGAINST PERPETUITIES (2d Ed.) § 144: The first indication of the idea that a conditional limitation of a freehold interest was indestructible appears in Smith v. Warren, Cro. El. 688 (1599). In that case a fine was levied to the use of the conusee and his heirs on condition that he would pay an annuity to the conuser, and on default of payment the land should be to the use of the conuser for his life, and one year over. The conusee made a feoffment in fee; the annuity was not paid, and the conuser entered on the feoffee's lessee. The Court of Common Pleas held that the feoffment had not destroyed the use to the conuser, "for it is a charge or burden upon the land, which goes along with the land, in whosoever hands it comes. And being limited to the conuser himself, Glanville [J.] conceived it to be a condition unto him; but if it had been to a stranger, to have arisen upon such a condition, the nonperformance thereof had been a springing [or, as we should now say, 'shifting'] use unto him; for now it is merely a tie and charge upon the land, which is not destroyed by the feoffment; and although it be a future use, it may be well raised upon non-performance of the condition; as it was adjudged in Bracebridge's Case." [This is not Bracebridge v. Cook, Plowd. 416, as stated in the margin, but Bracebridge's Case, 1 Leon. 264.] The springing use here was preserved under circumstances in which, according to Chudleigh's Case, a remainder limited by way of use would have been destroyed. The fact that the use arose as a penalty for breach of a condition in favor of the grantor seems to have had some influence—it is hard to say precisely what—on the decision.

⁴ See Lord Eldon's remarks in *Maundrell v. Maundrell*, 10 Ves. 246, 254 et seq. (1804), 263 et seq. (1805), accord., disapproving *Goodill v. Brigham*, 1 B. & P. 192 (1798).

PELLS v. BROWN.

(Court of King's Bench, 1620. Cro. Jac. 590.)

Replevin for the taking of three cows at Rowdham. The defendant justifies for damage fessant as in his freehold. The plaintiff traverseth the freehold; and, thereupon being at issue, a special verdict was found, in which the case appeared to be, That one William Brown, father to the defendant, being seised of this land in fee, having issue the defendant, his son and heir, and Thomas Brown his second son, and Richard Brown, a third son, by his will in writing devised this land to "Thomas his son and his heirs forever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him, and his heirs and assigns forever, paying the said sum as Thomas should have paid." Thomas enters, and suffers a common recovery, with a single voucher, to the use of himself and his heirs; and afterwards devises it to the wife of Edward Pells, the plaintiff, and her heirs; and dies without issue, living the said William Brown, who entered upon Edward Pells, and took the distress.

This case was twice argued at the bar, and afterward at the bench; and the matter was divided into three points.

First, whether Thomas had an estate in fee, or in fee-tail only?

Secondly, Admitting he had a fee, whether this limitation of the fee to William be good to limit a fee upon a fee?

Thirdly, If Thomas hath a fee, and William only a possibility to have a fee, Whether this recovery shall bar William, or that it be such an estate as cannot be extirpated by recovery or otherwise?

As to the first, all the justices resolved, that it is not an estate-tail in Thomas, but an estate in fee; for it is devised to him and his heirs forever; and also paying to Richard twenty pounds; both which clauses show that he intended a fee to him. And the clause, "If he died without issue, is not absolute and indefinite, whensoever he died without issue, but it is with a contingency, 'If he died without issue, living William;" for he might survive William, or have issue alive at the time of his death, living William; in which cases William should never have it, but is only to have it if Thomas died without issue, living William. Vide 19 Hen. 6, pl. 74. 12 Edw. 3, pl. 8. 7 Co. 41, Berisford's Case. 10 Co. 50, Lampet's Case. And therefore it is not like to the cases cited on the other part, 5 Hen. 5, pl. 6, 37. Ass. pl. 15 & 16, and Dyer, 330, Clactey's Case; for it is an exposition of his intent what issue should have it, viz. of his body; and whensoever he died without issue, the land should remain, &c. But here it is a conditional limitation to another, if such a thing happen; and therefore they all relied upon the book, Dyer, 124, and Dyer, 354, which are all one with this case.

Secondly, They all agreed that this is a good limitation of the fee to William by way of that contingency, not by way of immediate remainder; for they all agreed it cannot be by remainder; as, if one deviseth land to one and his heirs, and if he die without heir, that it shall remain to another, it is void and repugnant to the estate; for one fee cannot be in remainder after another; for the law doth not expect the determination of a fee by his dying without heirs, and therefore cannot appoint a remainder to begin upon determination thereof, as 19 Hen. 8, pl. 8, and 29 Hen. 8, Dyer, 33. But by way of contingency, and by way of executory devise to another, to determine the one estate and limit it to another, upon an act to be performed, or in failure of performance thereof &c., for the one may be and hath always been allowed: as devise of his land to his executors to sell, if his heir fail of payment of such a sum at such a day, this is an executory devise. So the case cited in Boraston's Case, 3 Co. 20, of Wellock and Hammond, where a devise was to the eldest son and heirs, paying such a sum to the younger sons, otherwise that the land should be to him and his heirs, is a good executory devise. And a precedent was shown, Trinity Term, 38 Eliz. Roll. 867, Fulmerston v. Steward, where upon special verdict it was adjudged, that whereas Sir Richard Fulmerston devised to Sir Edward Cleere and Frances his wife, daughter and heir of the said Sir Richard Fulmerston, certain lands in Elden, in the county of Norfolk, to them and the heirs of Sir Edward Cleere, upon condition they should assure lands in such places to his executors and their heirs, to perform his will; and if he failed, then he devised the said lands in Elden to his executors and their heirs; it was adjudged to be a good limitation and no condition; for if it should be a condition, it should be destroyed by the descent to the heir; but it is a limitation, and as an executory devise to his executors, who for non-performance of the said acts entered and sold; and adjudged good. So here, &c., for it is a good executory devise upon this limitation. And Doderidge said, the opinion 29 Hen. 8, Dyer 33, was that such a limitation in fee upon an estate in fee cannot be, and it had been oftentimes adjudged contrary thereto.

To the third point, DODERIDGE held, that this recovery should bar William; for he had but a possibility to have a fee, and quasi a contingent estate, which is destroyed by this recovery before it came in esse; for otherwise it would be a mischievous kind of perpetuity, which could not by any means be destroyed. And although it was objected, that a recovery shall not bar but where a recovery in value extends thereto, as appears by Capel's Case, 1 Co. 62 a, where a rent-charge granted by him in remainder was bound, yet he held, that this recovery destroying the immediate estate, all contingencies and dependencies thereupon are bound, and a recovery shall bind every one who cannot falsify it; and here he who hath this possibility cannot falsify it, therefore he shall be bound thereby. But all the other Justices were herein against him, that this recovery shall not bind; for he who suffered the recovery had a fee, and William Brown had but a possibility if he sur-

*Doderidge thought
executory devise
shd. be barred
by the recovery*

*Other J's, however,
were contra.*

vived Thomas; and Thomas dying without issue in his life, no recovery in value shall extend thereto, unless he had been party by way of vouchee, and then it should; for by entering into the warranty he gave all his possibility; therefore they agreed to the case which Dampont at the bar cited to be adjudged, 34 Eliz., where a mortgagee suffers a recovery, it shall not bind the mortgagor; but if he had been party by way of voucher, it had been otherwise. And here is not any estate depending upon the estate of Thomas Bray, but a collateral and mere possibility, which shall not be touched by a recovery. And if such recovery should be allowed, then if a man should devise, that his heir should make such a payment to his younger sons or to his executors, otherwise the land should be to them; if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such mischief that it should maintain perpetuities, for it is but in a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency: and, on the other part, it would be far more, and a greater mischief, that all executory devises should by such means be destroyed.

by J. had made v.
hath to recovery,
it w^d? for him

HOUGHTON, Justice, in his argument put this case: if a man give or devise lands to one and his heirs as long as J. S. hath issue of his body, he shall not by recovery bind him who made this gift, without making him a party by way of vouchee; for a recovery against tenant in fee-simple never shall bind a collateral interest, title, or possibility, as a condition or covenant, or the like; wherefore they all (except Doderidge) held that this recovery was no bar.

Then DODERIDGE took exception to the verdict, that the lands were not found to be holden in soccage; for otherwise it might be intended to be holden in knight's service; and so it shall be intended; and then the devise is void for a third part: and so it was resolved 24 Eliz. Dyer, that it ought to be shown that the land was holden in soccage, otherwise the devise was not good for the entire. But all the Justices held it not to be material (as this case is); for the issue is, whether it were the freehold of William Brown, who is found to be heir to the devisor. Then although it were admitted that the land was held by knight's service, yet he hath the entire (viz. two parts by the devise, and a third part by descent): wherefore the tenure is not material, as this case is; and it was adjudged for the defendant.^o

^o Accord (where conveyance inter vivos): *Stoller v. Doyle*, 257 Ill. 369, 100 N. E. 959 (1913).

But see *Littlefield v. Mott*, 14 R. I. 288; also *Kron v. Kron*, 195 Ill. 181, 62 N. E. 809 (the decision of which may be supported on the ground that the gift over was to take effect upon the first taker's intestacy); also *Stewart v. Stewart*, 186 Ill. 60, 57 N. E. 885 (which may be supported on the ground that the gift over was to take effect upon an attempted alienation by will by the first taker).

In the following cases the court said that "a fee cannot be limited after a fee by deed": *Siegwald v. Siegwald*, 37 Ill. 430, 438; *Summers v. Smith*, 127 Ill. 645, 650, 21 N. E. 191; *Glover v. Condell*, 163 Ill. 566, 592, 45 N. E.

CHAPTER IV

CONTINGENT REMAINDERS

SECTION 1.—VALIDITY

WILLIAMS ON REAL PROPERTY (21st Ed.) 356-358*: The simplicity of the common law allowed of the creation of no other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder—a remainder not vested, and which never might vest—was long regarded as illegal. Down to the reign of Henry VI not one instance is to be found of a contingent remainder being held valid.¹ *about 1450* The early authorities on the contrary are rather opposed to such a conclusion.² And,

173. 35 L. R. A. 360; *Strain v. Sweeny*, 163 Ill. 603, 605, 45 N. E. 201; *Stewart v. Stewart*, 186 Ill. 60, 57 N. E. 885; *Kron v. Kron*, 195 Ill. 181, 62 N. E. 809.

In the following cases the court said that by deed a fee cannot be limited on a fee by way of remainder, or that there can be no remainder after a vested remainder in fee: *Peoria v. Darst*, 101 Ill. 609, 616, 619; *McCampbell v. Mason*, 151 Ill. 500, 509, 38 N. E. 672; *Smith v. Kimbell*, 153 Ill. 368, 372, 38 N. E. 1029.

In *Morton v. Babb*, 251 Ill. 488, 96 N. E. 279, where the limitations were by deed to A. and his heirs, provided that, in case A. should die leaving no issue, then the premises should revert unto the grantor and his heirs, the court held that the grantor had a possibility of reverter after a determinable fee.

A power created by deed to appoint a new trustee is valid. *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Lake v. Brown*, 116 Ill. 83, 4 N. E. 773; *Craft v. I., D. & W. Ry. Co.*, 166 Ill. 580, 46 N. E. 1132; *West v. Fitz*, 109 Ill. 425, 442 (semble). It would seem, also, that clauses in deeds providing for the shifting of the legal title in fee from one trustee to a successor in trust without any appointment were also valid. *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (semble); *Irish v. Antioch College*, 126 Ill. 474, 18 N. E. 768, 9 Am. St. Rep. 638.

* The notes are those of Williams.—*Ed.*

¹ The reader should be informed that this assertion is grounded only on the author's researches. The general opinion appears to be in favor of the antiquity of contingent remainders. See *Third Report of Real Property Commissioners*, p. 23; 1 *Steph. Com. (5th Ed.)* 615, n. (c). And an attempt to create a contingent remainder appears in an undated deed in *Mad. Form. Angl. No. 535*, p. 305. See, too, *Bract. fo. 13a*; *Fleta*, fo. 179; *Britton (Ed. Nichols)* i, 231 and n. (k), and *Introd. lx-lxiii*.

² *Y. B. 11 Hen. IV*, 74, pl. 14, in which case a remainder to the right heirs of a man who was dead before the remainder was limited was held to vest by purchase in the person who was heir. But it was said by *Hankey, J.*, that if a gift were made to one for his life, with remainder to the right heirs of a man who was living, the remainder would be void, because the fee ought to pass immediately to him to whom it was limited. Note, also, that in *Mandeville's Case*, *Co. Litt. 26b*, which is an ancient case of the heir of the body taking by purchase, the ancestor was dead at the time of the gift. The cases of rents are not apposite, as a diversity was long taken between

at a later period, the authority of Littleton is express,³ that every remainder, which beginneth by a deed, must be in him to whom it is limited, before livery of seisin is made to him who is to have the immediate freehold. It appears, however, to have been adjudged, in the reign of Henry VI, that if land be given to a man for his life, with remainder to the right heirs of another who is living, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said that, at the time of the grant, the remainder was in a manner void.⁴ This decision ultimately prevailed. And the same case is accordingly put by Perkins, who lays it down, that if land be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there is one named in the lease (namely, A. the lessee for life), who may take immediately in the beginning of the lease.⁵ This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest; and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for the maxim is *nemo est hæres viventis*, and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate which will have no existence until the decease of J. S.; if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely gives rise to the prospect of a future estate, and creates an interest of that kind which is known as a contingent remainder.⁶

a grant of a rent and a conveyance of the freehold. The decision in H. 7 Hen. IV, 6b, pl. 2, cited in *Archer's Case*, 1 Rep. 66b, was on a case of a rent charge. The authority of P. 11 Rich. II, Fitz. Abr. tit. *Detinue*, 46, which is cited in *Archer's Case*, 1 Rep. 67a, and in *Chudleigh's Case*, 1 Rep. 135b, as well as in the margin of Co. Litt. 378a, is merely a statement by the judge of the opinion of the counsel against whom the decision was made. It runs as follows:

"Cherton to Rykhill—You think (*vous quides*) that inasmuch as A. S. was living at the time of the remainder being limited, that if he was dead at the time of the remainder falling in, and had a right heir at the time of the remainder falling in, that the remainder would be good enough? Rykhill—Yes, sir.—And afterwards in Trinity Term, judgment was given in favour of Wad [the opposite counsel]: *quod nota bene.*"

It is curious that so much pains should have been taken by modern lawyers to explain the reasons why a remainder to the heirs of a person who takes a prior estate of freehold should not have been held to be a contingent remainder (see *Fearn's*, C. R. 83 sq.), when the construction adopted (subsequently called the *Rule in Shelley's Case*) was decided on before contingent remainders were allowed.

³ Litt. § 721. See, also, M. 27 Hen. VIII, 24a, pl. 2.

⁴ Year Book, 9 Hen. VI, 24a; H. 32 Hen. VI, Fitz. Abr. tit. *Feoffments and Fairs*, 99.

⁵ Perk. § 52.

⁶ 3 Rep. 20a, in *Boraston's Case*. The gift to the heirs of J. S. has been determined to be sufficient to confer an estate in fee simple on the person

FEARNE'S CONTINGENT REMAINDERS, Vol. 1, pp. 3, 4: A contingent remainder is a remainder limited so as to depend on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the remainder will never take effect; as will appear, when I come to treat of the time when a contingent remainder is to vest.

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ID., p. 9, Butler's Note (g): 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.

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LEAKE ON PROPERTY IN LAND (2d Ed.) 233: But a remainder may be limited to a person not yet ascertained, or to a certain person upon a condition precedent which may not happen until after the determination of the particular estate; and whilst such uncertainty lasts, as to the person or the interest, it is described as a contingent remainder.

ARCHER'S CASE.

(Court of Queen's Bench, 1599. 1 Coke, 66b.)

Between Baldwin and Smith, in the Common Pleas, which began Trin. 39 Eliz. rot. 1676, in a replevin, upon a special verdict, the case was such: Francis Archer was seised of land in fee, and held it in socage, and by his will in writing devised the land to Robert Archer the father, for his life, and afterwards to the next heir male of Robert, and to the heirs male of the body of such next heir male; Robert had issue John, Francis died, Robert enfeoffed Kent with warranty upon whom John entered, and Kent re-entered, and afterwards Robert died, &c. At first, it was agreed by ANDERSON, WALMSELEY et totam cur', that Robert had but an estate for life, because Robert had an express estate for life devised to him, and the remainder is limited to the next

who may be his heir, without any additional limitation to the heirs of such heir. 2 Jarm. Wills (4th Ed.) 61, 62. If, however, the gift be made after the 31st of December, 1833, or by the will of a testator who shall have died after that day, the land will descend, on the decease of the heir intestate, not to his heir, but to the next heir of J. S., in the same manner as if J. S. had been first entitled to the estate. Stat. 3 & 4 Will. IV, c. 106, § 4. If the heirs taking as purchasers under such a gift be female, they take as joint tenants, and not as coparceners. Owen v. Gibbons, 1902, 1 Ch. 636.

heir male of Robert in the singular number; and the right heir male of Robert cannot enter for the forfeiture in the life of Robert, for he cannot be heir as long as Robert lives. Secondly, that the remainder to the right heir male of Robert is good, although he cannot have a right heir during his life; but it is sufficient that the remainder vests eo instanti that the particular estate determines. And so it is agreed in 7 Hen. 4, 6 b, and Cranmer's Case, 14 Eliz. Dyer 309 a. Thirdly (which was the principal point of the case), it was agreed per totam cur', that by the feoffment of the tenant for life, the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or at least eo instanti that it determines; for if the particular estate be ended, or determined in fact, or in law, before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed, against the opinion of Gascoigné in 7 Hen. 4, 23 b. But if the tenant for life had been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested, as it is said in 32 Hen. 6. But it is otherwise in the case at the bar, for by his feoffment no right of the particular estate doth remain. And it was said it was so agreed by Popham, Chief Justice, and divers justices in the argument of the case between Dillon and Freine [Chudleigh's Case, 1 Coke 120a, ante, p. 82,] and denied by none. See 11 R. 2, tit. Detinue, 46. And note the judgment of the book, and the reason thereof, which case there adjudged is a stronger case than the case at the bar. But note, reader, that after the feoffment, the estate for life to some purpose had continuance; for all leases, charges, &c., made by the tenant for life shall stand during his life, but the estate is supposed to continue as to those only who claim by the tenant for life before the forfeiture; but as to all others who do not claim by the tenant for life himself, the particular estate is determined: and by the better opinion, the warranty shall bind the remainder, although the warranty was created before the remainder attached or vested, and although the remainder was in the consideration of the law, and he who shall be bound by it, never could have avoided it by entry, or otherwise; yet forasmuch as the remainder did commence, and had its being by force of the devise, which was before the warranty; for this reason it shall bind the remainder; but the same was not unanimously agreed: and as the feoffment of the tenant for life shall destroy the remainder, which was in consideration of law, so, et a fortiori, the warranty of his ancestor (by whom he is intended to be advanced) shall bind him. And in many cases one shall be bound, and barred of his right by a warranty, who could never have defeated it by any means, as in 44 Edw. 3, 30, and 44 Ass. p. 35. Lessee for life is disseised, to whom a collateral ancestor of the lessor releaseth, and dieth, he shall be barred. Vide 3 Hen. 7, 9

a, and 33 Hen. 8, Br. Guarantee, 84, a feme covert, who cannot enter nor avoid the warranty, shall be barred. So if tenant for life, the remainder to the right heirs of J. S., had been disseised, and the disseisor had levied a fine at the common law, the right heir of J. S. shall be bound, and yet he could not enter nor make claim. But the point adjudged was, that by the feoffment of the tenant for life, the remainder was destroyed.⁷

⁷ See, also, the following American cases, where the life estate was prematurely terminated by a tortious feoffment made or common recovery suffered by the life tenant, and where in consequence the contingent remainder was destroyed: Waddell v. Rattew, 5 Rawle (Pa.) 231; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Lyle v. Richards, 9 Serg. & R. (Pa.) 322; Abbott v. Jenkins, 10 Serg. & R. (Pa.) 296; Redfern v. Middleton's Ex'rs, Rice (S. C.) 459; Faber v. Police, 10 S. C. 376; McElwee v. Wheeler, 10 S. C. 392.

In Bennett v. Morris, 5 Rawle (Pa.) 9, a remainder similar to that in Archer's Case was held contingent and destructible. As to the character of remainders to the heirs of a living person and the destructibility of such remainders, see the following: 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. (2d Ed.) 120; Boraston's Case, 3 Co. 19b; Irvine v. Newlin, 63 Miss. 192. See, also, Bailey v. Morris, 4 Ves. Jr. 788; Frogmorton v. Wharrey, 2 Wm. Black. Rep. 728; Mudge v. Hammill, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802; Hanna v. Hawes, 45 Iowa, 437, 440; Thurston v. Thurston, 6 R. I. 296, 300; Jarvis v. Wyatt, 11 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. Jacob, 74 Ky. (11 Bush) 646; Hall v. La France Fire Engine Co., 158 N. Y. 570, 53 N. E. 513; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669; Ætna Life Ins. Co. v. Hoppin, 214 Fed. 928, 131 C. C. A. 224, post, p. 136.

Gray's Rule against Perpetuities (3d Ed.) § 921: "And this doctrine has been repeatedly laid down and followed, as by Lord Norththing in Carwardine v. Carwardine, 1 Eden, 27, 34, where he says: '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;' by Lord Mansfield in Goodtitle v. Billington, Dougl. 753, 755; by Lord Kenyon in Doe d. Mussell v. Morgan, 3 T. R. 763, 765, where he says: 'If ever there existed a rule respecting executory devises which has uniformly prevailed without any exception to the contrary, it is that which was laid down by Lord Hale;' by Lord Ellenborough, in Doe d. Scott v. Roach, 5 M. & S. 482, 491, 492, where he says: 'As circumstances stood when the will was made the limitation to Mary Dennett's children must have been construed a contingent remainder, not because the testatrix meant it to operate in that particular mode, that is, by contingent remainder, nor because her intention would be most effectually carried into effect by treating it as a contingent remainder, but because 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;' by the Court of Common Pleas in Doe d. Planner v. Scudamore, 2 B. & P. 289, 296, 297, 298; and by the Court of King's Bench in Doe d. Herbert v. Selby, 2 B. & C. 926, 930. And Lord St. Leonards in Cole v. Sewell, 4 D. & War. 1, 27, says: '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 springing use, which can by possibility take effect by way of remainder.' See Fearne, C. R. 588-595; Smith, Exec. Int. 71, 72; Theob. Wills (7th Ed.) 649; Wms. Real Prop. (22d Ed.) 386; 21 Law Quart. Rev. 129. See also Burleigh v. Clough, 52 N. H. 267, 273, 13 Am. Rep. 23; Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219."

Construed as remainder, rather than exy devise, if it could possibly take effect as remainder.

JOSHUA WILLIAMS, ON THE ORIGIN OF THE PRESENT MODE OF FAMILY SETTLEMENTS OF LANDED PROPERTY, 1 Juridical Society's Papers, 45, 53: Chudleigh's case was argued in the 36th year of the reign of Queen Elizabeth (1 Rep. 121a); and in the 39th and 40th years of that reign the doctrine there laid down was confirmed by the decision of Archer's case (1 Rep. 66b), in which a tenant for life was held to have destroyed by his feoffment a contingent remainder to the next heir male of a person then living. However, notwithstanding these decisions, limitations to the use of unborn first and other sons successively in tail appear to have continued, of which an example may be seen in a settlement dated the 20th March, 3 Jac. 1 (Harleian Charter, 83 H. 20), where limitations occur to the use of the first male child begotten of the bodies of the husband and wife in tail, with remainder to the use of the second, and so on down to the fifth, followed by similar limitations to the use of the first female child in tail, with remainder to the others down to the sixth. It was evident, however, that, whilst these contingent remainders to unborn children were liable to be destroyed by the feoffment of the tenant for life, there was very little certainty in a settlement thus made, and a plan was accordingly devised for giving the free hold to trustees during the life of the father upon trust to preserve the contingent remainders to his children. It is said by counsel in the argument of the case of Garth v. Sir John Hind Cotton (1 Ves. Sen. 524), that this plan was invented by Lord Keeper Bridgman; and Lord Hardwicke, in his judgment in the same case, A. D. 1750, states, that the invention of trustees to preserve contingent remainders was then about 100 years since; and he subsequently states, that the limitation to trustees to preserve contingent remainders took its rise from the determination of two great cases, Chudleigh's case and Archer's case, though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the Usurpation; when probably the providing against forfeitures for what was then called treason and delinquency was an additional motive to it. (1 Dickens, 191.) There can be little doubt that these statements are correct, and that Sir Orlando Bridgman, afterwards Lord Keeper, who may be called the father of modern conveyancing, was in fact the inventor of the method so long in use for preserving contingent remainders by means of a limitation to trustees for that purpose.

Limitation to
 trustees to preserve
 cont. remain.

647-200

VAIZEY, LAW OF SETTLEMENTS, 1161, 1162: Immediately after the limitation of the particular estate, upon the determination of which the contingent remainder was expectant, and before the limitation of that remainder, a limitation was inserted, of which the following is an example:

And from and after the determination of the said estate so limited to the said [tenant for life] as aforesaid by forfeiture or otherwise in the lifetime of the said [tenant for life]. To the use of the said [tenant for life]. Upon trust to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit and suffer the said [tenant for life] and his assigns to receive the rents, issues and profits of the same premises for his and their own use during the term of his natural life. * * *

By a variation in its form it might be adapted to preserve remainders dependent on contingencies which might not happen during the continuance of the preceding estate for life. The ordinary use of the limitation, however, was that for which in the above-cited form it was adapted—the preservation of remainders which could only fail by means of the destruction as distinguished from the natural determination of the preceding estate.

REEVE v. LONG.

(King's Bench and House of Lords, 1695. 3 Lev. 408.)

Error of a judgment in ejectment in C. B. affirmed in B. R. where on a special verdict in ejectment the case was this. John Long being seised in fee devised the lands in question to Henry Long, the eldest son of his brother Richard, for life; the remainder to his first son in tail, remainder to all his other sons in the same manner, remainder to Richard the lessor of the plaintiff for life, remainder to his first and all his other sons in tail; with divers remainders over, and dies. Henry enters and was seised, but before he has any son born dies, leaving his wife great with child. Richard the lessor enters as in his remainder; and six months after the defendant, son of Henry, is born, and his guardian enters for him upon the lessor, who thereupon brings ejectment, and the cause being tried before Turton, Baron of the Exchequer, this whole matter was found specially; and upon argument in C. B. judgment was by the whole court given for the plaintiff for two causes: 1. For that this being a contingent remainder to the first son of Henry, and he not being born at the time the particular estate determined, it became void. 2. The next in remainder being the lessor, and he having entered before the birth of the first son of Henry, he was in by purchase, and shall not be evicted by an heir born

afterwards, 5 E. 4, 6; 9 H. 7, 5, &c., whereupon the defendant brought error in B. R., where the judgment was affirmed by the whole court; whereupon he brings error in Parliament where the judgment was reversed by almost all the Lords in Parliament, because it being a will they construed it according to the intent and equity and meaning of the parties, which they said could never be to disinherit the heir of the name and family of the devisor, nor would they do it on such a nicety. But all the judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon, but very much blamed Baron Turton for permitting it to be found specially where the law was so clear and certain.

Levinz for the plaintiff in the ejectment.⁸

⁸ 10 & 11 Wm. III, c. 16 (1699)—An act to enable posthumous children to take estates as if born in their father's lifetime. Whereas it often happens, that by marriage and other settlements, estates are limited in remainder to the use of the sons and daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees to preserve the contingent remainders limited to such sons and daughters, by which means such sons and daughters, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder by the next in remainder after them, and left unprovided for by such settlements, contrary to the intent of the parties that made those settlements: be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That where any estate already is or shall hereafter, by any marriage or other settlement, be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with any remainder or remainders over to, or to the use of any other person or persons, or in remainder to, or to the use of a daughter or daughters lawfully begotten, with any remainder or remainders, to any other person or persons, that any son or sons, or daughter or daughters of such person or persons lawfully begotten or to be begotten, that shall be born after the decease of his, her or their father, shall and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or daughters, in the same manner, as if born in the lifetime of his, her or their father, although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such afterborn son or sons, daughter or daughters, until he, she or they come in esse, or are born, to take the same; any law or usage to the contrary in any wise notwithstanding.

II. Provided also, That nothing in this Act shall extend or be construed to extend to divest any estate in remainder, that by virtue of any marriage or other settlement, is already come to the possession of any person or persons, or to whom any right is accrued, though not in actual possession, by reason or means of any afterborn son or sons, or daughter or daughters not happening to be born in the lifetime of his, her or their father.

"It is singular that this Statute does not expressly mention limitations or devises made by wills. There is a tradition that, as the case of *Reeve v. Long* arose upon a will, the Lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination."—*Butler's Note to Co. Lit.* 298a.

Remainders on concurrent contingencies

LODDINGTON v. KIME.

(Court of King's Bench, 1695. 1 Salk. 224.)

In replevin a special verdict was found, viz., That Sir Michael Armin being seised in fee, devised a rent-charge, and then devises the land to A. for life "without impeachment of waste; and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B. and his heirs forever." A. entered and suffered a common recovery, and died without issue.

1st question was, Whether A. was tenant in tail by this devise? POWELL held the express estate for life not destroyed by the implication that arose on the latter words following, so that A. was only tenant for life, and the rather, because these words, viz., impeachment of waste, and for life, must in that case be rejected, quod TREBY, C. J., concessit. 2dly. THE COURT held, that issue was to be taken here as nomen singulare, because the inheritance was annexed and limited to the word issue; so that the inheritance was in the issue, and not in A. the father. 3dly. That this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take. 4thly. That the remainder limited to the issue of A. was a contingent remainder in fee, and that the remainder to B. was a fee also. But those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that these are remainders contemporary and not expectant one after another. 5thly. THE COURT held that the remainder in fee to B. was not vested, because the precedent limitation to the issue of A. was a contingent fee; and they took this difference, viz., Where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person in esse, vest; but no remainder limited after a limitation in fee, can be vested. 6thly. That the recovery suffered by A. had barred the estate limited to his issue, that being contingent, and likewise the remainder limited to B. and his heirs, because that was contingent, not vested, and now never could vest; and that A. had gained a tortious fee, which would be good against B. and his heirs, and likewise against all persons but the right heirs of the devisor.

Nota.—In the report of this case in 3 Lev. 431, it is said, that the Court were agreed to give judgment for the avowant upon the point, that A. only took an estate for life, when POWELL, J., started the other point, whether the devise over to B. was only a contingent remainder, or an executory devise: Upon which it was afterwards twice argued; but that, before any judgment given, the parties agreed and divided the estate.

4 KALES PROP.—4

Shelley's case not applicable

lim. & issue not an exec. devise

Two contingent remainders in fee but not one after the other.

Remainder to B not vested

Recovery barred both issue of A, and B, because both were "remainders"

~~himself had been an exec. devise. if the estate: to A for life, and upon his death to B.~~

FESTING v. ALLEN.

(Court of Exchequer, 1843. 12 Mees. & W. 279.)

ROLFE, B.⁹ This case, sent for the opinion of this court by his Honor, Vice-Chancellor Wigram, was very fully argued in last Easter and Trinity Terms. The authorities cited were very numerous, and it was rather from a desire to look into them more attentively than it was possible to do at the time of the argument, than from our entertaining much doubt in the case, that we took time before delivering our judgment.

The question for our opinion arises on the will of Roger Belk, which, so far as it is material to state it, is as follows: "I give and devise unto George Allen, Thomas Youle, and John Gillatt, all and every my messuages, lands, tenements, and hereditaments, both freehold and copyhold, and all my other messuages, lands, tenements, hereditaments, and real estate whatsoever and wheresoever, to have and to hold the same unto the said George Allen, Thomas Youle, and John Gillatt, their heirs and assigns, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations hereinafter expressed and contained of and concerning the same; ¹⁰ viz., to the use of my said dear wife and her assigns, for and during the term of her natural life, if she shall so long continue my widow and unmarried, without impeachment of waste; and from and after her decease or second marriage, which shall first happen, to the use of my said granddaughter, Martha Hannah Johnson, and her assigns, for and during the term of her natural life, and from and after her decease to the use of all and every the child or children of her, the said Martha Hannah Johnson, who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns forever, and if but one such child, then to the use of such one child, his or her heirs and assigns forever; and for want of any such issue, then it is my will and mind, and I do hereby direct, that my said trustees, and the survivor of them, and the heirs and assigns of such survivor, do and shall stand seised and possessed thereof, in trust, as to one equal half part or share thereof, to permit and suffer Ann Johnson, the wife of my grandson Thomas Roger Belk Johnson, or any other wife whom he may happen to marry, to receive and take the rents, issues, and profits thereof, for and during the term of her natural life, for the maintenance and education of all and every the child or children of my said grandson Thomas Roger Belk John-

⁹ Only the opinion is here given.

¹⁰ The rule of destructibility of contingent remainders could not be invoked where the interests were equitable, *Astley v. Micklethwait*, 15 Ch. Div. 59 (1886).

son; and from and after her decease, to the use of all and every the child and children of my said grandson, Thomas Roger Belk Johnson, lawfully begotten, who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns forever; and if but one such child, then to the use of such one child, his or her heirs and assigns forever. And as to the other equal half part or share thereof, to stand seised and possessed thereof to the use of the said Sarah Rhodes, for and during the term of her natural life, and from and after her decease, to the use of all and every the child or children of the said Sarah Rhodes, lawfully begotten, who shall attain the age of twenty-one years, if more than one, to be equally divided amongst them, share and share alike, to hold as tenants in common and not as joint tenants, and to their several respective heirs and assigns forever."

Martha Hannah Johnson survived the testator's widow, and after his death, namely, in the year 1825, married Maurice Green Festing. She died in 1833, leaving three infant children; and the main question is, whether those children took on her death any interest in the devised estates.

We think that they did not. It was contended on their behalf that they took vested estates in fee immediately on the death of their mother, subject only to be divested in the event of their dying under twenty-one, and the case, it was said, must be treated as coming within the principle of the decision of the House of Lords in *Phipps v. Ackers*, 3 Cl. & Fin. 703, and the cases there referred to. To this, however, we cannot accede. In all those cases there was an absolute gift to some ascertained person or persons, and the courts held, that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously devised should be divested, and pass from the first devisee into some other channel. The clear distinction in the present case is, that here there is no gift to any one who does not answer the whole of the requisite description. The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing. Even if there were no authority establishing this to be a substantial and not an imaginary distinction, still we should not feel inclined to extend the doctrine of *Doe v. Moore*, 14 East, 601, and *Phipps v. Ackers* to cases not precisely similar. But, in fact, the distinction to which we have adverted in a great measure forms the ground of the decision in the case of *Duffield v. Duffield*, 3 Bligh, N. S. 20, in the House of Lords, and *Russell v. Buchanan*, 2 C. & M. 561, in this court; and on this

short ground our opinion is founded. We think that Mrs. Festing was tenant for life, with contingent remainders in fee to such of her children as should attain twenty-one; and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily defeated. It is equally clear that all the other limitations were defeated by the same event, namely the death of Mrs. Festing leaving several infant children, but no child who had then attained the age of twenty-one years. For the limitations to take effect at her decease were all of them contingent remainders in fee, one or other of which was to take effect according to the events pointed out. If Mrs. Festing had left at her decease a child who had then attained the age of twenty-one years, her child or children would have taken absolutely, to the exclusion of all the other contingent remainder-men. If on the other hand, there had at her decease been a failure of her child or children who should attain twenty-one, then the alternative limitations would have taken effect; but this did not happen, for though she left no child of the age of twenty-one years, and therefore capable of taking under the devise in favor of her children, yet neither is it possible to say that there was at her decease a failure of her issue who should attain the age of twenty-one years, for she left three children, all or any of whom might and still may attain the prescribed age; so that the contingency on which alone the alternative limitations were to take effect had not happened when the particular estate determined, and those alternative limitations, all of which were clearly contingent remainders, were therefore defeated. On these short grounds, we think it clear, that neither the infant children of Mrs. Festing, nor the parties who were to take the estate in case of her leaving no child who should attain twenty-one, take any interest whatever, but that on her death the whole estate and interest vested in the heir-at-law.

We shall certify our opinion to Vice-Chancellor Wigram accordingly.¹¹

¹¹ Accord: *Bull v. Pritchard*, 5 Hare, 567 (1847); *Holmes v. Prescott*, 33 L. J. Ch. 264 (1864); *Rhodes v. Whitehead*, 2 Dr. & Sm. 532 (1865); *Cunliffe v. Brancker*, 3 Ch. Div. 393 (1876); *Irvine v. Newlin*, 63 Miss. 192. Contra: *Browne v. Browne*, 3 Sm. & G. 568 (1857).

EGERTON v. MASSEY.

(Court of Common Pleas, 1857. 3 C. B. [N. S.] 338.)

COCKBURN, C. J.¹² I am of opinion that the defendants are entitled to the judgment of the court. The action is brought to try the right to property devised by the will of one Elizabeth Glover, who died seised in fee-simple. The devise was to the testatrix's niece Eunice Highfield, for life, with remainder to her children in such shares as she should appoint, with remainder, in default of issue of Eunice, to her nephew, Peter Highfield, in fee. And the will contained a residuary clause, whereby the testatrix gave and bequeathed all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto her said niece Eunice Highfield, her heirs and assigns forever. It appears that, after the death of the testatrix, Eunice Highfield by lease and release of the 1st and 2d of October, 1832, conveyed the premises in question to one Peter Jackson, in fee; and the question is, whether that is a valid conveyance, or whether the testatrix's nephew Peter Highfield,—Eunice Highfield, the tenant for life, having died without issue,—became entitled to the estate. That question turns upon whether by the conveyance to Jackson the life-estate of Eunice Highfield became merged in the reversion, so that, by the failure of the particular estate upon which the contingent remainder of Peter Highfield depended, the contingent remainder was destroyed. I am of opinion that that is the true state of things. The testatrix first creates a life estate in Eunice Highfield, and then gives a contingent remainder to Peter Highfield, leaving the reversion in fee undisposed of, except for the residuary clause. It is clear that the fee thus undisposed of must have remained somewhere, and that it was not the mere shadowy interest which Mr. Shapter by his very ingenious argument sought to persuade us. The fee, then, being somewhere, what would become of it? If it had remained undisposed of, it would have gone to the heir-at-law of the testatrix. But we find that the testatrix by the residuary clause professes to dispose of it; for she thereby gives all the residue and remainder of her estate not before disposed of, to her niece, in fee. If, therefore, the fee did not pass—as, I think, it did not—by the creation of the contingent estate, then it would appear to follow that it must be included in the residuary devise, the words of which are large enough to embrace it; and, that being so, the effect of the conveyance of 1832 was, to pass not only the life estate, but also the reversion, and, by the merger of the particular estate, on which the contingent remainder depended, in the reversion, to destroy the contingent remainder. The only difficulty suggested upon this was, whether an estate of this kind must not be made the subject of a specific devise. No authority, how-

Reversion undisposed of
"except for the residuary
clause"

Conveyance passed
life estate and reversion

¹² The opinions only are here given.

ever, was cited for that proposition: and, prima facie, and upon the reason of the thing, if a testator leaves the fee undisposed of by the earlier part of his will, and by a residuary clause professes to deal with "all the residue and remainder of his estate and effects whatsoever and wheresoever, not thereinbefore disposed of," it follows as of course that the fee passes by that. It was said, that, although this would be so as to personalty, a different rule prevails as to realty; but no authority was cited in confirmation of that view: and we have the authority of two very eminent conveyancers,—Mr. Preston and Mr. Hayes,—who seem to take it for granted that all estates previously undisposed of by the will pass by the residuary clause. I am therefore of opinion, that, there being this estate of fee in the testatrix, which, unless disposed of, would have passed to her heir-at-law, and she having disposed of it by the residuary clause in terms capable of passing it, and the estate for life and the reversion in fee being thus united in Eunice Highfield, and she having conveyed the whole of her interest to Peter Jackson, the particular estate became merged in the fee, and the contingent remainder in favor of Peter Highfield was consequently destroyed. For these reasons I think there must be judgment for the defendants.

WILLIAMS, J. I am entirely of the same opinion. The learned counsel who argued for the plaintiffs rested his case upon the position that the residuary clause in the will could not operate as a devise of the reversion in fee, because it would be a violation of the rule of law that a fee cannot be limited on a fee. The obvious meaning of that is, that, where an estate is so devised that the fee, whether absolute or determinable, is vested in the first taker, the subsequent dispositions cannot be good by way of remainder, but must operate by way of executory devise. And that is reasonable, because, the fee having been given and passed by the first devise, there is nothing further for the subsequent limitations to operate upon. But that rule is wholly inapplicable to a case like this, where all is in contingency, and the fee is outstanding. If the fee be outstanding, where is it? It is clear that the notion of the fee being in abeyance cannot now be sustained: see Purefoy v. Rogers, 2 Wms. Saund. 380, 2 Lev. 39, 3 Keble, 11; Plunkett v. Holmes, 1 Lev. 11, 1 Sid. 47, T. Raym. 28; Carter v. Barnardiston, 1 P. Wms. 511; but the fee descends to the heir-at-law, to let in the contingency if it happens. I think it is clear, that, if the will had contained no residuary clause, the fee would have descended to the heir-at-law. The question, then, resolves itself into this, whether the residuary clause passes this reversion in fee, which but for such residuary clause would have descended to the heir-at-law. Some passages have been cited from the works of two very eminent conveyancers, which treat it as quite plain that such an estate would pass by a residuary clause. The estate for life did not merge in the fee so long as both remained in the devise: but they both became

Does the residuary
Clause pass the
reversion in fee?

united by the conveyance to Peter Jackson. I therefore think the defendant is entitled to our judgment.

The rest of the court concurring.

Judgment for the defendants.¹³

MOOT CASE.

X. devised Blackacre to A. (a bachelor) for life, and then to A.'s children in fee; "but if A. dies without leaving any children who shall attain twenty-one, then to B. in fee." A. was X.'s only heir at law. He married after X.'s death and died intestate, leaving him surviving one child, M., who was A.'s only heir at law. M. died intestate before reaching the age of twenty-one, leaving N. his only heir at law. In ejection, B. claims against N.

KALES (*amicus curiæ*). B. is entitled to recover. In all the cases of contingent remainders which have been held destructible we have had presented a situation where the future interest after a freehold was limited upon an event which might happen before or at the time of

¹³ See *Perceval v. Perceval*, L. R. 9 Eq. 386 (1870), where it was held that, where contingent remainders were destroyed by the failure of the remainderman to reach a certain age before the termination of the life estate, the residuary devise vested the fee in the residuary devisee.

In the following American cases, the contingent remainder was destroyed by the termination by merger of the life estate before the contingent remainder was ready to take effect in possession: *Craig v. Warner*, 5 Mackey (16 D. C.) 460, 60 Am. Rep. 381 (reversion conveyed to life tenant); *Bennett v. Morris*, 5 Rawle (Pa.) 8; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; *Belding v. Parsons*, 258 Ill. 422, 101 N. E. 570 (life estate and reversion conveyed to a third party); *Barr v. Gardner*, 259 Ill. 256, 102 N. E. 287 (reversion conveyed to life tenant in one parcel and life tenant conveyed to reversioner in another). *Frazer v. Board of Supervisors*, 74 Ill. 282, must be distinguished on the ground that the contingent remainder there involved was created by the Statute on Entails.

Where 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 pending the taking effect of the contingent remainder, there was no merger of the life estate and the reversion: *Plunket v. Holmes*, 1 Lev. 11 (*semble*); *Challis*, *Real Prop.* (2d Ed.) 126; *Fearne*, C. R., 341 et seq.; 3 *Preston on Conveyancing* (3d Ed.) 51, 388, 491. See, also, *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. In such cases the merger occurred only when the one who was both life tenant and reversioner conveyed to a third party both the life estate and the reversion: *Egerton v. Massey*, 3 C. B. N. S. 338, *supra*; *Bennett v. Morris*, *supra*; *Bond v. Moore*, *supra*; *Belding v. Parsons*, *supra*; 3 *Preston on Conveyancing* (3d Ed.) 489.

But see *Dennett v. Dennett*, 40 N. H. 498, and *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693.

Where an undivided part of the reversion is conveyed to the life tenant a merger occurs, and the contingent remainder is destroyed to the extent of the interest held in reversion and conveyed to the life tenant. *Crump v. Norwood*, 7 Taunt. 362; *Fearne*, C. R., 310; *Craig v. Warner*, 5 Mackey (16 D. C.) 460, 60 Am. Rep. 381. See, also, 3 *Preston on Conveyancing*, 89; *Westcott's Case*, 3 Co. 2, 60.

An executory devise does not merge in the fee upon which it is limited, though they belong to the same person. *Goodtitle v. White*, 15 East, 174 (1812).

the termination of the particular estate, or afterwards. In the former case the future interest took effect as a common-law remainder, without any gap between the termination of the particular estate limited and the contingent interest expressly limited. If the event happened after the termination of the particular estate, and the future interest still took effect, it would do so after a gap and by a process of cutting short the reversion in fee which would have vested in possession between the time the life estate terminated and the time the future interest expressly limited was ready to take effect in possession.

In the case at bar the future interest in B., when created, is limited upon an event which may happen at the very time when A.'s life estate terminates by A.'s death, or it may happen after that time. In the former case B.'s interest will take effect as a common-law remainder without any gap between the life estate expressly limited and the interest expressly limited to B. Under these circumstances there can be no cutting short by B. of any estate which has come into possession. On the other hand, B.'s interest might, if it took effect as limited, do so after A.'s life estate had terminated and after a future interest in fee had vested in possession in the children of A. In that case B.'s interest, if it took effect, would do so as a shifting executory interest cutting short a previous estate in fee expressly limited.

It is argued on behalf of N. that the future interest in B. in the case at bar is as clearly destructible, if it must take effect as a shifting interest after a fee expressly limited, as is the contingent remainder when it must, by the termination of the particular estate before the contingency happens, take effect, if at all, as a springing future interest cutting short a reversion in fee by operation of law and vested in possession. It is argued that when X. died A. had no child, and B.'s interest was, therefore, at that time capable of taking effect as a common-law remainder vesting in possession at A.'s death. It is insisted that the rule of the common law, as deduced from the cases of the destructibility of contingent remainders, is that if the future interest can possibly take effect as such a common law remainder it must do so, and if afterwards, as events turn out, it cannot do so, but must take effect as an executory interest which would have been invalid under the feudal land law, then it must fail entirely. It is claimed that a future interest which, as it is created, can take effect as a remainder, must do so in that way or fail entirely and that it logically makes no difference whether the future interest fails to take effect as a remainder because the event upon which it is limited happens after the termination of a life estate with no other estate expressly created intervening, but only a reversion in fee, so that the future interest would, if valid, be obliged to take effect as a springing executory interest, or because another fee expressly limited does intervene, so that the future interest would have to take effect as a shifting executory interest.

The weakness with these logical deductions is that they are based upon an illogical premise. The adherence to the rule of destructibil-

ity after springing and shifting interests were allowed and made indestructible was a logical error. The rule that a future interest which can take effect as a common law remainder must do so or fail entirely and can never take effect as a springing executory devise or use is no more than a circumlocution announcing the rule of destructibility. It is, therefore, equally a logical error. We may guess that the rule of destructibility would never have obtained if the question had come up after the validity of springing and shifting interests and their indestructibility had become established and the rule against perpetuities promulgated. A rule of destructibility which is founded more upon a prejudice in favor of feudal rules than upon logic is not in a good position at this day to insist upon its extension, according to the strictest logic, to a case not actually covered and determined by authority. For this reason the doctrine of destructibility is held to be inapplicable in the case at bar.¹⁴

8 & 9 VICT. c. 106, § 8 (1845): That a contingent remainder, existing at any time after the 31st of December, 1844, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened.¹⁵

¹⁴ But see Gray, Rule against Perpetuities (3d Ed.) § 338, note 3, and *Challis v. Doe*, 18 Q. B. 231, 7 H. L. C. 531, post, p. 536.

¹⁵ "In a note to the passage just cited [3 Dav. Conv. (3d Ed.) 267] reference is made to a suggestion that the provision in 8 & 9 Vict. c. 106, § 8, protecting contingent remainders from failure by the forfeiture of the preceding estate of freehold, is not confined to forfeiture in consequence of any of the ordinary causes of forfeiture, but also protects the contingent remainders in the event of the life estate determining under a provision in the instrument creating the limitations, such as a shifting clause. This view is, it is said, favoured by the circumstance that otherwise the word 'forfeiture' would be without meaning, since the liability of a life estate to forfeiture by the act of the tenant for life has ceased altogether with the abolition by the same act of the tortious operation of a feoffment. *Id.* 268, note (u). The writer, indeed, afterwards adduces a reason against the conclusion to which he adverts, and seems inclined to approve. But the reason he advances in its favour seems to be grounded on a misapprehension. Forfeiture by the act of a tenant for life did not cease to be possible with the enactment depriving feoffments of their tortious operation. A life estate was formerly liable to forfeiture not only by means of a conveyance executed by the tenant and operating by wrong, but also for various other acts by him. 2 Blk. Com. 267, 268. Though not all of these were still operative at the time of the passing of the act of 1845, yet forfeiture for treason and felony continued until 1870, and then from its abolition forfeiture for outlawry was excepted. 33 & 34 Vict. c. 23, § 1.

"The act of 1845 did not afford any support to such contingent remainders as were dependent on an event which might not happen until after the natural termination of the preceding estate of freehold. *Festing v. Allen*, 12 M. & W. 279; *Re Styau*, Johns. 387; *Holmes v. Prescott*, 10 Jur. (N. S.) 507; 33 L. J. Ch. 264; *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *Perceval v. Perceval*, L. R. 9 Eq. 386; *Price v. Hall*, L. R. 5 Eq. 399; *Brackenbury v.*

act of 1845 did not save Cont. remain from forfeiture for treason & felony -
Even after 1870, when such forfeitures were abolished, the remained, possibility of outlawry.

In re LECHMERE and LLOYD.

(Chancery Division, 1881. 18 Ch. Div. 524.)

Adjourned Summons.

Elizabeth Williams, widow, being seised of a farm called Pistill, in the county of Radnor, by her will, made in 1846, shortly before her death, devised the same as follows:

"I give and devise the said farm, lands, and hereditaments, unto and to the use of my granddaughter, Elizabeth Eckley, and her assigns during her life, without impeachment of waste; and from and after her decease I give and devise the same to such children of the said Elizabeth Eckley living at her death, and such issue then living of her children then deceased, as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple, to take, if more than one, as tenants in common, according to the stocks, and not according to the number of individuals; and if there shall be no such children or issue," then over.

Elizabeth Eckley married Thomas Lechmere, and died in 1879, leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster.

There was no issue of any deceased child.

The five adult children having entered into a contract for the sale of the farm, the question arose, upon an objection by the purchasers, whether these five children could make a good title to the entirety of the property; and whether all the seven children did not take vested interests in remainder as tenants in common, subject, as to the shares of the two infant children, to be divested in case of their dying under age.

Gibbons, 2 Ch. D. 417 (but see In re Lechmere and Lloyd, 18 Ch. D. 524; Miles v. Jarvis, 24 Ch. D. 633); Cunliffe v. Brancker, 3 Ch. D. 393; Astley v. Micklethwait, 15 Ch. D. 59. Wherever, therefore, until after the passing of the act next referred to, such remainders were limited, it was necessary to limit estates to trustees to preserve them." Vaizey on Law of Settlements, 1163, 1164.

In some American states the contingent remainders act which exists is of partial effect only, like the Statute of 8 & 9 Vict. supra: Maine, Rev. St. 1871, c. 73, § 5; Massachusetts, Rev. Laws (1902) c. 134, § 8. The acts in both these states antedate the English Contingent Remainders Act of 1845. The Massachusetts act appears in R. S. 1836, c. 59, § 7; the Maine act in R. S. 1841, c. 91, § 10.

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

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

The question was raised for the opinion of the court upon a summons taken out by the purchasers under the Vendor and Purchaser Act, 1874.

JESSEL, M. R. I am sorry there is a report of such a case as *Brackenbury v. Gibbons*, 2 Ch. D. 417, because I am not aware of any other case in which the words we have here occur, and I cannot now say what I otherwise should have said had there been no such reported case. But, with all respect, I must say this, that the real point does not appear to have been taken by Vice-Chancellor Hall in *Brackenbury v. Gibbons*, for he fails to point out that the devise in that case, so far as it related to children who had not attained twenty-one when the particular estate determined, could really only take effect as an executory devise and not as a remainder at all. He seems to have relied upon *Holmes v. Prescott*, 10 Jur. N. S. 507; 12 W. R. 636, and *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; but those were different cases altogether, for there the words "or after" the death, which were in *Brackenbury v. Gibbons*, and which we have here, did not occur. The Vice-Chancellor says that "Every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise." I agree, that is the rule; but I am at a loss to see how the devise in that case or this could take effect as a remainder. The rule is that a remainder must be capable of taking effect when the preceding estate determines. Now what is the gift here? It is this: [His Lordship then read the clause of the will above stated, and continued:] The rule being as stated by Vice-Chancellor Hall, that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise, how is it possible to construe such a gift as this—"to such children of the said Elizabeth Eckley living at her death as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple"—as a gift that can take effect as a remainder as to those children who had not complied with the conditions of the will before the death of the tenant for life? It is impossible. It cannot take effect as a remainder as regards those children who attain twenty-one or marry after the death of the tenant for life; for the class to take under the gift to children who attained twenty-one or married after the death could not possibly be ascertained during the lifetime of the tenant for life. Where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take on the footing of its being an executory devise. What ground is there for cutting down the devise and saying that only those who had attained twenty-one or married at the death of the tenant for life were to take?

If the devise be to A. for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, can-

not take, according to the rule in *Festing v. Allen*, 12 M. & W. 279; but here we have two distinct classes as the objects of the devise, the one being children living at the death of the tenant for life and attaining twenty-one or marrying before the death, and the other being children living at the death and attaining twenty-one or marrying after the death. There are two children who were living at the death of the tenant for life, but are at present under age: why should they not, upon their fulfilling the conditions of the will, participate in the testatrix's bounty equally with the other children who had fulfilled those conditions in the lifetime of the tenant for life? But to enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule: why should I extend it? Why should a gift which cannot possibly take effect as a remainder not take effect as an executory devise? I see no good reason why it should not.

The result is, in my opinion, that the devise in this case could not take effect as a remainder in respect of those children who survived the tenant for life but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise. Consequently the five children who have attained twenty-one take vested interests liable to open to let in the two infant children on their fulfilling the conditions of the will; and I am therefore of opinion that the five children who attained twenty-one in the lifetime of the tenant for life cannot now make a good title to the entirety of the property.¹⁶

¹⁶ Accord: *Dean v. Dean*, [1891] 3 Ch. 150; *In re Wrightson*, [1904] 2 Ch. (C. A.) 95. In *Dean v. Dean*, supra, Chitty, J., said:

"Apart from the clauses as to maintenance and advancement, this case is not distinguishable from *Brackenbury v. Gibbons* and *In re Lechmere and Lloyd*, 18 Ch. D. 524. The decisions in those cases are conflicting. In the former, Hall, V. C., had present to his mind two rules of law; the first, as he stated it, 'that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise'; and, secondly, that a contingent remainder fails unless it is ready to take effect in possession immediately on the determination of the particular freehold estate. He applied both rules. In the latter case, the Master of the Rolls (Sir G. Jessel) declined to apply the first rule, and held that the limitation was a valid executory devise. The distinction which he drew between a future limitation to all the children of a tenant for life who shall attain twenty-one and a future limitation to all the children of a tenant for life who either during his life or afterwards shall attain twenty-one, seems at first sight subtle and over-refined. 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 any one not acquainted with the niceties 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. But a difference in the mere form of words does in several cases make a difference in law. For instance, where there is a limitation of real estate to a man for life, or until he shall attempt to aliene, and a limitation over on such attempt, both limitations are valid and effectual; but, if intending the very

40 & 41 VICT. c. 33 (August 2, 1877): Every contingent remainder created by any instrument executed after the passing of this act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, 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 the 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.¹⁷

BOND v. MOORE.

(Supreme Court of Illinois, 1908. 236 Ill. 576, 86 N. E. 386, 19 L. R. A. [N. S.] 540.)

Petitions by W. A. Bond and others and by Lester Curtis against Sally Palmer Curtis Moore and others, to register land titles. From decrees dismissing the petitions, petitioners appeal, and the appeals were consolidated. Reversed and remanded.

Horace K. Tenney and Albert M. Kales, for appellants. John S. Huey, for appellees.

DUNN, J. Sarah Walker died testate in 1883, seised of the west quarter of lot 2, in block 32, known as No. 205 Lake street, and of the west quarter of lot 3, in block 16, known as No. 103 South Water street, both in the original town of Chicago. The second clause of her

same thing, the testator limits the real estate to a man for his life, and then adds a condition that he shall not aliene, and that if he does, the property shall go over, the condition and gift over are void."

But compare *White v. Summers*, [1908] 2 Ch. 256.

¹⁷ "This statute appears to provide for most of the cases in which, subsequently to 1845, it was still necessary to limit estates to trustees for the preservation of contingent remainders, including that—if, indeed, it was one—which has been already mentioned, of a parent's estate being subject to determine or shift in his lifetime, as, for instance, on his failing to assume or discontinuing the use of a prescribed name and arms, or on his acquiring another estate, and its being intended that the remainder to his children should take effect, notwithstanding the determination of his estate.

"Yet even this statute appears to have left one case unprovided for, and in which it may be still necessary to insert limitations to trustees to preserve. If a remainder is limited to such children as shall attain a certain age, and when the last precedent particular estate determines some only of those children have attained that age the remainder will vest in them. Consequently the Act will not operate, and the younger children will be excluded." *Vaizey's Law of Settlements*, 1164, 1165.

See, also, 6 *Bythewood's Conveyancing* (4th Ed.) 400, 401.

In *Washburn on Real Property* (6th Ed.) 1600, the following states are referred to in the note as having a complete contingent remainders act: Alabama, Georgia, Indiana, Kentucky, Michigan, Minnesota, Montana, New York, North Dakota, Virginia, West Virginia, and Wisconsin.

will, which was executed September 25, 1876, was as follows: "I give, bequeath and devise all of my estate, real and personal, unto my son, Lester Curtis, during his lifetime, and authorize him to sell or exchange any or all of my real estate, and to invest the proceeds thereof as in his judgment he may think best; but should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives, in such proportions as the law in such cases does provide."

Lester Curtis was the only heir of the testatrix. He was unmarried at the date of the will, but at the time of the death of the testatrix he was married and had two children. Immediately after his mother's death he entered into possession of the premises, and has ever since continued in possession of them. In February, 1908, he conveyed them to William A. Bond, by deeds reciting the second clause of the will of Sarah Walker that under it Lester Curtis took a life estate, and that he was also entitled, by descent, to a legal reversion of the fee pending the event of his dying without children, and the taking effect in possession, in that event, of the gift to the testatrix's nearest relatives, and that it was the intention of the grantor to convey the life estate and the reversion in fee, so that the life estate should merge in the fee and be extinguished and prematurely destroyed, and the grantee be vested at once with a legal estate in fee in possession, and that any contingent future interest in the nearest relatives should be destroyed. On February 13, 1908, William A. Bond executed a declaration of trust in favor of Lester Curtis for the premises at No. 103 South Water street in fee, and on February 24, 1908, together with his wife, by special warranty deed conveyed the premises at No. 205 Lake street to Lester Curtis.

On February 26, 1908, Bond, claiming the fee as trustee, filed his application to have the title to the premises at No. 103 South Water street registered under the Torrens act, and Curtis filed a separate application for the registration of the title to the premises at No. 205 Lake street. The two daughters of Curtis were made parties defendant, as were also various nieces and nephews of Sarah Walker, her next of kin. Mary Isabel Curtis, one of the daughters, assented to the petition, but the appellee Sally Palmer Curtis Moore, the other daughter, filed an answer, denying that Lester Curtis and Bond were the owners of the fee, and alleging that she and her sister were the owners of the fee in remainder, subject to the life estate. The answers of the nieces and nephews alleged that, next to the daughters, they were the nearest relatives of Sarah Walker, and in case of the death of the two daughters without issue before the death of their father, such of the nieces and nephews as should survive Lester Curtis would be entitled to the fee. The causes were referred to an examiner, who found that the petitioners were the owners of the fee and entitled to have their titles registered; but upon objection the reports were disapproved, and decrees were entered dismissing the applications, but without prejudice

to the rights of the petitioners in an estate less than the fee. The appeals, prosecuted separately to this court, have been consolidated.

The principal question arising upon the construction of the second clause of Sarah Walker's will is whether or not there was a devise, by implication, of the remainder in fee to the children of Lester Curtis, by reason of the gift over to the nearest relatives of Sarah Walker should he die without children. [The court held that there was no remainder by implication in the children.]

The limitation of the estate to the nearest relatives of the testatrix should Lester Curtis die without children is a contingent remainder. Since Lester Curtis was himself the nearest relative of the testatrix at the time of her death, the devise comes within the rule that, where there is a gift to one for life, with remainder to the testator's next of kin, and the life tenant is the sole next of kin at the death of the testator, the remainder will be considered as given to the persons answering the description at the termination of the estate for life. *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76. Both the event upon which the estate in remainder is to come into possession, the death without children of Lester Curtis, and the persons who may at that time be entitled, as the nearest relatives of Sarah Walker, to take the estate, are uncertain, and the remainder is therefore contingent. Until its vesting, or the determination of the impossibility of its vesting, the reversion in fee descended to Lester Curtis as the heir. *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714.

It is contended by appellants that, by the conveyance to William A. Bond of the life estate devised to Lester Curtis, and of the remainder in fee inherited by him, the life estate became merged in the fee, and the contingent remainder to the nearest relatives was destroyed. The effect of a conveyance of his estate, by a life tenant, to the remainderman is to cause the destruction of the particular estate, which becomes merged in the fee. *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; 2 *Blackstone's Com.* 177; 4 *Kent's Com.* 100. Every remainder requires a particular estate to support it, and a contingent remainder must vest during the continuance of the particular estate, or eo instanti that it determines. 2 *Blackstone's Com.* 168. If the particular estate comes to an end before the event upon the happening of which the contingent remainder is to take effect occurs, the remainder is defeated; and this is so whether the preceding estate reaches its natural termination or is brought to a premature end by merger, forfeiture, or otherwise. "Unless a contingent remainder becomes vested on or before the determination of the preceding vested estate, it can never come into possession; it has perished. It makes no difference whether the preceding estates have ended by reaching the limit originally imposed upon them, or whether they have been cut short by merger, forfeiture, or otherwise. *Gray on Perpetuities*, § 10." *Madison v. Larmon*, 170 Ill. 65,

48 N. E. 556, 62 Am. St. Rep. 356. "Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend before the contingency happens whereby they become vested. Therefore, where there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest, the consequence of which is that he utterly defeats them all." 2 Blackstone's Com. 171. So a tenant for life, with subsequent contingent remainders, might make a tortious conveyance by deed of feoffment with livery of seisin, and thus forfeit his life estate for the express purpose of destroying the contingent remainders, and upon reconveyance of the tortious title would hold it free from the contingent remainders. It was to prevent contingent remainders from being defeated by such premature determination or destruction of the preceding estate that the device was invented of interposing trustees to preserve contingent remainders having a legal estate to support the remainders until the happening of the contingency. When the estate for life and the next vested estate in remainder or reversion meet in the same person, notwithstanding intervening contingent remainders, the particular estate will merge in the reversion or remainder, and the contingent remainders will be destroyed. A qualification of this rule exists where the creation of the particular estate and the remainder or reversion occur at the same time and by the same instrument. Fearne on Contingent Remainders, §§ 316-324; 3 Preston on Conveyancing (3d Ed.) 399; 2 Washburn on Real Property (6th Ed.) 553, pars. 1597, 1598; Williams on Real Property, 233.

In *Egerton v. Masey*, 3 C. B. (N. S.) 338, the devise was to Eunice Highfield for life, remainder, in default of issue of Eunice, to Peter Highfield in fee, residuary devise to Eunice in fee. After the death of the testatrix, Eunice, by lease and release, conveyed to Peter Jackson in fee, and after her death without issue the question of title arose between those claiming under Peter Jackson and those claiming under Peter Highfield. It was held that under the residuary devise the reversion in fee went to Eunice Highfield; that the life estate did not merge in it so long as both remained in the devisee, but that upon her conveyance of both estates to Peter Jackson the life estate merged in the fee, and that the contingent remainder of Peter Highfield was destroyed. The same question arose in *Bennett v. Morris*, 5 Rawle (Pa.) 9, and a similar question in *Craig v. Warner*, 5 Mackey (D. C.) 460, 60 Am. Rep. 381, and were similarly decided. In *Faber v. Police*, 10 S. C. 376, and *McElwee v. Wheeler*, 10 S. C. 392, the devise was for life, with contingent remainders over, the life tenant being the sole heir of the testator. The devisees made deeds of feoffment with livery of seisin, and their grantees reconveyed to the grantors. It was held that, the common law not having been modified in South Carolina at the time, the effect of

the deeds was to destroy the life estates and perfect the absolute title in the life tenants. *Redfern v. Middleton, Rice* (S. C.) 459.

The case of *Frazer v. Supervisors of Peoria County*, 74 Ill. 282, is cited as sustaining the proposition that the court will not permit a contingent remainder to be destroyed contrary to the will of a testator or grantor. A deed was made to an unmarried woman and the heirs of her body. She reconveyed before having issue, and it was held that the contingent remainder to her children was not thereby destroyed. The question there discussed was the effect of section 6 of the statute of conveyances, which modifies estates tail so as to give the first taker a life estate, with the remainder in fee simple absolute to the next. The doctrine of merger, which has just been considered, did not apply to estates tail under the statute de donis, which were an exception to the rule. Such estates were protected and preserved from merger by the operation and construction given to the statute de donis for the express purpose of preventing the particular tenant from thus barring and destroying the estate tail. 2 Blackstone's Com. 177, 178. It was held in *Frazer v. Supervisors of Peoria County* that the General Assembly did not intend to restore the common law as it stood before the adoption of the statute de donis, and leave the donee with power to alien the estate and repurchase, and thus cut off both the remainder and reversion, but did intend that the person who should first take from the tenant in tail should take a fee simple absolute, without any power in the donee to dock the remainder, or any reversion in the donor except on failure of issue. The case deals with an estate tail only under our statute, and is a case of statutory construction only, having nothing to do with the general question of the destruction of contingent remainders.

Our conclusion is that the language of the will does not warrant the implication of a devise of the remainder to the children of Lester Curtis; that the reversion descended to Lester Curtis, as heir at law; that by his deed to William A. Bond the life estate merged in the reversion, and the contingent remainder to the nearest relatives of the testatrix was destroyed; and that the appellants hold the title to the premises involved in the respective causes in fee simple.

The decrees are reversed, and the causes remanded for further proceedings in accordance with this opinion.¹⁸

Reversed and remanded.

¹⁸ The three judges dissenting did so only as to the point that there was no remainder in the children by implication.

But see *Simonds v. Simonds*, 199 Mass. 552, 85 N. E. 860, 19 L. R. A. (N. S.) 686 (1908); *Hayward v. Spaulding*, 75 N. H. 92, 71 Atl. 219 (1908); *Gray, Rule against Perpetuities* (3d Ed.) § 918 et seq.

PROPOSED LEGISLATION.

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.¹⁹

SECTION 2.—CONSTRUCTION

WEBB v. HEARING.

(Court of King's Bench, 1617. Cro. Jac. 415.)

Ejectment for a messuage in London. Upon a special verdict the case was, that William Say was seised in fee of this messuage holden in socage, having Margaret his wife, Francis his son, and three daughters, Agnes, Alice, and Elizabeth, and deviseth the said messuage in this manner: "I bequeath to Francis my son my houses in London, after the death of my wife; and if my three daughters, or either of them, do overlive their mother, and Francis their brother and his heirs," then they to enjoy the same houses for term of their lives; and the same houses then I give to my sister's sons, Roger Wittenbury and John Wittenbury, and they to pay yearly to the Bachelors' Company of Merchant Taylors £6. 10s. And if they or their successors deny the payment of the said sum, then it shall be lawful to the wardens of the said company to enter and discharge them forever." It was found, that the devisor died; the son and two of the sisters died without issue; the wife Margaret survived them, entered and died; Elizabeth, the third sister, survived, entered, and died, having issue the defendant; John Wittenbury died; Roger entered, and died; Henry Pierson the lessor, his cousin and heir, entered, and made that lease; the defendant, as cousin and heir of Francis the son, ousts him, &c.

The principal question was, Whether Francis the son had a fee or a fee-tail by this will, in regard the limitation is, "If his sisters survive him and his heirs"?

THE COURT resolved, he had but a fee-tail; for "heirs," in this place, is intended "heirs of his body;" for the limitation being to his sisters, it is necessarily to be intended, that it was if he should die without issue of his body; for they are his heirs collateral. And therefore there is a difference where a devise is to one and his heirs, and if he die without heirs, that it shall remain, it is void, as 19 Hen. 8, pl. 9; yet when a

¹⁹ Adapted from section 1 of a proposed act concerning limitations of interests in property, drafted by Professor Ernst Freund. See, also, 1 Ill. Law Rev. 378.

devise is to one and his heirs, and if he die without heir, it shall be to his next brother, there is an apparent intention what heirs he intended; and the intention being collected by the will, the law shall adjudge accordingly. Vide 18 Eliz.; Dyer, 333, Chapman's Case; 6 Co. 16, Wild's Case.

The second point, whether John Wittenbury and Roger Wittenbury had a fee by this devise? And it was resolved they had; because they had paid a consideration for it, viz., an annual sum; and the words, "if they or their successors deny the payment," show the intent, that it should go to their heirs. Vide 4 Edw. 6, "Estate," Br. 78; 6 Co. 16.

A third point, the estate being limited, "And if my three daughters or either of them, do overlive their mother and brother and his heirs, then they to have it, and after them John Wittenbury and Roger Wittenbury, &c." Whether this be a contingent estate, and if so, whether it were performed, two of the daughters dying in the lifetime of their brother. And it was resolved that this was no limitation contingent,²⁰ but shows when it shall commence, which is well enough performed: wherefore it was adjudged for the plaintiff.—I was of counsel with the plaintiff.

J. & R. W. had fee, though "heirs" not used

J. & R. W. had vested rems.

LUXFORD v. CHEEKE.

(Court of Common Pleas, 1683. 3 Lev. 125.)

Ejectment upon the demise of Benjamin Cutter and Mary his wife; and upon Not guilty it was found by special verdict, that John Church was seised in fee, and by his wife Isabel had issue four sons: Humphry the first, Robert the second, Anthony the third, John the fourth; and by his will the 6th of March, 1583, devised all to his wife for her life, if she do not marry, but if she do marry, that Humphry presently after her decease enter, have, hold, and enjoy all the land to him and the heirs males of his body; remainder to Robert, and the heirs males of his body; the remainder to Anthony, and the heirs males of his body; remainder to John, and the heirs males of his body; with divers

and not say "if she die" Humphry & c. enjoy, and "if she marry" but plainly implied

²⁰ A fortiori, where the limitations are to A. for life, remainder to B. for life, B.'s remainder for life is vested. Gray, Rule against Perp. (2d Ed.) § 102; Madison v. Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356.

Hall v. Nute, 38 N. H. 422, contra, now seems to be overruled. Kennard v. Kennard, 63 N. H. 303; Wiggin v. Perkins, 64 N. H. 36, 5 Atl. 904; Parker v. Ross, 69 N. H. 213, 45 Atl. 576.

The introduction of a remainder after a life estate with the words "after the death of the life tenant" do not make the remainder contingent. Doe v. Considine, 73 U. S. 458, 475, 18 L. Ed. 869; Minnig v. Batdorf, 5 Pa. 503; Doe v. Provoost, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; Cheney v. Teese, 108 Ill. 473; O'Melia v. Mullarky, 124 Ill. 506, 17 N. E. 36; Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; McConnell v. Stewart, 169 Ill. 374, 48 N. E. 201; Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; Bowler v. Bowler, 176 Ill. 541, 52 N. E. 437.

See, also, Bates v. Gillett, 132 Ill. 287, 24 N. E. 611.

remainders over: that Isabel the wife did not marry; and they derive title from Humphry to his grandson, and from him to the wife (the lessor) filiam unicam suam; and that the title of the defendant was as heir male of the body of Robert the second son. And after argument it was resolved, that the verdict is imperfect as to the plaintiff, for the grandson of Humphry, though he hath no other daughter, may nevertheless have a son, according to Gymlett and Sand's Case, Cro. Cha. 391. Whereupon by consent the verdict was mended, and made filiam unicam et hæredem suam. And then the question was, whether any estate tail be created by this will. For Isabel the wife never married, and if no entail was created, then the feme-lessor hath a good title as heir general. But upon argument the court resolved, that the land was entailed by this will; for by the whole scope of the will it appears plainly, the devisor intended an entail with several remainders over; and rather than this intent shall be defeated, the words shall be read and taken thus: scil. if she marry, Humphry to enter presently; if she do not marry, then Humphry shall have, hold, and enjoy them to him and the heirs males of his body, with remainder over. Whereupon judgment was given for the defendant.

*Protes to person
ent. rem.*

CHALLIS, LAW OF REAL PROPERTY (2d Ed.) 133: "The question whether the trustees took a vested estate was obviously, before 8 & 9 Vict. c. 106, a question of the utmost practical importance, because, if they had taken a contingent estate, their estate would have been nothing but one more contingent remainder, which would have been equally liable to destruction with the rest. This question has led to some difference of opinion. But it was for all practical purposes set at rest forever by the decision of the House of Lords in the case of Smith d. Dormer v. Packhurst or Parkhurst, commonly cited as Dormer v. Parkhurst, or Dormer v. Fortescue, 3 Atk. 135, 6 Bro. P. C. 351, Willes, 327, 18 Vin. Abr. 413, pl. 8, in which case the estate was decided to be a vested remainder. Fearne approved of this decision; Butler expresses no dissatisfaction with it; but Mr. Josiah Smith plainly intimates his opinion, that it was directly opposed to the principles of the law, and that it can be justified only by the pressing necessity not to overturn all the settlements then in existence. (Smith on Executory Interests, p. 116 et seq.)"

EDWARDS v. HAMMOND.

(Court of Common Pleas, 1683. 3 Lev. 132.)

Ejectment upon Not guilty, and special verdict, the case was: A copyholder of land, borough English, surrendered to the use of himself for life, and after to the use of his eldest son and his heirs, if he live to the age of 21 years; provided, and upon condition, that if he die before 21, that then it shall remain to the surrenderer and his heirs. The surrenderer died, the youngest son entered; and the eldest son being 17 brought an ejectment; and the sole question was, whether the devise to the eldest son be upon condition precedent, or if the condition be subsequent; scil. that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was precedent, and that the estate should descend to the youngest son in the mean time, or at least shall be in contingency and in abeyance till the first son shall attain to one and twenty; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the COURT, that though by the first words this may seem to be a condition precedent, yet, taking all the words together, this was not a condition precedent, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, scil. his not attaining the age of 21; and they resembled this to the case of Spring and Cæsar, reported by Jones, J., and abridged by Roll. 1, Abr. 415, nu. 12. A fine to the use of B. and his heirs if C. pays him not 20s. upon Septemb. 10, and if C. does pay, to the use of B. for life, remainder to C. and his heirs, where the word si does not create a condition precedent, but the estate in fee vests presently in C. to be divested by payment afterwards; so here. Accordingly this case was adjudged in Mich. Term next following.²¹

²¹ Followed in the case of freehold land in Broomfield v. Crowder, 1 B. & P. N. R. 313 (1805), and in Roome v. Phillips, 24 N. Y. 463. Cf. Boraston's Case, 3 Co. 19a (1587). And see Hawkins on Wills, 237-242.

Leake, Digest of the Law of Property in Land, p. 367: "Accordingly a devise to A. if or when he shall attain a given age, followed by a devise over in case he die under that age, is construed as giving an immediately vested estate, subject to be divested by the executory devise over taking effect, and not as an executory devise upon his attaining that age, which would be the necessary construction if it stood alone without the devise over."

So x for life, then
 to A if he ~~live~~
 live to 21, but
 if he die before
 21 to grantee
 & his heirs "
 Held, vested
 immediately
 subject to fee
 divested

DOE d. WILLIS v. MARTIN.

(Court of King's Bench, 1790. 4 Term R. 39.)

This was an ejectment for some premises in the Isle of Wight on the joint and several demises of Richard Legg Willis, James Willis, Bethia Ann Willis, and Mary Willis. And on the trial at the Summer Assizes at Winchester, 1789, before Buller, J., a special verdict was found, stating in substance as follows:

That Bethia Legg, being seised in fee of the premises in question, on her intended marriage with Richard Willis, by deeds of lease and release, dated the 14th and 15th of February, 1757, between Richard Willis of the first part, Bethia Legg of the second part, and Peter Bracebridge and Robert Willis of the third part, conveyed to Bracebridge and Robert Willis and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child or children or such of them of Richard Willis and Bethia for such estates and interest, &c., and in such parts, shares, and proportions as Richard Willis and Bethia should by deed appoint, and for want of such appointment, then to the use of the child or children of Richard Willis and Bethia in such parts, shares, and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint, and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns forever; and in default of such issue, then to the use of the survivor of Richard Willis and Bethia in fee. [The deed contained a proviso for the revocation of the uses, the statement of which is omitted.—Ed.]

The verdict then set forth that on the 3d March, 1757, the marriage between Richard Willis and Bethia Legg took effect; and that they had several children; (to wit) Richard Legg Willis, their eldest son and heir, James Willis, Bethia Ann Willis, and Mary Willis, the lessors of the plaintiff; and also one Thomas Willis, since deceased. [Facts as to an alleged revocation under the above-mentioned proviso were stated in the verdict, but are here omitted.—Ed.]

The verdict then stated that in Hilary Term 9 Geo. III. [1769] a fine sur consuance de droit come ceo, &c., was levied of the premises in question by Richard Willis and Bethia his wife to Joseph Martin. That on the 21st of December, 1775, Joseph Martin by will devised to the defendants and their heirs upon certain trusts therein mentioned, and

died in March, 1776; on whose death the defendants entered, &c. In 1778 Bethia Willis died; and in 1780 the first-mentioned Richard Willis also died, without making any appointment by virtue of the power contained in the release of February, 1757. On Richard Willis's death Richard Legg Willis was beyond the seas, and did not return till the latter end of the year 1785; James Willis was then an infant, of the age of 19 years; Bethia A. Willis was of the age of 18 years; and Mary Willis is still an infant. Thomas Willis, having survived Richard Willis and Bethia, died in 1782, being then an infant; after whose death and within five years next after, Richard Legg Willis returned to this country, and James Willis and Bethia A. Willis attained their respective ages of 21 years, and before the time when, &c., they the said Richard Legg Willis, J. Willis, B. A. Willis, and M. Willis, in due form of law entered, &c., in order to avoid the fine; and thereupon became seised, &c., and being so seised, caused an action to be commenced for trying the title, &c., within one year next after such entry, which action is now prosecuting with effect, according to the form of the Statute, &c. And after such entry, and while they were seised, they demised to the plaintiff, &c., who entered, and was possessed thereof until the defendants entered and ejected him, &c. But whether, &c.

This verdict was argued three several times; first by Jekyll for the plaintiff, and Gibbs for the defendants, in Hilary Term, 1790; a second time by Watson, Serjt., for the plaintiff, and by Lawrence, Serjt., for the defendants, in Easter Term last; and on this day by Morris for the plaintiff, and Wilson on behalf of the defendants.

LORD KENYON, C. J.²² The principal question in this case is, Whether the remainders to the children of Robert and Bethia Willis were vested or contingent? if the latter, it cannot be disputed but that the destruction of the particular estate on which they depended, before they became vested, would destroy them. One argument which has been used is, that the estate limited to the trustees was an use executed in them, for that otherwise the estate limited to the wife for her sole and separate use would not be secured to her, but would be under the husband's control. But in answer to that it is sufficient to observe, that it is limited to the trustees, without saying "to and to the use of the trustees." If none of the limitations of the settlement could possibly take effect without this construction, I should be inclined so to decide it; as was done some years ago in a case in the House of Lords. But that is not the case here; for this estate was limited to Bethia Willis and to her heirs until the marriage should be solemnized; it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect. Besides the Court of Chancery would

²² The opinion of Ashhurst, J., in concurrence, is omitted, as also those parts of the other opinions which deal with the question of the revocation of the uses of the settlement. It was held by all the judges that there was no revocation.

consider the husband, if it vested in him, a trustee for the wife, so that she might have all the benefit intended by the marriage settlement. If the remainders to the children of R. and B. Willis were contingent, the objection made by the defendants, that the conveyance by Willis and his wife and the fine, by destroying the particular estate before they vested, also destroyed those remainders, must prevail; for it is too late, as the law now stands, to say that such is not the established doctrine of contingent remainders. This doctrine indeed involves in it difficulties which have been frequently felt by wise and able lawyers, who have wished to break through the rule; but they have been deterred from the attempt by a consideration of the consequences that might possibly ensue. There are two instances, it is true, where the law is otherwise: in equitable estates, where the contingent remainders are not destroyed, because the estate is vested in trustees to preserve the contingent remainders; and in copyholds, where the estate in the lord of the manor will support all the remainders: but in the case of freehold estates of inheritance, the rule is so established that it is not now to be shaken. On the first question in this case our judgment must depend on the authorities cited; the three leading of which are *Lovie's Case* [10 Co. 78a], *Walpole v. Lord Conway* [Barnard. Ch. 153], and *Cunningham v. Moody* [1 Ves. Sr. 174]. Of the first, inserted in *Rolle's Abridgment*, which was published under the inspection of Sir M. Hale, it is sufficient to say, that it was held in a case circumstanced like the present, that the remainder was contingent. This was also adopted in a great measure by Lord Hardwicke, in *Walpole v. Lord Conway*.²³ But I am happy to find that, in the last of those cases, *Cunningham v. Moody*, where the same point arose, and where Lord Hardwicke had an opportunity of reconsidering this question more fully and at a time of life when his judgment was more mature, that great judge determined differently. And I cannot find any substantial distinction between that case and the present. There Lord Hardwicke (after saying that the fee was not in abeyance) added, "nor does the power of appointment make any alteration therein; for the only effect thereof is that the fee which was vested was thereby subject to be divested if the whole were appointed." Now in this case the limitations to the children were first subject to a power of appointment, but for want of such appointment to the children in fee (I say in fee, as I

²³ "With regard to the case of *Walpole v. Conway*, which was mentioned in *Willis v. Martin* as being contrary to another decision of Lord Hardwicke in *Cunningham v. Moody*, and which was pressed upon us in *Willis v. Martin*, a further account of it has been found among the papers of the late Sir T. Sewell, from which it clearly appears that Lord Hardwicke ultimately gave directions in it conformable to what he had done in *Cunningham v. Moody*. I am therefore perfectly satisfied with the decision of *Willis v. Martin*; and though a writ of error was brought to reverse our judgment in that case, it was afterwards non-pross'd in the House of Lords." Per Lord Kenyon, C. J., in *Doe d. Tanner v. Dorvell*, 5 T. R. 518, 521 (1794).

See *Smith v. Camelford*, 2 Ves. Jr. 698, 703-707 (1795).

shall show in the course of my opinion). And whether the limitations precede or follow the power of appointment, it makes no difference. The object of the parties here was to make the whole estate subject to the power and will of the parents, according to the situation and exigencies of the family. I therefore say, in the words of Lord Hardwicke in *Cunningham v. Moody*, that the fee was vested in the children, subject however to be divested by the execution of the power of appointment. The opinion of Lord Hardwicke in the latter case is peculiarly deserving of attention, because when it was discussed, the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him, and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that court. I cannot therefore forbear thinking that, on the authority of that case, we ought to decide that the remainders to the children were vested, subject nevertheless to be divested by the parents executing the power of appointment. No appointment has been made; and therefore at the time when the acts stated in the verdict were done by the parents in opposition to the interests of their children, the limitations to the children were not destroyed. This decision puts an end to this cause as far as respects all the children but one; but it has been contended that they only took estates for life, and that, one being since dead, the reversion in fee of the parents immediately came into possession. And that brings me to the next question, whether the children took estates for life or in fee, which arises on these words: "and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns forever." And the question is, whether the words, "his or her heirs" may not with propriety, and ought not, considering the whole settlement and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence; I cannot bring myself to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear. And we know that no stops are ever inserted in Acts of Parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole: if then we use the points suggested by the counsel, the clause will read thus, "to the use of all and every the child or children, equally, share and share alike, his or her heirs or assigns forever." If this had been like the case of *Hay v. Lord Coventry*, 3 T. R. 83, we might have lamented that the parties had not inserted words of inheritance to carry their probable intent into execution, but we could not have supplied them. But in this case there are words of inheritance; and I think we should defeat the manifest intention of the parties, and the object of the settlement, which was to give the chil-

dren estates of inheritance, were we not to read this part of it in the manner contended for by the plaintiff's counsel.

BULLER, J. This case has been so fully discussed both on the bench and at the bar, that I will content myself with stating the general grounds of my opinion.

With respect to the first and principal question, the argument on the part of the defendants, as far as authorities are concerned, rests on *L. Lovie's Case*, and on that of *Walpole v. Lord Conway*. But what was said by Lord Coke in the former case certainly did not apply to the point before the court; the question there arose on the will only; and nothing was said either in argument or by any other of the judges on the construction of the deed. The same case is also reported in *Moor. 772*; where it appears that the remainder under the will was contingent, because it could not arise unless the eldest son died without issue, and there was also an alienation. Therefore I think it did not occur to Lord Coke that a remainder, when once vested, could be afterwards divested by the execution of the power. If there were no authority against this case, I could not have made up my mind to agree to it; but his opinion has been since controverted in other cases. In *2 Lord Raym. 1150*, Mr. J. Powell, speaking of *L. Lovie's Case*, said, "Though it was a doubt in *L. Lovie's Case*, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-simple be limited to such persons as A. shall appoint by his will, remainder over, that is a good remainder vested till the appointment." Now the instance there put is directly this case; and if the limitations to the children were vested on the birth of a son, nothing has since happened to divest them. The defendants' counsel have rather hinted at, than insisted on, a difference between this case and that put by one of the plaintiff's counsel, of a remainder to the first and other sons of A. with a remainder to the first and other sons of B. his brother, where, on the birth of B.'s son before A. had any son, the remainder would vest in the former, subject to be divested on the birth of a son of A.; but I see no distinction; for when a child of Robert and Bethia Willis was born, the limitation was vested in him exactly in the same manner as if the limitation had been to their first and other sons. If there had been no power of appointment, the limitation to the children would have vested on the birth of a child: that was the point decided in *Lewis Bowles's Case*. Then suppose the limitation to the children had been followed by a proviso containing a power of appointment, that would not have varied the case: if so, what difference is there, either in reason or in law, whether the power of appointment be inserted in one part of the instrument or the other? The court must consider the whole deed together in order to collect the intention of the parties. As to the quantum of interest which the children took, that question also seems equally clear. Suppose the limitation were to "all and every the children, and his or her heirs and assigns forever:" that would not be

grammatically written, but the intention of the parties being manifest, the court must read it thus, his, her, or their heirs and assigns forever. This question arises on a family settlement, which was made for the benefit of all the children of the marriage; and in order to give effect to the intention of the parties, we may leave the intervening words in a parenthesis, by which means the word "heirs" will have relation to the words in the former part of the sentence.

GROSE, J. If my brother BULLER found the case so much exhausted as to make it unnecessary for him to go fully into every part of it, much less necessary is it for me to do so. The first considerable question is, whether the remainder to the children, which was certainly contingent in its creation, did or did not become vested in the children as they came in esse. I confess I was at first forcibly struck with *L. Lovie's Case*, and *Walpole v. Lord Conway*, as also with the common definition of a contingent remainder. But I think that the rule laid down in *Cunningham v. Moody* is the best and wisest construction; and there the rule is "that a remainder may vest, liable to be divested by the execution of a power of appointment." The ground of it is, that the courts will never suffer the fee to be in abeyance but from necessity. And I am the more inclined to adopt this rule, as being the most likely to give effect to the intention of the parties; which the contrary doctrine would probably defeat. Therefore I think that on the birth of the children the limitations to them became vested; and as to the quantum of estate which they took, I have not a particle of doubt. By reading the words in the mode adopted by the court, all the difficulty is removed.²⁴

²⁴ The opinions of Kenyon, C. J., and Ashurst (and Grose, J.), in concurrence, are omitted, as is also that part of Buller, J.'s opinion which deals with the question of the revocation of the uses of the settlement. It was held by all the judges that there was no revocation. *See ante p. 73 n*

~~With regard to the case of *Walpole v. Conway*, which was mentioned in *Willis v. Martin* as being contrary to another decision of Lord Hardwicke in *Cunningham v. Moody*, and which was pressed upon us in *Willis v. Martin*, a further account of it has been found among the papers of the late Sir T. Sewell, from which it clearly appears that Lord Hardwicke ultimately gave directions in it conformable to what he had done in *Cunningham v. Moody*. I am therefore perfectly satisfied with the decision of *Willis v. Martin*; and though a writ of error was brought to reverse our judgment in that case, it was afterwards non-pross'd in the House of Lords." Per Lord Kenyon, C. J., in *Doc d. Tanner v. Dorvell*, 5 T. R. 518, 521 (1794). *ante p. 72 n*~~

~~See *Smith v. Camelford*, 2 Ves. Jr. 698, 703-707 (1795).~~

~~The dicta in *Johnson v. Battelle*, 125 Mass. 453, 454 (1878), and *Taft v. Taft*, 130 Mass. 461, 464, 465 (1881), must be inadvertent.~~

~~See *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Bergman v. Arnhold*, 242 Ill. 218, 89 N. E. 1000. See Gray, *Rule against Perp.* (2d Ed.) § 112.~~

DOE d. PLANNER v. SCUDAMORE.

(Common Bench, 1800. 2 Bos. & P. 289.)

This was an ejectment to recover possession of a messuage and lands described in the declaration which came on to be tried at the last assizes for Bedfordshire, when a verdict was found for the plaintiffs, subject to the opinion of the court, on a case in substance as follows:

Thomas Lane on the 9th of March, 1792, by his will duly executed, devised as follows: "I give and devise my messuage or tenement and farm called Buckingham-hall with the lands and appurtenances thereunto belonging and all other my real estate whatsoever situate lying and being in the parishes of Higham Gobiais Pulloxhill and Barton or elsewhere in the county of Bedford unto and to the use of my brother George Lane of the city of Canterbury and his assigns for and during the term of his natural life without impeachment of waste, and from and immediately after his death then I give and devise the same unto and to the use of my amiable friend Catherine Benger (niece to Mrs. Mary Shindler of Burgate Street Canterbury and who at this time lives with me and superintends the management of my family) her heirs and assigns for ever in case she the said Catherine Benger shall survive and outlive my said brother but not otherwise; and in case the said Catherine Benger shall die in the life-time of my said brother then and in such case I give and devise my said messuage farm lands and real estate in the said county of Bedford unto and to the use of my brother George Lane his heirs and assigns for ever." In March, 1793, the said Thomas Lane died without having altered or revoked his said will, leaving the said George Lane, his brother, and heir at law, him surviving, who thereupon entered on the estate so devised, being the premises in question. In Trinity term, 1793, the same George Lane levied a fine sur conuzance de droit come ceo, &c., with proclamations of the premises in question, and declared the use of the said fine to himself in fee. On the 15th December, 1796, the said George Lane, by his will duly executed, devised the said premises to Edward Scudamore the defendant in fee; and in November, 1799, the said George Lane died in possession of the premises, without having altered or revoked his said will. On the 29th May, 1798, the said Catherine Benger made an actual entry upon the premises in question, being within five years after the levying the said fine, and for the purpose of avoiding the same. Catherine Benger afterwards married John Planner, and on the 17th of January, 1800, before the bringing of this ejectment, the said John and Catherine Planner, the lessors of the plaintiff, made an actual entry on the said premises.

The question for the opinion of the court was, Whether the lessors of the plaintiff were entitled to recover? If they were, the verdict was to stand, but if not, a verdict to be entered for the defendant.

HEATH, J. Two questions have been made in this case: first, Whether the condition be precedent or subsequent? Secondly, Whether the devise to C. Benger be a contingent remainder or executory devise? It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction according to the intent of the devisor. The question always is, Whether the thing is to happen before or after the estate is to vest? If before, the condition is precedent; if after, it is subsequent. In this case it is clear that the event is to happen before the estate can vest: for the brother is to die before C. Benger can be entitled to the estate, the words being "in case the said C. Benger shall survive and outlive my said brother, and not otherwise." In all the cases which have been cited to prove this a condition subsequent, the intent of the testator, has been clear that the estate should vest immediately in possession. Such was the case before Lord Talbot, and such was the case of *Edwards v. Hammond*. This case therefore is distinguishable from the cases cited, since in those cases the estate was not intended to vest in possession immediately. As to the second question, it has been decided so long ago that it will not admit of discussion. The case is not distinguishable from *Plunket v. Holmes*. Where a freehold is limited to the first taker and afterwards a fee is given on a condition, if it may take effect as a contingent remainder it shall do so; and it is not material that a fee might have descended to the first taker independent of the will.

ROOKE, J. I am of opinion that this is a contingent remainder, and I found that opinion on the case of *Plunket v. Holmes*. It was the intent of the testator that G. Lane should take for life, and that after his decease C. Benger should take an estate in fee if she survived him, but if she did not survive him that G. Lane, who was the heir at law, should take an estate in fee. Here therefore there was a particular estate for life, which was sufficient to support the devise over as a contingent remainder; and it is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise.

CHAMBRE, J. I am of the same opinion. The case is perfectly clear both on reason and authorities.

Judgment for the defendant.²⁵

²⁵ See *Finch v. Lane*, L. R. 10 Eq. 501.

A fortiori, where the remainder is to children who "survive" the life tenant, it is contingent and destructible. *Abbott v. Jenkins*, 10 Serg. & R. (Pa.) 296.

FESTING v. ALLEN.

(Court of Exchequer, 1843. 12 Mees. & W. 279.)²⁶

See ante, p. 50, for a report of this case.

PRICE v. HALL.

(Court of Chancery, 1868. L. R. 5 Eq. 399.)

George Hall, by his will, dated the 28th of February, 1839, bequeathed his personal estate to his wife absolutely for her own use, benefit, and disposal, and all his real estate, for and during the term of her natural life, chargeable with the payment of debts and expenses, and £15 yearly and every year during his natural life unto his grandson William Hall, and to his children equally after his death. "And as to my said real estates, after the death of my wife I give, devise, and bequeath the same equally to the child or children of my said grandson William Hall, if he leave any him surviving, but in case he leave no child or children him surviving, I give, devise, and bequeath my said real estates, or the residue thereof, unto the children or child of my cousin, Jonas Wilman, of Althorpe, the said Jonas Wilman and his wife first taking the income thereof yearly and every year during his life."

The testator died in March, 1843. Mary Hall, his widow, died in June, 1855, leaving William Hall her surviving.

At the date of testator's death William Hall had no children living, but five children had since been born to him, of whom three were living at the death of the testator's widow, Mary Hall, the tenant for life, the other two having been born since her death.

The bill was filed by the children of William Hall for the purpose of ascertaining the rights of all parties; and it was prayed that the income of the infants' shares might be applied for their maintenance and education, and the back rents accounted for by William Hall, who was in possession.

At the hearing the Vice-Chancellor allowed the two children of William Hall born after the death of Mary Hall to be added to the record as defendants.

SIR W. PAGE WOOD, V. C. The question is, whether the estate vested in the children of William Hall, subject to be divested in the event of William Hall dying without leaving any child or children living at his death, or whether it is an interest in the children contingent upon William Hall dying in the lifetime of the testator's widow, the

²⁶ Accord: Bull v. Pritchard, 6 Hare, 567 (1847); Holmes v. Prescott, 33 L. J. Ch. 264 (1864); Rhodes v. Whitehead, 2 Dr. & Sm. 532 (1865). 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, 74 N. E. 779.

tenant for life, which contingency has not taken effect by reason of the tenant for life having pre-deceased William Hall. It is clear that in neither view could the children of Jonas Wilman take. The case was very ably argued by Mr. Freeman, who relied upon that class of cases where it has been held that upon a gift to A. when or if he shall live to attain twenty-one, followed by a limitation over in case he die under that age, the devise over is considered as indicating that he is to take all that is not given over in the given event, and that in such a case the interest vests immediately, though not absolutely and indefeasibly, until A. attains twenty-one. But there is another class of cases, of which *Festing v. Allen*, 12 M. & W. 279—which, although it has been called in question (see *Browne v. Browne*, 3 Sm. & Giff. 568), has not been overruled—is an instance, viz., that if you attach to a legatee a description so that the legatee cannot be ascertained but for that description, which contains in itself a contingency; then until the contingency happens you have no legatee to answer the whole of the requisite description, and no one to whom the doctrine laid down in *Edwards v. Hammond*, 3 Lev. 132, and that class of authorities, can apply. In all the cases cited in favor of vesting, the gift was to children on their attaining a particular age, and the only words of contingency were that, if the particular age was not attained, the estate was to go over, the effect of which was that, although the estate vested immediately, it did not vest indefeasibly until the particular age had been attained. But in this case the contingency which is introduced does not fit in with the prior interest given. *Doe d. Roake v. Nowell*, 1 M. & S. 327, affirmed in *Dom. Proc.* (5 Dow. 202), is always referred to by those who disapprove of *Festing v. Allen*. There however, all the class was distinctly ascertained and indicated, and it would be going far beyond the authority of that case, or even *Browne v. Browne*, to hold in this case that the children took vested remainders liable to be divested in the given event. It is not here a gift to ascertained persons with a gift over, but there was a clear intention on the part of the testator that the class should not be ascertained until the death of William Hall, and that all those children who survived him (William Hall), and those only, should take. Unfortunately for the interests of the children, William Hall was not tenant for life, and has survived the person named by the testator as tenant for life, so that the particular estate to support the contingent remainder has dropped before the event on which the contingency depends has arrived. By treating it as a remainder vesting immediately in the children living at the death of the tenant for life, it might happen that those children might all die in the lifetime of William Hall, and yet be absolutely entitled, to the exclusion of after-born children who survived William Hall. That was the very class of events which was not intended by this testator. He meant to give to any children of William Hall whom he might leave living at his death. That was the

particular period pointed out for ascertaining the class, and if no children of William Hall were then living, then the property was to go over to the Wilman family. I mention, lest it should be thought that I had overlooked it, the case of *Doe d. Bills v. Hopkinson*, 5 Q. B. 223, which, at first sight, looks very like this case, but is not so in reality. There the devise was to T. and W. for life in equal moieties, and after their death the moiety of T. was given "to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her, or his heirs and assigns forever, to take in equal shares if more than one." The gift of W.'s moiety was in similar terms, and in case either T. or W. died without lawful issue, the moiety of him so dying was given to the survivor and to J. If both T. and W. died, and neither of them left issue, the whole was given to J. for life, and after his death to such children as he should leave at the time of his death. In case all three, T., W., and J., should die without lawful issue, or if they, or any of them, should leave lawful issue, and such issue should depart this life under twenty-one and without lawful issue, then the property was given over. The court there, looking to the whole will, held that the estate of each child (of T.) in remainder vested at birth, liable only to open and let in the interests of after-born children. It must be held in this case that the limitations after the death of Mary Hall to the children of William Hall were contingent limitations, and that, as the contingency has failed, William Hall takes the estate as heir-at-law of his father. As, therefore, the plaintiffs are not entitled to any interest under the testator's will, the bill must be dismissed, and, as costs are not asked for, without costs.²⁷

²⁷ In *Parker v. Ross*, 69 N. H. 213, 45 Atl. 576, there was, after a life estate in the whole property, 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." The life tenant renounced and the question was whether the remainders were vested so they could be accelerated. It was held that they were.

If, after limiting a remainder to the children of the life tenant who survive the life tenant, there be added a gift over if the remainderman does not survive the life tenant and dies leaving children, then to these children, the remainder has been held to be contingent. *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; *Thompson v. Adams*, 205 Ill. 552, 69 N. E. 1; *Starr v. Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623; *Brechteller v. Wilson*, 228 Ill. 502, 81 N. E. 109½; *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275, Ann. Cas. 1913E, 414.

In *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457, the remainder after a life estate was to "my children then living and the descendants of such as may be dead, share and share alike." It was held that the children took vested remainders. See, also, to the same effect, *Farnam v. Farnam*, 53 Conn. 261, 2 Atl. 325, 5 Atl. 682; *Nodine v. Greenfield*, 7 Paige (N. Y.) 544, 34 Am. Dec. 363.

If, in the case of a remainder limited to the children of the life tenant who survive the life tenant, there be added the single gift over, if any child does not survive and dies without leaving children, the remainder has been held to be contingent, in accordance with the language expressly introducing the

SECTION 3.—ALIENABILITY

GOLLADAY v. KNOCK.

(Supreme Court of Illinois, 1908. 235 Ill. 412, 85 N. E. 649, 126 Am. St. Rep. 224.)²⁸

Appeal from Circuit Court, Coles County; M. W. Thompson, Judge. This is an appeal from the circuit court of Coles county in a partition proceeding in which the complainants claim an interest in the real estate in question as grandchildren and heirs of Moses Golladay. The real estate involved was owned in fee simple by George Golladay at the time of his death, which occurred on the 13th of January, 1854. The interests of the parties in the real estate depends upon the construction to be given to the second clause of the will of George Golladay. That clause is as follows: "After the payment of such debts I give, devise and bequeath unto my wife, Nancy Golladay, all my personal property and real estate, being in sections 9 and 10, in town 13, north, range 10, east, third P. M., in said county, and to her children after her death; and if the said Nancy Golladay does not have children that will live to inherit said real estate, that the said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs, of said county." At the time of the death of the testator, his widow, Nancy Golladay, had no children, but after the death of the testator his widow married one Johnson and had a daughter by him, who lived to be 23 years of age. This daughter died before her mother. Moses Golladay died in 1855, leaving two children, William Golladay and Mary Knock. On May 15, 1900, William Golladay executed a general warranty deed to Henry H. Fuller and Ross R. Fuller, purporting to convey the real estate described in the bill. William Golladay died January 1, 1904, intestate. Complainants are his children. Mary Knock, the only daughter of Moses Golladay, died intestate in the year 1890, leaving six children as her only heirs. John Knock, Jr., one of the children of Mary Knock, on the 27th day of February, 1904, made a warranty deed conveying his interest in the real estate involved to Henry H. Fuller. Nancy Golladay died in 1907. The court below found that Nancy Golladay took a life estate in the real estate in question under the will of George Golladay,

condition precedent of survivorship. Chapin v. Crow, 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213 (gift over to surviving remainderman); McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672 (gift over to surviving remainderman); City of Peoria v. Darst, 101 Ill. 609 (gift over to third party); Robeson v. Cochran, 255 Ill. 355, 99 N. E. 649 (gift over to grantor).

²⁸ Arguments of counsel omitted.

and that Moses Golladay and his heirs took a contingent remainder, which upon the death of Nancy Golladay without leaving children surviving her, became a fee in the persons who at that time answered the description of "heirs of Moses Golladay";²⁹ that Henry H. Fuller and Ross R. Fuller took nothing under their deed from William Golladay, and said deed was by the decree of the court canceled as a cloud upon the title. The court by its decree found that the complainants are each entitled to a one-sixteenth interest in the premises in fee, and that H. H. Fuller, Jack Knock, Catherine Knock, Minnie Knock, Anna Knock, and Emma Knock are each seised of an undivided one-twelfth interest in said estate, and that no other parties have any interest therein. All of the defendants other than H. H. and R. R. Fuller claimed as heirs of Cassie Johnson, the daughter of Nancy Johnson, formerly Nancy Golladay. The court found that these parties had no interest in the premises. Henry H. and Ross R. Fuller excepted to the decree, and have perfected an appeal to this court. The errors relied on for a reversal are that the court erred in finding that the second clause of the will of George Golladay gave Moses Golladay a contingent remainder instead of a vested remainder, and that the court erred in rendering a decree in favor of complainants, against the defendants.

VICKERS, J. (after stating the facts as above). The principal question in this case is whether the interest devised to Moses Golladay and his heirs was a vested or a contingent remainder. A vested remainder is a present interest which passes to a party to be enjoyed in future, so that the estate is invariably fixed in a determinate person after a particular estate terminates. 2 Blackstone's Com. 168; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120. *Fearne*, in his work on *Remainders*, on page 2, says: "An estate is vested when there is an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment. An estate is vested in interest when there is a present fixed right of future enjoyment." A remainder is vested when a definite interest is created in a certain person, and no further condition is imposed than the determination of the precedent estate. It is not sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined. It must also appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate. *Smith v. West*, 103 Ill. 332. In the case last above cited this court quoted with approval the language of Chancellor Walworth in *Hawley v. James*, 5 Paige (N. Y.) 466, as follows: "A remainder is vested in interest where the person is in being and ascertained, who will, if he lives, have

²⁹ Moses Golladay's remainder was clearly transmissible by descent or devise upon his death before the contingency happened upon which it was to vest. *Jarman on Wills* (6th Ed., by Sweet, 1910) vol. 1, p. 80; vol. 2, p. 1353.

an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him by the remainder shall so long last; in other words, where the remainderman's right to an estate in possession cannot be defeated by third persons or contingent events or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest." A contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. This general definition has often been approved by this court. While the difference between a vested and a contingent remainder is clear enough under the definitions as given by the authorities, still it is not always an easy matter to determine whether a particular instrument creates a vested or a contingent remainder. Thus it does not necessarily follow in all cases that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The contingency or condition may be either precedent or subsequent. If the former, the estate is contingent; if the latter, the remainder is vested, subject to be divested by the happening of the condition subsequent. *Haward v. Peavey*, *supra*, and authorities there cited. To distinguish between a contingent remainder and one that is vested, subject to be divested by a condition subsequent, is often a matter of much difficulty. So far as our investigation has gone, we have found no attempt to formulate a rule on the subject, except the general rule that it is to be determined in each case as a question of construction of the instrument creating the interest.

In the case at bar both parties agree that, under the second clause of the will of George Golladay, Nancy Golladay took a life estate. The devise over to Moses Golladay and his heirs cannot be construed as vesting a present interest in fee, subject to be divested upon the death of the life tenant leaving children surviving her. The language of the testator will not bear such construction. The clearly expressed intention of the testator was to give his wife a life estate in the premises, with remainder in fee to such of her children as might be living at the time of her death. Then, to meet the possibility that his wife might die leaving no children surviving her, he made the devise over to Moses Golladay and his heirs. Here the devise over depended on a dubious and uncertain contingency; that is, the death of the life tenant without leaving children surviving her. The language of the testator that the real estate is to fall to Moses Golladay and his heirs "at the death" of the life tenant clearly indicates that the testator did not intend or contemplate a vesting of the devise over before the happening of that contingency. In other words, the testator has fixed the time and the condition under which the estate may vest, and it is not the province of courts to defeat the intention of the testator by a resort to artificial rules of construction.

Appellants place much reliance upon the case of *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81. That case arose under the following facts: The testator devised a certain portion of his real estate to his son, Emory Boatman, subject to the following condition: "The share of the real estate that my son Emory gets under this will is only a life estate. He is to have the use, rents and proceeds of said land, after paying taxes and necessary repairs, so long as he may live. At his death, if he leaves any child or children surviving him, then said land is to go to such child or children, but if he dies leaving no child or children surviving him then said lands to go to his brothers and sisters." After the death of the testator, and during the life of Emory Boatman, Clara V. Worsham, a sister of Emory Boatman, conveyed, by quitclaim deed, all of her interest in the real estate of her father, including that upon which Emory Boatman held a life estate, to four of her brothers, one of whom was Clarence E. Boatman. Clarence E. Boatman died intestate February 14, 1899, leaving no children, but leaving Ida M. Boatman, his widow. Emory Boatman died June 19, 1901, leaving no widow, child, or children, or descendants of a child or children. Ida M. Boatman filed her bill for a partition, claiming that her deceased husband was seised of a vested interest in the lands in which Emory Boatman held a life estate, and that, by the death of her husband without children, she, as his widow, became seised, under the statute of descent, of one undivided half interest in the lands upon which Emory Boatman held the life estate. This court affirmed a decree sustaining the contention of the widow of Clarence E. Boatman.³⁰ In that case, on page 420 of 198 Ill., page 83 of 65 N. E. a definition of a vested remainder was given, as follows: "A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency."

This definition is not erroneous when all of the language embraced within it is properly considered. The definition, however, is very erroneous and misleading unless the modifying clause introduced by the last eight words employed is constantly kept in mind. The subsequent treatment of the question involved in that case shows that the court applied the definition given without considering that the death of the life tenant leaving children surviving him was the "concurrence of a collateral contingency," which, under the definition given, prevented the interest of the brothers and sisters of Emory Boatman from being a

³⁰ See, also, *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279; *Chapin v. Nott*, 203 Ill. 341, 67 N. E. 833; *Ruddell v. Wren*, 208 Ill. 508, 70 N. E. 751; *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731; 8 Ill. Law Rev. 313-322.

vested remainder. There was in that case, as there is in the case at bar, a collateral contingency to be taken into account; that is, the death of the life tenant without leaving surviving children before the remainder could become vested. This contingency is a dubious and uncertain event. It could not be known until the death of the life tenant whether this contingency would happen; hence the remainder was contingent in the Boatman Case as it is in this. In this respect the Boatman Case is out of harmony with our previous decisions, as well as the great weight of authority outside of this state. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 418. In so far as the Boatman Case seems to lay down the rule that a devise to one with remainder in fee to his children who may survive him, with a devise over to another in case the life tenant dies leaving no children, creates a vested interest in remainder in the last devisee, that case is overruled. The case of Chapin v. Nott, 203 Ill. 341, 67 N. E. 833, in so far as it is based on the Boatman Case on this point, must be regarded as unsound. The remainder created by the devise over in such case is contingent upon the death of the life tenant without leaving children. That this is the proper construction of a clause in a will or deed is recognized by many decisions of this court, among which the following may be cited: City of Peoria v. Darst, 101 Ill. 609; Smith v. West, supra; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Furnish v. Rogers, 154 Ill. 570, 39 N. E. 989. In the case last above cited the clause in the will involved was as follows: "I give and bequeath to my grand-niece, Jessie Starkweather, * * * my house and two lots in Sycamore, * * * also thirty-two acres in Mayfield, DeKalb county, Ill., and \$500, 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 grand-nieces and nephews who will appear and give evidence of such." It was held that under the foregoing clause Jessie Starkweather took a life estate, and that the remainder created by the devise over was contingent on her marriage and the birth of children who survive the life tenant. In disposing of that case this court, speaking by Mr. Justice Phillips, on page 571 of 154 Ill., page 990 of 39 N. E., said: "The language employed designates the children as those who take the remainder, and the estate does not vest in them, as an absolute fee-simple title to them and their heirs forever, until the death of Jessie, as it is further provided that, if she die childless, the estate is to be divided among her mother and the rest of the testator's grandnieces and nephews, etc., whose estate is contingent upon the death of Jessie without a surviving child or children or the descendants of such child or children, in which case the takers of the remainder are substituted for surviving children. By the first clause of the will Jessie Starkweather takes an estate for life in the house, lots, and land and in the \$500 therein bequeathed. The remainder is a concurrent, contingent remainder with a double aspect, to be determined immediately upon the death of Jessie, as at that mo-

ment it will vest in her child or children, or the descendants of such child or children, that survive her, and, in default of such survival, the remainder would vest in the mother of Jessie and the other grandnieces and nephews of the testator"—citing *Dunwoodie v. Reed*, 3 Serg. & R. (Pa.) 435, and *City of Peoria v. Darst*, supra. The law as laid down in the *Rogers Case*, and the others above cited in line with it, furnishes the correct rule of decision in the case at bar. The second clause of the will of George Golladay gave his wife a life estate with a contingent remainder with a double aspect, to be determined upon the death of the life tenant. At the time of her death she left no children surviving her. The devise over to the heirs of Moses Golladay therefore took effect as a fee-simple interest upon the falling in of the life estate. The daughter of Nancy Golladay who died before her mother, and such of the heirs of Moses Golladay as predeceased the life tenant, had no interest in the premises. William Golladay was a son of Moses Golladay. As already shown, he made a warranty deed purporting to convey his interest in the premises to Henry H. Fuller and Ross R. Fuller several years before the death of the life tenant. Appellants contend that this deed operated as a conveyance of the interest of William Golladay, and that, if said deed was otherwise inoperative, it should be given effect, by way of estoppel, against the assertion of title by the complainants, who are the children of William Golladay. This contention cannot be sustained. William Golladay died before the life tenant. No title ever vested in him. 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.³¹ A contingent remainder may be transferred by warranty deed, under our statute, so

³¹ This would seem to be a following of the common-law rule that the descent of a remainder is traced from the first purchaser—that is to say, the original remainderman—in lieu of the person last seised, so that, upon the life tenant's death, those persons were entitled who were then heirs of Moses Golladay, the remainderman, as in the following cases: *Barnitz v. Casey*, 7 Cranch (U. S.) 456, 3 L. Ed. 403; *Buck v. Lantz*, 49 Md. 439; *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363; *Jenkins v. Bonsal*, 116 Md. 629, 82 Atl. 229; *Payne v. Rosser*, 53 Ga. 662; *Lawrence v. Pitt*, 46 N. C. 344.

It has been held, however, under American statutes of descent that the common-law rule has been changed, and that descent is traced from the person last entitled, so that on Moses Golladay's death his contingent remainder passed by descent to his heirs, including William, and upon William's death his interest passed by devise to his children, the complainants, as his heirs at law, as in the following cases: *Hicks v. Pegues*, 4 Rich. Eq. (S. C.) 413; *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103, 113, 29 Am. Dec. 336. See, also, the following cases, where the remainder or reversion descending was vested and descent was traced from the person last entitled: *Cook v. Hammond*, 4 Mason (U. S.) 467, 488, Fed. Cas. No. 3,159; *Lahey v. Scott*, 15 N. Y. Wkly. Dig. 148; *Moore v. Rake*, 26 N. J. Law, 574, 582; *Oliver v. Powell*, 114 Ga. 592, 600, 40 S. E. 826; *Cote's Appeal*, 79 Pa. 235; *Hillhouse v. Chester*, 3 Day (Conn.) 166, 210, 3 Am. Dec. 265; *Early v. Early*, 134 N. C. 258, 46 S. E. 503. This was the rule regularly applied where personal property was involved. *Hillhouse v. Chester*, 3 Day (Conn.) 166, 210, 3 Am. Dec.

as to vest the title in the grantee.³² Hurd's Rev. St. 1905, c. 30, § 7; *Wadhams v. Gay*, 73 Ill. 415; *Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332. But, where the grantor of such an interest dies before the contingency happens upon which the estate is to vest, nothing passes by such deed. *Thomas v. Miller*, 161 Ill. 60, 43 N. E. 848. Had William Golladay survived the life tenant, appellants would have succeeded to his share in this estate. In that event his deed would have been binding upon him and his heirs after his death. The conveyance by John Knock, Jr., to Henry H. Fuller is valid under the authorities which nullify the deed of William Golladay. John Knock, Jr., survived the life tenant. The court below correctly held that H. H. Fuller was entitled to the share of John Knock, Jr. This is the only interest he has in this estate. The other appellant Ross R. Fuller, who claims under the deed of William Golladay, has no interest whatever.

There is no error in the decree of the circuit court. The decree will be affirmed.

Decree affirmed.³³

DUNN, J., took no part in the decision of this case.

265; *Thompson v. Sandford*, 13 Ga. 238; *Cote's Appeal*, 79 Pa. 235. *Contra: Jenkins v. Bonsal*, 116 Md. 629, 82 Atl. 229.

North v. Graham, 235 Ill. 178, 85 N. E. 267, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189, would seem to have settled the rule in Illinois in favor of tracing the descent from the person last entitled as in the above class of cases.

If, then, the complainants took as heirs of William Golladay, why were they not bound by the warranty of their ancestor? See 3 Ill. L. R. 373.

³² With regard to the effect of the warranty to pass the title, see 3 Ill. Law Rev. 373.

In *Blanchard v. Brooks*, 12 Pick. (Mass.) 47, a deed, with general warranty of "all his [the grantor's] right, title and interest in" the land conveyed, did not pass the contingent remainder, and the warranty did not transfer the title by estoppel when the remainder vested.

³³ NOTE ON THE EXTINGUISHMENT OF FUTURE INTERESTS BY RELEASE.—Executory and contingent future interests may be released by the holder. Such releases, where they operate merely to extinguish the future interest, are valid for this purpose. *Fearne*, C. R. 421, n. (d), 423; 2 *Preston on Conveyancing*, 268, 269, 392, 471, 473. Thus a contingent remainder after a life estate can be released to the reversioner and thereby extinguished. 2 *Washburn on Real Property* (6th Ed.) 528; *Williams on Real Property* (17th Int. Ed.) 422; *Caraher v. Lloyd*, 2 Com. (Australian) Rep. 480. So the holder of a shifting executory interest cutting short a preceding fee simple can release to the holder of the preceding fee and thereby extinguish the future interest. *Williams v. Esten*, 179 Ill. 267, 53 N. E. 562; *Smith v. Pendell*, 19 Conn. 107, 48 Am. Dec. 146; *Fortescue v. Satterthwaite*, 1 Ired. (23 N. C.) 566; *Lampet's Case*, 10 Coke, 48a, 48b; *In re Coates Street*, 2 Ashm. (Pa.) 12; *Jeffers v. Lampson*, 10 Ohio St. 101; *Miller v. Emans*, 19 N. Y. 384; *D'Wolf v. Gardiner*, 9 R. I. 145. But cf. *Edwards v. Varick*, 5 Denio (N. Y.) 664; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110, and *Jackson v. Waldron*, 13 Wend. (N. Y.) 178, where the present holder in fee and the one having the executory devise over united in a deed, and where it was held that the deed was ineffective so far as the future interest was concerned.

The release, however, by the son of the executory devisee in the lifetime of his parent, is entirely ineffective. *Dart v. Dart*, 7 Conn. 250.

Quære: Whether the holder of the contingent future interest can, under the guise of a release, transfer the future interest to a life tenant so as to

ÆTNA LIFE INS. CO. v. HOPPIN.

(U. S. Court of Appeals, Seventh Circuit, 1914. 214 Fed. 928, 131 C. C. A. 224.)

See post, p. 136, for a report of the case.³⁴

BLANCHARD v. BLANCHARD.

(Supreme Judicial Court of Massachusetts, 1861. 1 Allen, 223.)

Petition for partition, in which the petitioner claimed two undivided fifth parts of the estate described. At the trial in the Superior Court the following facts were proved.

William Blanchard, the former owner of the premises, died in 1840, leaving a widow and ten children; and his will, after a devise to his wife of all the income of all his real and personal property during

enlarge the interest of the life tenant by the addition to it of the future interest. See cases put in *Lampet's Case*, 10 Coke, 51, and *Striker v. Mott*, 25 N. Y. 82; *Caraher v. Lloyd*, 2 Com. (Australian) Rep. 480; *Williams v. Esten*, 179 Ill. 267, 53 N. E. 562; *Ortmayer v. Elcock*, 225 Ill. 342, 80 N. E. 339.

Where several are tenants in common in fee, with a gift over to the others in certain events, and they exchange deeds by way of partition, it has been held that each takes his portion discharged of the gift over. In *re Coates Street*, 2 Ashm. (Pa.) 12. But the contrary was held in *Thompson v. Becker*, 194 Ill. 119, 62 N. E. 558.

³⁴ Accord (on the point of inalienability of the contingent remainder by execution sale): *Watson v. Dodd*, 68 N. C. 528; *Id.*, 72 N. C. 240; *Taylor v. Taylor*, 118 Iowa, 407, 92 N. W. 71; *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. 107; *Henderson v. Hill*, 77 Tenn. (9 Lea) 26; *Roundtree v. Roundtree*, 26 S. C. 450, 471, 2 S. E. 474; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366; *Phayer v. Kennedy*, 169 Ill. 360, 48 N. E. 828; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *Spengler v. Kuhn*, 212 Ill. 186, 72 N. E. 214; *Robertson v. Guenther*, 241 Ill. 511, 89 N. E. 689, 25 L. R. A. (N. S.) 887. Cf. *White v. McPheeters*, 75 Mo. 286, 292.

The rule of the principal case applies to guardian's sales. *Furnish v. Rogers*, 154 Ill. 569, 39 N. E. 989; *Hill v. Hill*, 264 Ill. 219, 106 N. E. 262. See, also, *Kingman v. Harmon*, 131 Ill. 171, 23 N. E. 430.

On the other hand, a vested remainder is freely alienable by all modes of conveyance. *O'Melia v. Mullarky*, 124 Ill. 506, 17 N. E. 36; *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394.

NOTE ON THE TREATMENT IN EQUITY OF CONVEYANCES OF REVERSIONS AND OTHER FUTURE INTERESTS, WHETHER VESTED OR CONTINGENT.—The English Court of Chancery regularly set aside, if there was any inadequacy in the consideration given, conveyances of reversions and vested remainders dependent upon the falling in of a life estate, even when the conveyance was made by a mature adult, who knew exactly what he was about, and there was no fraud whatsoever. *Gowland v. De Faria*, 17 Ves. Jr. 20; *Hinckman v. Smith*, 3 Russ. 434; *Edwards v. Burt*, 2 De G., M. & G. 55; *Boothby v. Boothby*, 15 Beav. 212; *Salter v. Bradshaw*, 26 Beav. 161; *Bromley v. Smith*, 26 Beav. 644; *Foster v. Roberts*, 29 Beav. 467; *Jones v. Picketts*, 31 Beav. 130; *Nesbitt v. Berridge*, 32 Beav. 282; 13 Yale Law Journal, 228.

For legislation abolishing the rule of inalienability of contingent remainders and other future interests, see 8 & 9 Vict. c. 106, § 6; 1 Ill. Law Rev. 380.

her natural life, contained the following clause: "Thirdly, I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property both real and personal that may be left at the death of my wife, to be divided equally between the last five named children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors, except they should leave issue, in that case to go to said issue, provided the said issue be legitimate." The testator's widow died in 1857. The share of the daughter Mary Jane was conveyed to the petitioner by deed dated May 24, 1858. The petitioner, by deed dated July 25, 1842, conveyed to his mother all his right, title and interest in and to the real and personal estate of his late father.

Upon these facts, Rockwell, J., ruled that Henry Blanchard took no interest in the premises, under his father's will, which he could convey in the lifetime of his mother, and that his deed to his mother conveyed no interest therein, and that he was entitled to hold two fifths of the premises; and the jury found a verdict accordingly. The respondents alleged exceptions.

HOAR, J. The will of William Blanchard devised to his wife Elizabeth all the income of all his real and personal property during her natural life, and then devised as follows:

"Thirdly, I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property both real and personal that may be left at the death of my wife, to be divided equally between the five last named children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors, except they should leave issue, in that case to go to said issue, provided the said issue be legitimate." The testator had ten children, all of whom survived the wife.

The principal question presented by the exceptions is, whether Henry Blanchard, during the life of his mother, took a vested or contingent interest in the real estate of his father, included within the terms of the devise.

The language used is not wholly free from ambiguity; and the case certainly comes very near the dividing line between vested and contingent remainders. It does not seem probable that the testator, or the person by whom the will was drawn, had any very distinct notions or purposes upon the subject; and the expressions employed are such, that, among the great multiplicity and variety of adjudged cases, some may undoubtedly be found which would countenance either construction.

The gift of the income of real estate for life is a gift of a life estate in the land. *Blanchard v. Brooks*, 12 Pick. 63. The devise to the children was therefore of a remainder, vested or contingent, or an executory devise. It is a settled rule of law, that a gift shall not be deemed to be an executory devise if it is capable of taking effect as a remainder; and it is equally well settled, that no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. *Blanchard v. Brooks*, ubi supra; 4 Kent, Com. (6th Ed.) 202; *Shattuck v. Stedman*, 2 Pick. 468; *Doe v. Peryn*, 3 T. R. 484 and 489, note. We must then consider whether there is anything in the language of this devise which shows an intention to postpone its vesting until the death of the mother.

The first clause of the devise to the children is certainly sufficient, if it stood alone, to create a vested remainder in all the children. The words descriptive of the property, "all the property both real and personal that may be left at the death of my wife" are used inartificially, and in their ordinary sense would have no proper application to the devise which the testator was making. As he had only given to his wife the income of the estate for her life, all the property would be left at her death. But even if we may suppose that it was in the testator's mind that some part of the principal of the personal estate might be lost or consumed while his wife was enjoying the income of it, undoubtedly all the real estate must be left at her death. The words "that may be left" add nothing, therefore, to the meaning, unless they may be regarded as expressing the idea of devising all the estate remaining after the wife's estate for life. It would then stand as the ordinary case of a devise to the wife for life, remainder in fee to the five children at her death, to be equally divided between them. There would be by such a devise, according to all the authorities, a vested remainder created in them as tenants in common. It would vest at once in interest, though not in possession. There are no words of contingency, such as, "if they shall be living at her death," or "to such of them as shall be living," the usual and proper phrases to constitute a condition precedent; but a direct gift of all the property left after the life estate previously carved out. The difficulty arises from the remaining sentence, which is a proviso containing a limitation over of the estate thus devised to the children respectively, upon the contingency of either of them dying before their mother, either with or without issue. Although this is in the form of a proviso, yet there are numerous cases in which a limitation thus expressed has been held to qualify in its inception the interest or estate before devised, and to make that contingent which would otherwise have been vested. And there is no doubt that if the effect of this clause is to limit the remainder to such of the children named as should survive their mother, then it is a contingent remainder. And this is the construction urged on behalf of the petitioner.

But if, on the other hand, it can be regarded as a devise in fee to

the five children, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition, then the children named took a vested remainder in fee; the limitation over would have taken effect, if at all, only as an executory devise; and, as the contingency never happened, the fee became absolute.

Four cases only were cited by the counsel for the petitioner in favor of the former construction. Doe v. Scudamore, 2 Bos. & P. 289, was the case of a devise to G. L., the testator's heir-at-law for life, and from and after his death to C. B., her heirs and assigns forever, in case she should survive and outlive the said G. L., but not otherwise, and in case she should die in the lifetime of the said G. L., then to G. L., his heirs and assigns forever; and it was held that the devise to C. B. was of a contingent remainder. There the words of the gift made it expressly, and in the first instance, dependent upon the contingency.

In Moore v. Lyons, 25 Wend. (N. Y.) 119, a devise to one for life, and from and after his death to three others or to the survivors or survivor of them, their or his heirs and assigns forever, was held, in the Court of Appeals, to give a vested interest to the remainder-men at the death of the testator, the words of survivorship being construed to refer to the death of the testator, and not to the death of the tenant for life. It had been conceded in the Supreme Court that, if the survivors at the death of the tenant for life had been intended, the remainder would have been contingent. Here, too, the survivorship directly qualified the gift, and it was not easy to regard it as a subsequent condition to an estate previously given. But Chancellor Walworth, in this case, was of opinion that the remainders would have been vested, even if the words of survivorship had been taken to refer to the death of the tenant for life; and states the rule to be, that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is in esse and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet, if the estate is limited over to another in the event of the death of the first remainder-man before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainder-man, which was before either an executory devise or a contingent remainder, will, if he is in esse and ascertained, be immediately converted into a vested remainder."

Where the def. of cont. and vested remainders advised by the decision.

In Hulburt v. Emerson, 16 Mass. 241, the devise was to the testator's son John, his heirs, executors, and assigns, subject to the payment of a legacy; but in case John should leave no male issue, then one half to be equally among his children, and the other half equally among all the surviving children of the testator. This was held to give

John an estate in tail male, with contingent remainders over; and that the surviving children were such as should be living whenever John died without male issue. No reasons are given by the court for the latter opinion, nor authorities cited to support it; and the heirs of the children who survived the testator, but did not survive John, were not parties to the suit.

The case of Olney v. Hull, 21 Pick. 311, is the remaining case, and perhaps the strongest in favor of the petitioner. The devise was to the testator's wife so long as she remained his widow; and should she marry or die, then to be equally divided among his surviving sons, with each son paying sixty dollars to his daughters, to be equally divided among them, as soon as each son might come in possession of the land. This court decided that no estate vested in the sons until the death of the widow; and in the opinion great stress is laid upon the provision that, "should the wife marry or die, the land then should be equally divided among the surviving sons," as indicating that the survivorship had reference to the death or marriage of the widow. But the difference between that case and the case at bar is this, that in the former the devise is made upon the contingency, while in the latter it is first made to the devisees by name, and the contingency appears only in a subsequent provision, which may consist as well with the previous vesting of the remainder.

And we are all of opinion that the case before us falls within another class of cases, which it more nearly resembles, and where the devise has been held to create a vested interest, determinable upon the happening of the contingency.

Such a case was Bromfield v. Crowder, 1 New Rep. 313, where the testator devised to A. for life, and after her death to B. for life, and at the decease of A. and B., or the survivor, gave all his real estate to C., if he should live to attain the age of twenty-one; but in case he should die before that age, and D. should survive him, in that case to D. if he should live to attain twenty-one, but not otherwise; but in case both C. and D. should die before either of them should attain twenty-one, then to E. in fee. It was held by all the judges of the Common Pleas, that C. took a vested estate in fee simple, determinable upon the contingency of his dying under the age of twenty-one years, the intention of the testator being apparent to make a condition subsequent, and not a condition precedent, notwithstanding the use of the word "if." And they relied upon Edwards v. Hammond, 3 Lev. 132, which was the case of a copyholder who "surrendered to the use of himself for life, and after to the use of his eldest son and his heirs, if he live to the age of twenty-one years; provided, and upon condition, that if he die before twenty-one, that then it shall remain to the surrenderer and his heirs;" and it was held that, notwithstanding the word "if" in the first clause, the whole showed an intention to create a condition subsequent. Bromfield v. Crowder was afterwards affirmed in the House of Lords.

In Doe v. Moore, 14 East, 601, a devise of real estate in fee to J. M. when he attains the age of twenty-one; but in case he dies before twenty-one, then to his brother when he attains twenty-one; with like remainders over: was held to give to J. M. an immediate vested interest, and that the dying under twenty-one was a condition subsequent on which the estate was to be divested. Lord Ellenborough cited Mansfield v. Dugard, 1 Eq. Cas. Ab. 195; Edwards v. Hammond; Bromfield v. Crowder; and Goodtitle v. Whitby, 1 Burr. 228; and said that "these authorities were attempted to be distinguished, on the ground that they were cases of a remainder and not of an immediate devise; but that forms no substantial ground of distinction: the estate vests immediately, whether any particular interest is carved out of it to take effect in possession in the mean time or not."

Smither v. Willock, 9 Ves. 233, was the case of a bequest of personal estate to the testator's wife for life, and from and after her death to be divided between his brothers and sisters in equal shares; but, in the case of the death of any of them in the lifetime of the wife, the shares of him or her so dying to be divided between all and every his, her, or their children. Sir William Grant decided that the shares vested in the brothers and sisters, subject only to be divested in the event of death in the life of the testator's widow, leaving children.

But a case more nearly resembling the case at bar is Doe v. Nowell, 1 M. & S. 327. There was a devise to J. R. for life, and on his decease to and among his children equally at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to such child and his or her heirs, at his or her age of twenty-one; and in case J. R. should die without issue, or such issue should die before twenty-one, then over. It was held that the children of J. R. took vested remainders; and Lord Ellenborough said that the case of Bromfield v. Crowder was very fully considered, and was a conclusive authority.

In Ray v. Enslin, 2 Mass. 554, the devise was to the wife for life, and after her decease to the testator's daughter and her heirs forever. "But in case my daughter should happen to die before she come to age, or have lawful heir of her body begotten," then one third to his sister and two thirds to his wife, and their heirs forever. It was held that the daughter took a vested estate in fee simple defeasible upon a contingency reasonably determinable. See also Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24.

These cases, with many others depending on a similar principle, seem to us sufficient to show that the devise to Henry Blanchard was of a vested remainder, defeasible on a condition subsequent, which he could convey by deed in the lifetime of his mother. This would be equally true whether his remainder was in fee simple or in tail. Were the other construction to prevail, it would follow that, if the tenant for life should have forfeited her estate by waste, the whole estate

would have gone to the heirs at law, which is obviously inconsistent with the whole intention of the testator. At least such would have been the effect of the forfeiture at common law, though in this Commonwealth such a consequence has been guarded against by Statute. Rev. Sts. c. 59, § 7.

The decision of this question renders the other point, respecting the deed of Henry Blanchard to his mother, of no importance.

Exceptions sustained.³⁵

³⁵ Accord: *Jeffers v. Lampson*, 10 Ohio St. 102; *Pingrey v. Rulon*, 246 Ill. 109, 92 N. E. 592.

If the limitations be to A. for life, remainder to the children of A. in fee, but if any die before A. leaving children, then to such children the share which their parent would have taken, gives the child or children of A. upon birth a vested and alienable remainder. In *re Rogers' Estate*, 97 Md. 674, 55 Atl. 679; *Moore v. Hare*, 144 Ind. 573, 43 N. E. 870; *Callison v. Morris*, 123 Iowa, 297, 98 N. W. 780; *Smith v. West*, 103 Ill. 332; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586; *Pingrey v. Rulon*, 246 Ill. 109, 92 N. E. 592; *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 94 N. E. 980, 34 L. R. A. (N. S.) 1150; *Haward v. Peavey*, 128 Ill. 430, 439, 21 N. E. 503, 15 Am. St. Rep. 120 (semble).

If the limitations be to A. for life, remainder to the children of A. in fee, but if A. die without leaving children, then over to B. and his heirs, the remainder to the children is vested. *Forsythe v. Lansing's Ex'rs*, 109 Ky. 518, 59 S. W. 854; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Hinrichsen v. Hinrichsen*, 172 Ill. 462, 50 N. E. 135. But see *Hill v. Hill*, 264 Ill. 219, 106 N. E. 262 (1914).

In New York, by the judicial construction of a statute defining vested and contingent remainders (1 Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 13), it has been held that a remainder is alienable by a deed without covenants, when made by the person or persons who would be entitled at the moment of conveyance, if the life estate should be terminated at that moment by the death of the life tenant. *Moore v. Littel*, 41 N. Y. 66 (1869); *House v. Jackson*, 50 N. Y. 161 (1872). But this is now conceded to be the result of the New York statute and contrary to the rule of the common law. *Smaw v. Young*, 109 Ala. 528, 20 South. 370 (1895).

In *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20, it was held, however, that where the limitations were to the widow for life and "then to such of my children as may then be alive, share and share alike," and where a child of the testator had survived him and died before the widow leaving a child, the plaintiff, the plaintiff was entitled on the death of the widow because it had vested in her parent and she took by descent from him.

But in *Hall v. La France Fire Engine Co.*, 158 N. Y. 570, 53 N. E. 513, where the limitations were to A. for life "and at her death to the heir or heirs of her body her surviving," and where at the date of the deed creating these limitations A. had a child, who, however, died before A., it was held that the heir of A.'s deceased child had no interest in the land so limited. The court called the remainder to the heir or heirs of the body of the life tenant "a contingent remainder."

See, also, *In re Moran's Will*, 118 Wis. 177, 96 N. W. 367.

Clarke v. Fay, 205 Mass. 228, 91 N. E. 328, 27 L. R. A. (N. S.) 454 (1910), was a suit in equity under Rev. Laws, c. 159, § 3, cl. 7, to reach and apply to the payment of a debt due to the plaintiff from the principal defendant the interest of that defendant under the will of his grandfather. It appeared that that will gave the residue of the testator's property to trustees, and, after providing for certain trusts, directed that all the residue of his estate should be divided into as many equal shares as there should be at the time of his decease children of his then living or deceased leaving issue, and then, after providing for the management of the trust and the payment of its expenses, proceeded as follows: "To pay over the residue of the income of such share to the child for whose benefit such share is held, * * * for and dur-

ing the term of such child's natural life and upon such child's death to convey transfer and pay over the principal of the share so held for such child's benefit to such child's lawful issue then living by representation; but if such child shall die without leaving lawful issue living at the time of such child's death then upon such child's death to add the principal of the share held for such child's benefit equally to the shares held for the benefit of my other children then living. * * * provided however that the lawful issue then living of any other child of mine who shall have theretofore deceased shall take and have (and there shall be paid and conveyed to such issue)—by right of representation the same part of such principal which would have been added to the share which would have been held for the benefit of such issue's deceased parent if such issue's deceased parent was then living." When the bill was filed the father of the principal defendant was living. Defendant had two unmarried sisters, who as well as he were born before the death of the testator. He had had five aunts, who were living at the death of the testator, one of whom had died, leaving issue, one of whom was a childless widow, two of whom were married, each of them having a married son without issue, and one of whom was married and had a minor unmarried son. Held, that the interest of the principal defendant in his share of the fund of which his father enjoyed the income, although his enjoyment of it was contingent on his surviving his father, was assignable property, which could be reached and applied under the statute, but that his interest in the funds of which the incomes were enjoyed respectively by his aunts, and a part of which would come to him if, after his father's death and during his own lifetime, any of his aunts should die without leaving issue, was not property, but a mere possibility of property, which could not be reached under the statute."

MISCELLANEOUS LEGAL CONSEQUENCES WHICH DEPEND UPON THE CHARACTER OF THE REMAINDER AND ARE OFTEN SAID TO BE DETERMINED ACCORDING AS THE REMAINDER IS VESTED OR CONTINGENT.--The union of the particular estate and the contingent remainder in the same person will not cause the termination of the particular estate (*Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264), while the coming together of a particular estate and the next immediate estate in remainder, which is vested and larger than the particular estate, will terminate by merger the particular estate and cause the remainder at once to vest in possession (*Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. [N. S.] 540; *Whitaker v. Whitaker*, 157 Mo. 342, 58 S. W. 5; *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698). This rule of merger, it is believed, is based upon the strictly feudal or common law distinction between vested and contingent remainders.

The rule against perpetuities only requires that the future interest shall vest within lives in being and twenty-one years after its creation. "Vest" here does not mean vest in the sense of being non-contingent, nor does it mean vest in possession. It means vest in the feudal or common law sense of that term. Hence in applying the rule against perpetuities it may become of vital importance to determine what interests are vested in that sense, so as to determine whether the future interest does or does not violate the rule against perpetuities. *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363.

The person with a vested remainder must be made a party to a decree in chancery or he will not be bound by it. A contingent remainderman may be bound by the decree by representation. *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366; *Thompson v. Adams*, 205 Ill. 552, 69 N. E. 1. This may refer to the common law or feudal distinction.

If the remainder be subject to a condition precedent in form that the remainderman to take must survive the life tenant, then if the remainderman dies before the life tenant no interest passes from him, for he obtained nothing. On the other hand, if the remainder be not subject to any such condition precedent of survivorship and if there is no divesting clause operating in the events which happen, the remainderman will have an interest transmissible at his death. The question, which situation exists, is fundamentally merely one of construction. What is the meaning of the language used? Is

CHAPTER V

LIMITATIONS TO CLASSES

RULE IN WILD'S CASE.

Hawkins on Wills (2d Ed.) 243: A devise of real estate to A. and his children, A. having no children at the time of the devise, vests in A. an estate tail; "children" being construed as a word of limitation. (Wild's Case, 6 Rep. 16b; see Webb v. Byng, 2 K. & J. 669.)

The rule does not apply to bequests of personal estate. (Audsley v. Horn, 1 De G., F. & J. 226.)

"The time of the devise appears to mean the date of the will," and not the death of the testator. (Buffar v. Bradford, 2 Atk. 220; [Grieve v. Grieve, L. R. 4 Eq. 180; Seale v. Barker, 2 B. & P. 485; Clifford v. Koe, 5 A. C. at p. 471.]¹)

Co. Lit. 9a: B. having divers sonnes and daughters, A. giveth lands to B. et liberis suis, et a lour heires, the father and all his children to take a fee simple joyntly by force of these words (their heires); but if he had no childe at the time of the feoffment, the childe borne afterwards shall not take.

there a condition precedent of survivorship or not? Nevertheless, if the remainder is subject to a condition precedent in form of survivorship, it is, according to the feudal or common law distinction, a contingent remainder. On the other hand, if it is not subject to such condition precedent of survivorship it is vested and that whether it be subject to a gift over or not. Hence the purely practical question of construction is continually dealt with by the courts and judges on the basis of whether the remainder is vested or contingent according to the feudal or common law distinction.

In such cases the courts, not being faced with any consequences of destructibility or inalienability, have not infrequently reached doubtful results. Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264; People v. Byrd, 253 Ill. 223, 97 N. E. 293; Drury v. Drury, 271 Ill. 336, 111 N. E. 140.

It is clear that partition cannot be had by a contingent remainderman, but may be had by a non-contingent and indefeasibly vested remainderman. Ruddle v. Wren, 208 Ill. 508, 70 N. E. 751; Dee v. Dee, 212 Ill. 338, 354, 72 N. E. 429. It may not be permitted to a remainderman having a vested remainder according to the common law or feudal definition if that remainder is uncertain ever to take effect, because it is subject to a gift over on events which may happen before it vests in possession. Goodrich v. Goodrich, 219 Ill. 426, 76 N. E. 575; Cummings v. Hamilton, 220 Ill. 480, 483, 77 N. E. 264 (as to 180 acres), *semble*; Seymour v. Bowles, 172 Ill. 521, 50 N. E. 122. Hence the question of whether a remainder may be partitioned does not depend upon the application of the purely common law or feudal distinction between vested and contingent remainders. 1 Ill. Law Rev. 184.

¹ The rule in Wild's Case was applied in Lofton v. Murchison, 80 Ga. 391, 7 S. E. 322. It was held to have been abolished by implication by the statute which makes a devise to A. simpliciter prima facie the devise of a fee, in Davis v. Ripley, 194 Ill. 399, 62 N. E. 852, and Boehm v. Baldwin, 221 Ill. 59, 77 N. E. 454.

Sheppard's Touchstone, 436: If one devise his land to the children of I. S., by this devise the children that I. S. hath at the time of the devise, or at the most the children that I. S. hath at the time of the death of the testator, and not any of them that shall be born after his death, shall take.²

SHEPHERD v. INGRAM.

(High Court of Chancery, 1764. Amb. 448.)

Mr. Shepherd, of Exning in Cambridgeshire, by will gave all his freehold, leasehold, and copyhold estates, and also his personal estate, to trustees, to hold to them, their executors, administrators, and assigns, in trust to pay certain annuities and legacies out of the rents and profits of his personal estate; and in case of want of sufficiency of personal estate, then out of the rents and profits of his said real estate. And as for and concerning all the rest, residue, and remainder of his said real and personal estate, of what nature or kind soever, after provision made for payment of the said annuities and legacies, he gave the same to such child or children as his daughter Frances Gibson, otherwise Frances Shepherd (who was his natural daughter, to whom he had given the greatest part of his estate), should have of her body lawfully begotten, whether male or female, equally to be divided between them, share and share alike, taking upon them the name of Shepherd; but having made no provision for the disposal of the rest, residue, and remainder of the said real and personal estate, in case his said daughter Frances Gibson, commonly called Frances Shepherd, should die without issue of her body lawfully to be begotten, then he gave the same, after payment of the said annuities and legacies, unto Christopher Jeafferson and Joseph Pyke, equally to be divided between them, share and share alike, they taking the name of Shepherd.

By a codicil, 26th September 1744, he revokes the bequest to Jeafferson, and declares, that he shall have no benefit from the residue of his estate, and devises the same to Samuel Shepherd and the said Joseph Pyke, equally to be divided between them, for their lives; and directed that the annuities which should fall in should go back to the residuum of his real and personal estate, and be equally divided between Samuel Shepherd and Pyke, provided his said daughter should die without leaving issue of her body lawfully begotten; but in case his said daughter should leave at her death any child or children

² Singleton v. Gilbert, 1 Cox, 68; s. c. 1 B. C. C. 542, note; Scott v. Harwood, 5 Mad. 332 (goes on the construction to be given the devise), Cook v. Cook, 2 Vern. 545 (the after-born children were included); Hill v. Chapman, 3 Bro. C. C. 391, post, page 258 (personal property); Faloon v. Simshauser, 130 Ill. 649, 22 N. E. 835 (conveyance by deed; after-born child excluded).

then such annuities as should fall in should be divided among such children, or go to such only child: and his will was, and he desired that the said codicil should be, and be adjudged to be part and parcel of his said last will and testament.

The bill was brought by Frances Gibson, who was then under age, and unmarried, to establish the will, and to have the opinion of the Court, and directions with respect to the trusts; and upon hearing of the cause, on 25th June 1750, before Lord Hardwicke, the Court directed, That if there should be any surplus of interest arising on any of the funds, after payment by the said decree directed to be made thereout, the same should be laid out in South Sea annuities, subscribed in the name of the Accountant General, to the credit of the said cause, on account of the personal estate, subject to the further order of the Court; and declared, that the same ought to go according to the bequest in the testator's will of the residue of his personal estate; and after directing, in case of a deficiency of the personal estate to answer the legacies and annuities, that such deficiency should be made good out of the rents and profits of the real estates, his Lordship ordered, that such rents and profits should from time to time be paid into the Bank, in the name of the Accountant General; and that the surplus should be accumulated and laid up; when the same should amount to a competent sum, be placed out at interest in the Accountant General's name, and subject to the contingency in the testator's will; and that the interest and dividends that should arise therefrom should, when they amount to a competent sum, be placed out in like manner. And his Lordship declared that no part of the surplus rents and profits of the testator's real estates was descended to, or belonged to Elizabeth Rogers, the heir at law, but the same was subject to the trusts and contingencies in the will; and any person that might be intitled thereto, according to such trusts and contingencies, was to be at liberty to apply, as any of such trusts should arise, or contingencies happen.

Afterwards Frances Gibson married ——— Ingram, now Lord Irwin, on 2d August, 1758, and there are three children of the marriage, all infants.

Bill by the plaintiffs, being two of those children, the other being made a defendant, to have an account of the profits of the residuum of the real and personal estate, as constituted under the former decree, from the birth of the eldest child; and that so much as became due, from the birth of the first child till the second was born, may be declared to belong to the first; and after the birth of the second, till a third was born, to belong to the first and second child; and that so much as became due from the birth of the third child, may be declared to belong to all the three children.

For the plaintiffs it was argued, That the residue was given to the children defeasible, in case they should all die before Lady Irwin their mother. For the defendants, Shepherd and Pyke, it was argued, That

the children took no interest in the residuum in the life-time of their mother, but that the whole was contingent till her death; and that the interest and profits were intended to accumulate in the mean time.

LORD CHANCELLOR NORTHINGTON was very clear of opinion, that the daughters took a defeasible interest in the residue; and put the case of a legal devise of the residue to the daughters, with a subsequent clause declaring, that if all the daughters should die in the life-time of their mother, then the residue should go over, that would be an absolute devise with a defeasible clause, and the daughters would in that case be clearly intitled to the interest and profits till that contingency happened. And decreed according to the prayer of the bill, with liberty to apply in the case of the birth of any other child.³

PRESTON ON CONVEYANCING, vol. 3, p. 555: "But under the learning of uses and of executory devises, a gift to a class of persons may give a title, first to one person, and afterwards open and admit of a participation by others. But at the common law, and under the learning of remainders, a gift to a class of persons will not admit to a participation any who are born after the determination of the particular estate, though such after-born persons might take under a gift operating by executory devise, or springing or shifting use. (Mogg v. Mogg, in Chancery, 1815, 1816, 1 Mer. 654.)

"By this distinction different parts of the certificate in Mogg v. Mogg are reconciled; the same words of description having, under different circumstances, conferred a title on a different number of the grandchildren of the testator."⁴

MELLICHAMP v. MELLICHAMP.

(Supreme Court of South Carolina, 1888. 28 S. C. 125, 5 S. E. 333.)⁵

McIVER, J. This action was instituted for the purpose of obtaining partition of a certain tract of land described in the complaint, containing 3,771 acres, and the several questions raised by the appellants grow out of the following facts: On the 15th of January, 1878, one John Mobley conveyed the tract of land described in the complaint to the defendant "Marion R. Mobley and the children she already has and may hereafter bear by her husband," Edward P. Mobley, Sr. At the time of the execution of this deed, Mrs. Mobley had borne to

³Accord: Where personal property was involved: *Weld v. Bradbury*, 2 Vern. 705, post, p. 257.

⁴See, also, *Brackenbury v. Gibbons*, 2 Ch. Div. 417; *Archer v. Jacobs*, 125 Iowa, 467, 482-484, 101 N. W. 195. See, also, *Matthews v. Temple*, *Comberbach's Rep.*, 467 (1698); *Fearne, C. R.* 312, 314; 1 *Jarman on Wills* (5th Amer. Ed.) star pp. 264, 875; *Theobald on Wills* (7th Ed.) 312.

⁵Only part of the opinion of the court is given.

her said husband the following children, viz., Edward P., Jr., Moses H., Kate, (who had intermarried with the plaintiff,) Marion, Jones, Hattie, and Nancy,—seven in number,—all of whom were then living. After the said deed was executed, another child—the defendant Berry H. Mobley—was born to the said Marion R. and Edward P. Mobley, Sr., whose right to participate in the partition is disputed by some of the parties.

[The circuit judge held that Berry H. Mobley, though born after the execution of the deed from John Mobley to Marion R. Mobley and her children, was entitled to share in the partition.]

As to the question [namely, whether the after-born child, Berry H. Mobley, took any interest under the deed from John Mobley to Marion R. Mobley and her children] there can be no doubt that the intention was to include after-born children, for the language is: “Unto the said Marion R. Mobley and the children she already has and may hereafter bear by her husband, the said Edward P. Mobley, Sr.,” and it is difficult to conceive what language could have been employed more expressive of an intention to include after-born children. It is true that this question arises under a deed, and not under a will, where it is supposed greater weight is given to the intention; but as we understand it, when a court is called upon to construe any paper, the first effort should be to ascertain the intention of the parties from the language which they have used. It is, however, likewise true that sometimes the intention of the parties, although so clearly expressed as to leave no doubt upon the subject, cannot be carried into effect, even in case of a will, because such intention contravenes some settled rule of law, and it is argued here that although the intention is plain to include after-born children, the deed cannot be given such effect, because it violates the well-established rule of law that “a freehold estate cannot be limited to commence in futuro,” and therefore, as Berry H. Mobley was not in existence when this deed was executed, and when the estate granted passed out of the grantor, it could never afterwards have the effect of vesting any estate in him. The cases cited to support this view are: *Stroman v. Rottenburg*, 4 Desaus. 268; *Myers v. Myers*, 2 McCord, Eq. 214, 16 Am. Dec. 648; *McMeekin v. Brummet*, 2 Hill Eq. 638; *Holeman v. Fort*, 3 Strob. Eq. 66, 51 Am. Dec. 665; and *Kitchens v. Craig*, 1 Bailey, 119. Now, while in all of these cases the after-born children were excluded, it was because the court held that the terms of the instrument—deed or will—did not show an intention to include the after-born children, and not because such children could not take under the rules of law. On the contrary, it is plainly implied in all of these cases, that if the language used had shown an intention to include after-born children, such would have been the effect.

The case of *Hall v. Thomas*, 3 Strob. 101, is also cited in support of the view contended for by appellant. That was a case in which a mother, by a very informal deed of gift, transferred personal property to her two children, “Martha and Avan; and also, if I should have any

more children, they shall all my children be equal and share equal in this my property, given and intended to be granted and given and confirmed, and by these presents do give, grant, and confirm unto my said children," etc., "of all which premises I, the said Magdalen Ulmer, have put the said, my children, in full and peaceable possession by virtue hereof;" and it was held that this paper, by its terms, vested the whole legal estate in the children born at the date of the deed, to the exclusion of those born afterwards, stress being laid upon the words last quoted, as one not in esse could not be put in possession. It is true that O'Neill, J., in delivering the opinion of the court, also lays down the doctrine that "a deed is inter vivos, and is to take effect in presenti. Such a thing as a deed to a person unknown or not in esse cannot be; * * * such a thing as a direct and immediate gift of personalty to person not in esse has not as yet been allowed, and I trust never will be." But he adds, further on in the same opinion: "If this had been a conveyance of land, the most that could have been made of it, between the parties, would have been that, at law, the legal estate was in the grantees Martha and Avan, and in equity, that they might have been regarded as trustees of a springing or shifting use, first, for themselves; second, for themselves and the after-born children, as they respectively come into being." If this be so, then, upon the same principle, the after-born child, Berry-H. Mobley, could be let in.

In considering the question arising under a devise to children, as to the point of time at which the class is to be ascertained, or rather as to the period within which the objects must be born, we find in 2 Jarm. Wills, marg. p. 98, the following language: "We are now to consider how the construction is affected by the words 'to be born,' or 'to be begotten,' annexed to a devise or bequest to children; with respect to which the established rule is that, if the gift be immediate, so that it would, but for the words in question, have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to all the children who shall ever come into existence; since in order to give to the words in question some operation, the gift is necessarily made to comprehend the whole."⁶ Now, while this language is applied to a will, we do not see why it should not also be applied to a deed for the purpose of effecting the manifest intention of the parties, and giving to the words used some operation and effect. Indeed, we find that the principles upon which the above-stated rule seems to rest have been applied to a deed in the case of *Hewet v. Ireland*, 1 P. Wms. 426, though the precise question here under consideration did not arise in that case. Nearly 40 years ago it was said by one of the chancellors of this state that "the difference between the rules of construing deeds and wills has often been a subject of regret; and it is evident that the current of decisions is gradually wearing it away;

⁶Accord: *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; *Leake on Property in Land* (2d Ed.) 267.

so that, at no very distant day, it is probable they will become almost identical." If, therefore, any mode can be devised by which the manifest intention of the parties, as expressly declared in this deed, can be carried into effect without violating an ancient rule of the common law, deriving its origin from the feudal system, as Judge O'Neill seems to think there can be, we think it should be adopted. It will be observed that the deed here in question is not solely to persons not in esse at the time of its execution, but there were persons in existence then competent to take the estate conveyed; and we do not see why the estate thus vested in them may not, in order to effect the intention, open and let in all of the class expressly mentioned in the deed as they severally came into existence. It seems to us, therefore, that there was no error on the part of the circuit judge in holding that Berry H. Mobley was entitled to share in the partition of the land described in the complaint.⁷

[Balance of opinion, relating to another point, omitted.]

⁷ Accord: *Pierce v. Brooks*, 52 Ga. 425.

Contra: *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254 (1902).

CHAPTER VI

FREEHOLD INTERESTS SUBJECT TO A TERM

POLLOCK ON THE LAND LAWS, pp. 137, 138: Leaving exceptional cases aside, we pass on to consider the position of the tenant who holds either for a term of years, or as tenant from year to year. In the feudal plan of society there is no place for him; and accordingly the legal doctrine starts from the conception that the relation between the landlord and the tenant is simply a personal contract. This conception is at the bottom of all the differences between freehold and leasehold tenure, and, though largely qualified in its effects, must be borne in mind in order to understand even the most modern form of the law. The lessee's interest is now beyond question property, not the mere right to the performance of a contract. Still, being in legal theory 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; and the custom of creating it by deed has become a legal requirement (and that not in every case) only by modern statutes. 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. 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. From a strictly feudal point of view there is not an estate at all, only a personal claim against the freeholder to be allowed to occupy the land in accordance with the agreement. But as early as the thirteenth century two points were settled, which together constituted a true right of property in the tenant. If he 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. Already the purchaser could not say to the tenant whom he found on the land, "I have made no contract with you, look for your redress to the man with whom you did contract." The farmer's possession was as secure while his estate lasted as the freeholder's. On the foundation thus laid the modern law has been completed, partly by judicial usage and partly by express legislation. Broadly speaking, both the landlord's and the tenant's successors in title enjoy, while the

term of the tenancy lasts, the rights conferred at its creation upon the landlord and tenant respectively, and are subject to the burdens imposed on them. Exceptions may still occur, too rare and technical to be now further specified, which are just enough to show that the old notion of a mere personal agreement, though decayed, is not dead.

CHALLIS' REAL PROPERTY (3d Ed.) 99: The seisin [of the immediate freehold estate] is quite independent of, and unaffected by, the existence of any term or terms of years. Therefore, so far as the seisin is concerned, there can exist no such thing as a remainder of freehold expectant upon a term of years. The existence of a prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession. (Litt. § 60: "If the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor.") Words and phrases which grammatically import futurity, such as "then," "when," "from and after," and the like, when they refer to the determination of a prior term of years, do not make the subsequently limited freehold contingent, or postpone the vesting of it until the expiration of the term; but under such circumstances the freehold is vested immediately. (Boraston's Case, 3 Rep. 19.) During the continuance of a prior term, the first estate of freehold is properly described, not as being a remainder of freehold expectant upon the term of years, but as being the freehold in possession subject to the term. But since the possession of the freeholder is in such a case subject to the rights of the termor, and since these rights may, and in practice usually do, deprive the freeholder of the immediate use and occupation of the lands during the term, the result is, for many practical purposes, much the same as if the freehold subsisted only as a veritable remainder. In this sense the word remainder is often applied to estates of freehold limited after a term of years. But when this language is used the reader must bear in mind (1) that a prior term of years does not prevent a subsequent vested estate of freehold from being an estate of freehold in possession; and (2) that a prior term of years does not prevent a subsequent contingent estate of freehold from being void in its inception, as being an attempt to create a freehold in futuro.

LEAKE ON PROPERTY IN LAND (2d Ed.) 35: If a lease were made for years with a contingent remainder of freehold, the limitation in remainder was wholly void, because it left the seisin in abeyance until the happening of the contingency; nor could livery be given for such an estate for want of a present certain grantee of the freehold. (Co. Lit. 217a.) Thus, "it is a general rule, that wherever an estate in con-

tingent remainder amounts to a freehold, some vested estate of freehold must precede it." (Ferne, Cont. Rem. 281. See Loyd v. Brooking, 1 Vent. 188.)

LIT. § 60. But if a man letteth lands or tenements by deed or without deed for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

NOTE ON THE DISTINCTION BETWEEN FREEHOLD INTERESTS SUBJECT TO TERMS AND THOSE SUBJECT TO A PARTICULAR ESTATE OF FREEHOLD SO FAR AS THE EXISTENCE OF SEISIN IS CONCERNED.—Freehold interests limited after terms for years, if valid at all, are present interests and the seisin of the freeholder is a present seisin. Challis' Real Property (3d Ed.) 70, 89-90. The freeholder's wife or husband has dower (Scribner on Dower [2d Ed.] 233) or curtesy. The freeholder, even though not the original purchaser, constitutes a new stock of descent. Bushby v. Dixon (1824) 3 B. & C. 298 (4 Gray's Cas. on Prop. 10). On the other hand, a remainderman has no seisin at all. After mentioning that the reversioner has a sort of seisin because of the services rendered him, the learned authors of Pollock and Maitland's History say (2 Pollock & Maitland, History of English Law, 39): "On the other hand, we cannot find that any sort of kind of seisin was as yet attributed to the remainderman. He was not seised of the land in demesne, and he was not, like the reversioner, seised 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): "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." Co. Lit. (Hargrave's note) 217. It followed, from the fact that the remainderman had no seisin that he did not render feudal services. 2 Pollock & Maitland, History of English Law, 39. He could not bring a writ of right. Lit. § 481. 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 the grantee of the remainderman. Mystery of Seisin, by F. W. Maitland, 2 L. Q. R. 481, 490-493. A remainderman, other than one who was an original purchaser did not constitute a new stock of descent. 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 L. Q. R. 481, 485. 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 curtesy in a remainder. Co. Lit. 29a, 32a; Scribner on Dower (2d Ed.) 233, 321. In this respect the remainder was on the footing of a mere right of entry by one disseised. Mystery of Seisin, 2 L. Q. R. 481, 485, et seq.—*Ed.*

ADAMS v. SAVAGE.

(Court of King's Bench, 1703. 2 Ld. Raym. 854.)

A scire facias was sued by the plaintiff as administrator to J. S. upon administration granted to him by the archdeacon of Dorset, upon a judgment recovered by the intestate against Savage in this court. And the issue after pleading was, whether Savage was seised of the lands, etc., in fee? Upon which the jury found a special verdict, that Savage being seised in fee, conveyed the lands by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, if he should so long live, remainder to the trustees for twenty-five years, remainder to the heirs male of his body, remainder to his own right heirs. And the question was, if Savage during his life, not having heirs male of his body, should have a use result to him for his life, and so become tenant in tail in possession; or if no use could result, and then there being no freehold to support the contingent remainder to the heirs male of the body of Savage, the said remainder would be void, and Savage seised in fee as before. And this was argued by Mr. Eyre for the plaintiff, and by Mr. Serjeant Darnell for the defendant, Hilary term last, and this term. And the court held, that no use could result to Savage during his life, and therefore the remainder to the heirs male was void, and Savage seised in fee. And their reasons were, because the limitations to himself for ninety-nine years, and to the trustees for twenty-five years, and the heirs male, were new uses and new estates. As if a man by lease and release, or by covenant to stand seised, limit the use to himself for life, or in tail, these are new estates, and not parcel of the old estate, according to 7 Co. 13 b, Englefield's Case. And where in such case upon a conveyance such uses are limited, as (supposing the limitations to be good) would pass the whole estate, there no use will result contrary to the express limitations of the party. But if the limitations are void, the conveyance of necessity will fail. If a man seised in fee convey his estate by lease and release to the use of himself for life, remainder to trustees for their lives, remainder to the heirs of his body; he hath an estate tail in him, but he is but tenant for life in possession: otherwise if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man makes a feoffment, it is no discontinuance, but only divests the estate. And for the same reason in this case, where the first limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. These are the reasons of the Chief Justice HOLT.

And POWELL, Justice, said, that there was a difference, where the limitation was upon a covenant to stand seised, and where upon a lease and release. For where the limitations are to take effect out of the es-

tate of the covenantor, there if the limitations were such as could not take effect immediately, or not till after the death of the covenantor, as in the case of *Pybus v. Midford*, 2 Lev. 75, there the law may mould the estate remaining in the covenantor into an estate for life; but that cannot be where the limitations are to take effect out of the estate of the trustees for want of a limitation, much less against an express limitation. And therefore (by him) if there had been an express limitation in the case of *Pybus v. Midford*, limited to the covenantor, the judgment would have been otherwise. And for these reasons the whole court ordered last Hilary term, that judgment should be entered for the plaintiff, unless cause should be shown to the contrary the first day of this term. And the first day of this term Darnell, Queen's Serjeant, showed for cause, that the plaintiff could not have judgment, because it appeared upon the scire facias that he was not intituled to it; because the administration was granted to him by the archdeacon of Dorset, and therefore the grant of it was void; for the judgment of this court, upon which the scire facias is founded, is bona notabilia. 2. If it will not make bona notabilia, yet this grant of administration will be void quoad this judgment, because it lies out of the limits of the jurisdiction of the archdeacon of Dorset. Against which it was urged by Mr. Eyre for the plaintiff that this court cannot take notice of the boundaries of dioceses; and it may be, that this court is within the archdeaconry of Dorset, for that archdeaconry may be within the diocese of London; and this court will not intend the contrary, since the contrary does not appear to them. But per HOLT, Chief Justice, this court will take notice of the limits of ecclesiastical jurisdiction, which is part of the law of the realm, under which we live; and consequently it will take notice, that a judgment of the King's Bench is not within the jurisdiction of the archdeacon of Dorset. And for this reason the whole court held, that judgment ought to be given for the defendant.¹

GORE v. GORE.

(Court of Chancery, 1722. 2 P. Wms. 28.)

This case came on before Lord Chancellor Macclesfield, who directed it to be referred to the judges of the King's Bench for their opinion.

The testator William Gore had several sons, Thomas and Edward Gore, &c., and several daughters; and being seised in fee of divers manors and lands, did, by his will dated 14th July, 1718, devise these lands, &c., to trustees for 500 years, and after the determination of

¹ *Rawley v. Holland*, 22 Vin. Ab. 180, pl. 11 (1712), accord. See Gray, *Perpetuities*, §§ 58-60.

that term, to the first son of his eldest son Thomas (who was then a bachelor), to be begotten in tail male, and so to every other son of the body of Thomas to be begotten in tail male successively,

Remainder to the testator's second son Edward for life, remainder to his first, &c., son in tail male successively, with divers remainders over.

The trust of the term of 500 years was, to pay the testator's debts and legacies, which were considerable, and likewise to pay £50 per annum annuity to the testator's eldest son for his life, with a power for his said eldest son to distrain for the same, if in arrear, with a power to the testator's younger son Edward to charge the premises with £1,000 apiece for his younger sons or daughters, payable at twenty-one, and with a maintenance for them in the mean time, not exceeding the interest of their portions; the trustees to raise such portions, and maintenance out of the term for 500 years, and when all the trusts of the term were performed, then the term to attend the inheritance.

Also the testator declared, that the reason why he gave his eldest son Thomas no more than £50 per annum was, because his said eldest son had stood him in a great deal of money, and was to have £400 per annum, in lands in Wiltshire, immediately after his [the testator's] death.

In the February following, the testator died, leaving his eldest son Thomas then a bachelor, who afterwards married, and had a son.

The first question was, whether the devise to the first son of Thomas (the testator's eldest son) was good?

2dly, in whom the freehold of the premises did vest at the death of the testator?

Whereupon all the four judges of the King's Bench that then were, (viz.) PRATT, C. J., POWIS, EYRE, and FORTESCUE ALAND, Justices, certified their opinions under their hands, "that the devise to the eldest son of Thomas Gore was void; that it could not be good as a remainder, for want of a freehold to support it; and that it could not take effect as an executory devise, because it was too remote (viz.), after 500 years." But Lord Macclesfield expressed some dissatisfaction at this opinion of the judges, saying, that though the law might be so, yet the term of 500 years being but a trust term, and to be considered in equity as a security only for money, was not to be so far regarded (at least in equity) as to make the devise over void.

After which the eldest son Thomas Gore and his brother Edward came to an agreement, which was confirmed by the court.

Afterwards Thomas Gore had a son and died, and the son of Thomas Gore bringing this matter over again in Chancery, Lord Chancellor King sent it a second time to the Court of King's Bench, where LORD HARDWICKE, C. J., PAGE, PROBYN, and LEE, Justices, certified their opinion against the opinion of their predecessors, (viz.) "That this was

a good executory devise, and not too remote; for that it must in all events, one way or other, happen, upon the death of Thomas Gore, whether he should have a son or not, and either upon the birth of the son, or upon his death without issue male, the freehold must vest."

LORD RAYMOND also was of this last opinion.

(1) The two certificates were in the words following:

"We have heard counsel on both sides on the question above specified, and having considered the same, are of opinion, that the devise of the manors above mentioned to the first son of Thomas Gore is void, because he cannot take by way of remainder, for that there is no freehold to support it; nor can he take by way of executory devise, because it is not to take place within that compass of time which the law allows; and we are also of opinion that the freehold of the same manors, on the death of the devisor, vested in Edward the second son.

"JOHN PRATT, LITTLETON POWIS, R. EYRE, J. FORTESCUE ALAND.

"— 1722."

(2) "Upon hearing counsel on both sides, and consideration of this case, we are of opinion, that the devise of the manors of Barrow and Southley to the first son of Thomas Gore is good by way of executory devise, and that the freehold of the said manors, on the death of the devisor, vested in his heir-at-law.

"HARDWICKE, F. PAGE, E. PROBYN, W. LEE.

"Jan. 26, 1733."

CHAPTER VII

RULE IN SHELLEY'S CASE

PROVOST OF BEVERLEY'S CASE.¹

(Y. B. 40 Edw. III, 9. [1366.])

Lands were given to one John de Sutton for his life, the remainder, after his decease, to John his son, and Eline, the wife of John the son, and the heirs of their bodies; and in default of such issue, to the right heirs of John the father. John the father died first; then, John and Eline entered into possession. John the son then died, and afterwards Eline his wife, without leaving any heir of her body. R., another son, and heir at law of John de Sutton, the father, then entered. And it was decided by all the Justices that he was liable to pay a relief to the chief lord of the fee, on account of the descent of the lands to himself from John the father. Thorpe, who seems to have been a judge, thus explained the reason of the decision: "You are in as heir to your father, and your brother [father?] had the freehold before; at which time, if John his son and Eline had died [without issue] in his lifetime, he would have been tenant in fee simple."²

WILLIAMS ON REAL PROPERTY (21st Ed.) 346-348: We have seen that, according to feudal law, the grantee of an hereditary fief was considered as being entitled during personal enjoyment only, that is, for his life; while his heir was regarded as having been endowed with a substantial interest in the land. And these conceptions seem to have been imported into English law along with the principle of tenure. In early times after the Conquest therefore, if a grant of land were made to a man and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapters. A tenant in fee simple was, accordingly, a person who held to

¹ As stated in Williams on Real Property (21st Ed.) pp. 350, 351.

² The same rule is said to have been mentioned in Abel's Case, 18 Edw. II, 577 (1324), which will be found translated in 7 M. & G. 941, note (c).

him and his heirs; that is, the land was given to him to hold for his life, and to his heirs, to hold after his decease. It cannot, therefore, be wondered at, that a gift, expressly in these terms, "To A. for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words "heirs" and "heirs of his body" are said to be words of limitation; that is, words which limit or mark out the estate to be taken by the grantee. At the present day, when the heir is perhaps the last person likely to get the estate, those words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance, that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee simple. And the circumstance, that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery.

GOODEVE, LAW OF REAL PROPERTY (4th Ed., by Ephinstone, Clark & Dickson) 239, 240: We do not know by what reasoning the rule [in Shelley's Case] was originally established; but the following considerations will show that it would be impossible for any person who understood the meaning of the words employed to deny the existence of the rule. Ever since the Conquest, English lawyers were acquainted with the difference between a conveyance "to A." and a conveyance of land "to A. and his heirs." In the first case, A.'s interest determined on his death; in the second case, it passed on his death to his heirs. Then the case arose of a conveyance "to A., with remainder to his heirs." Now what is the meaning of "the heirs of A.?" (Evans v. Evans (1892) 2 Ch. 173.) It means an indefinite succession of persons, each of whom will succeed to the land of which A. dies seised (or ac-

ording to the present law of which A. was the purchaser, and dies seised), unless some prior heir alienates it, or according to the old law, becomes attainted. It is sometimes forgotten that although before the Inheritance Act, 1833 (3 & 4 Will. IV, c. 106, 9 L. Q. R. 2), heirship was traced from the person last seised, yet every blood relation of the purchaser was necessarily one of his heirs, except where he was excluded by the rule as to the half-blood. It follows therefore that, unless both the purchaser and his father and mother were bastards, the number of persons each of whom might be his heir was infinite; and as there can be only one heir at the same time, each of these persons became the heir in succession one after the other. There was no manner known to the common law in which these persons could take by purchase. The only estates which could be held by more than one person as purchaser were estates in joint tenancy and tenancy in common. The estate of the heirs could not be in joint tenancy, for the estates of joint tenants must, according to the common law, arise at the same time and not in succession; it could not be tenancy in common, because, although the estates of tenants in common may arise at different times, still persons cannot be tenants in common unless they are tenants at the same time, which is impossible in the case of heirs. If, therefore, it is not possible for the heirs to take by purchase, the only possible manner in which they can take is by descent; in other words, A. the ancestor must take the fee simple.

CHALLIS' REAL PROPERTY (3d Ed.) p. 152: In the limitations now under consideration, there occurs always an estate of freehold limited to a specified person, and a subsequent limitation, whether immediate or remote, expressed to be made to the heirs, or to some class of the heirs, of the same person. The prior estate and the subsequent limitation must both arise under or by virtue of the same instrument. Grammatically, the construction of the second limitation 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. (Vide *supra*, p. 131.) But the law puts upon the limitation to the heirs a different construction, not giving to them any estate at all by purchase, but taking account of the mention of the heirs only for the purpose of giving a corresponding estate to the specified ancestor. Therefore, it is commonly said, that in limitations coming within the rule in Shelley's Case, the word "heirs" is not a word of purchase but a word of limitation.

ID., p. 166: The question as to the origin, or true grounds, of the rule in Shelley's Case, has given rise to much speculation, into which it is not desirable to enter at length. Considering that, at the time when

the rule arose, tenure was the mainstay of our political constitution, and that the preservation of the fruits of tenure was notoriously a principal aim of the law, and that settlements giving an estate for life to the ancestor with a remainder to his heir, if they had been permitted to take effect by way of remainder, would have enabled a family to enjoy all the advantages of a descent, while evading the feudal burdens by which a descent was accompanied: the opinion seems to be more than plausible, that the true origin of the rule is to be found in the policy of feudalism.³ (See 1 Prest. Est. 295-309.)

1 HAYES ON CONVEYANCING (5th Ed.) 542-546: The rule assumes and founds itself upon two pre-existing circumstances,—a freehold in the ancestor,⁴ and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a remainder, it plainly excludes,—1, the case of limitations differing in quality, the one being legal and the other equitable;⁵ 2, the case of limitations arising under distinct assurances;⁶ and, 3, the case of an executory limitation, by way of devise or use;⁷ and, conse-

³This is at all events the policy of the Statute of Marlebridge, 52 Hen. III, c. 6, enacting that the lord should not lose his wardship by a feoffment made in the tenant's lifetime to the tenant's heir, being within age; and the language of the statute shows that this and other like devices for evading feudal burdens were then well known. This enactment was not merely leveled at covinous feoffments, where the feoffor continued afterwards in receipt of the profits, but extended to bona fide feoffments to the heir's use. (Bacon, Uses, p. 25, ad init.) [See *Van Grutten v. Foxwell*, (1897) A. C. 659, where the origin of the rule was discussed. The true view seems to be that the rule was an inevitable result of the doctrines of the ancient common law. At the time when the rule was established, contingent remainders were not recognized as lawful limitations; consequently it was impossible to give effect to a limitation to the heirs of a person, unless they took by descent (Williams, R. P. [3d Ed.] 218, note); and even if such a limitation had been legal it would have been impossible to give literal effect to it, because this would have involved giving the heirs estates in succession by purchase (see *Goodeve, R. P.* [5th Ed.] p. 224). The only way of carrying out the intention of the settlor was to give the ancestor an estate of inheritance. So far, therefore, from having been invented in order to defeat the intention of settlors, the object of the rule was benignant, namely to give effect to the intention as far as possible.]

⁴Although it be determinable, e. g. by marriage. *Curtis v. Price*, 12 Ves. 89 (1805).—*Ed.*

⁵*Harvey v. Ballard*, 252 Ill. 57, 96 N. E. 558, accord. But where both estates are equitable the rule applies. *Wright v. Pearson*, 1 Edw. 119; *Jones v. Morgan*, 1 Bro. C. C. 206, overruling *Bagshaw v. Spencer*, 1 Ves. 142.—*Ed.*

⁶*Moore v. Parker*, 4 Mod. 316.—*Ed.*

⁷*Papillon v. Voice*, 2 P. Wms. 471 (1728); *Leonard v. Sussex*, 2 Vern. 526 (1705); 1 Prest. Estates, 355. See 3 Ill. Law Rep. 153.

Where there is a direction to trustees to convey to A. for life, with a remainder to the heirs of A., or a remainder to the heirs of A.'s body, it is regularly held that there is an executory trust, and that a settlement will

quently, upon principle, the case of a limitation arising under an appointment of the use; but authority seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the heirs, it follows, that, with limitations to sons, children, or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personæ*, as distinguished from a limitation embracing the line of inheritable succession, the rule has no concern whatever. In order to find whether the second limitation is a remainder to the heirs or not, we must resort to the general rules and principles of law. The rule being a maxim of legal policy, consonant with things and not with words, applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term "heirs." Thus, even the word "children," aided by the context, or the word "issue," uncontrolled by the context, may have all the force of the word "heirs," and then the rule applies; while the word "heirs," restrained by the context, may have only the force of the word "children," and then the rule is utterly irrelevant. These are preliminary questions, purely of construction, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation. This point, kept steadily in view, would have prevented infinite confusion.

The operation of the rule is twofold: First, it denies to the remainder the effect of a gift to the heirs; secondly, it attributes to the remainder the effect of a gift to the ancestor himself. It is, therefore, clear that the rule not only defeats the intention, but substitutes a legal intendment directly opposed to the obvious design of the limitation. A rule which so operates cannot be a rule of construction. As a consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor, who is ascertained, the inheritance, limited in contingency to the heirs, may become vested in the ancestor; and, as another consequence of the same process, the ancestor's estate of freehold may merge in the inheritance. Thus—1. If land be limited to A. for life, remainder to his heirs or to the heirs of his body, the primary effect will be to give him an estate of freehold (liable, of course, to merger), with, by force of the rule, a remainder immediate and vested, to himself in fee or in tail (just as if the limitations were to him for life, remainder to him and his heirs, or to him and the heirs of his body); and the final result, under the law of merger, will be, by the absorption of the particular freehold in the vested inheritance, to give him an estate in fee tail or an estate in fee simple in possession. But—2. If land be limited to A. for life, remainder, if A. shall survive B., to his (A.'s) heirs or to the heirs of his body, then, as the remainder is contingent, because made to depend on A.'s surviving B., the ancestor (A.) will take, under the rule, not a vested, but a contingent inheritance; (just as if the limitations were to him for life, remainder, if &c.,

to him and his heirs, or to him and the heirs of his body); the rule changing the object, but not the quality of the remainder. Here, as the inheritance cannot vest, the particular estate of freehold will not merge, but A. will remain tenant for life, with an immediate contingent remainder to himself in tail or in fee. This remainder, in the event of his surviving B., will vest in him (A.); the estate of freehold will then merge, and he will thus have, as in the previous example, a fee tail or fee simple in possession. So—3. If land be limited to A. for life, remainder to B. for life or in tail, remainder to the heir or heirs of the body of A., then, by reason of the interposition of the estate for life or estate tail of B., the ancestor (A.) has, under the rule, not an immediate but only a mediate inheritance (just as if the limitations were to him for life, remainder to B. for life or in tail, remainder to him (A.) and his heirs, or to him and the heirs of his body), the rule changing the object, but not the position, of the remainder. A., therefore, will be tenant for life, with a mesne vested remainder to himself in tail or in fee, in which remainder, if B.'s interposed estate should determine in A.'s lifetime, A.'s life estate will merge, and he will then have, as in the first example, a fee tail or fee simple in possession.⁸

The obvious deduction from these examples is, that in no case does the rule disturb the particular estate of freehold in the ancestor, which estate is left to the uncontrolled operation of ordinary principles, merging, or not merging, according as the remainder, transferred by the rule from the heirs to the ancestor, is absolute or conditional, proximate or remote. The estate of freehold is a circumstance without which the rule is dormant; but the rule, when called into action, exerts its force on the remainder alone. Why that circumstance was selected, we can only conjecture. It is affirmed, indeed, that a limitation to A. for life, with remainder to his heirs, is in truth the same thing as a limitation to A. and his heirs. In the simple case thus put, the effect, under the rule, aided by the doctrine of merger, is the same, but surely the import is not the same. And how unsatisfactory does this reasoning appear, when it is recollected that the rule equally applies

be directed which will prevent the application of the rule in Shelley's Case. *Theobald on Wills* (7th Ed.) 725, 726; *Papillon v. Voice*, 2 P. Wms. 471; *Parker v. Bolton*, 5 L. J. Ch. 98; *Duncan v. Bluet*, Ir. Rep. 4 Eq. 469; *Hawden v. Hawden*, 23 Beav. 551; *Stoner v. Curwen*, 5 Sim. 264; *Bastard v. Proby*, 2 Cox, 6; *Rochfort v. Fitz Maurice*, 2 D. & War. 1; *Tallman v. Wood*, 26 Wend. (N. Y.) 9; *Wood v. Burnham*, 6 Paige (N. Y.) 513; *Hanna v. Hawes*, 45 Iowa, 437; *Saunders v. Edwards*, 55 N. C. 134; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245, 258, 261. But see *Wicker v. Ray*, 118 Ill. 472, 8 N. E. 835.—*Ed.*

⁸ *Douglas v. Congreve*, 1 Beav. 59; *Measure v. Gee*, 5 Barn. & Ald. 910; *Dennett v. Dennett*, 43 N. H. 499; *Carpenter v. Hubbard*, 263 Ill. 571, 580, 105 N. E. 688, accord.

In the same way, where the life estate is subject to a valid spendthrift trust clause, the rule still operates upon the remainder; the spendthrift trust being effective to prevent any merger. *Wehrhane v. Safe Deposit Co.*, 89 Md. 179, 42 Atl. 930; *Carpenter v. Hubbard*, 263 Ill. 571, 580, 105 N. E. 688. But see *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221, and *Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220, 226.

where the gift is to A. for life, remainder (interposed) to B. for life, remainder to the heirs of A; or to A. *pur auter vie*, remainder to the heirs of A.; or, to A. *durante viduitate*, remainder to the heirs of A.; or to A. in tail, remainder to the heirs of A. &c.,—cases which need only be mentioned in order to destroy the theory that would form a fee by the union of the two limitations. It is an error, and the fruitful parent of errors, to affirm that the limitations unite or coalesce under the rule, which has discharged its office by simply substituting the ancestor for the heirs in the second limitation.

When the ordinary rules of construction have ascertained the co-existence of a freehold in the ancestor with a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to the ancestor himself and his heirs. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs:—reading the words “and his heirs,” not (according to the notion referred to at the close of the preceding paragraph), as words of limitation of the estate of freehold before expressly limited to him, but as words of limitation of the estate in remainder attributed to him by the rule.

ARCHER'S CASE.

(Court of Queen's Bench, 1599. 1 Coke, 66b.)⁹

See ante, p. 43, for a report of the case.

⁹Accord (on the point that the rule in Shelley's Case did not apply): *Willis v. Hiscox*, 4 Myl. & Cr. 197; *Clerk v. Day*, Moore, 593; *Greaves v. Simpson*, 12 W. R. 773, 10 Jur. 609; *Bayley v. Morris*, 4 Ves. Jr. 788; *Canedy v. Haskins*, 54 Mass. (13 Metc.) 389, 46 Am. Dec. 739; *Hamilton v. Wentworth*, 58 Me. 101.

But where the remainder created by will was to “the next lawful heir” of the life tenant “all the freehold estate forever,” the rule in Shelley's Case applied. *Fuller v. Chamier*, L. R. 2 Eq. 682 (1866).

A fortiori, where the remainder is to the heir (in the singular) of the life tenant and there are no superadded words of limitation or otherwise, the rule in Shelley's Case applies. *Richards v. Bergavenny*, 2 Vern. 324; *Theobald on Wills*, 7th Ed., 422.

But where the remainder is limited to the life tenant's heir (in the singular) “for life,” the rule in Shelley's Case does not apply. *White v. Collins*, Com. 289; *Pedder v. Hunt*, 18 Q. B. D. 565.

The principal case is followed so far as it holds that the rule in Shelley's Case applies where there are life estates to several with a remainder to the heirs of one only. *Hess v. Lakin*, 7 Ohio Dec. 300; *Kepler v. Reeves*, 7 Ohio Dec. (Reprint) 34; *Bullard v. Goffe*, 20 Pick. (Mass.) 252; *Bails v. Davis*, 241 Ill. 536, 89 N. E. 706, 29 L. R. A. (N. S.) 937; *Fearne*, C. R. 36, 63, 310. But see *Shaw v. Robinson*, 42 S. C. 342, 347, 20 S. E. 161.

NOTE.—“When an estate is limited to a husband and wife, and the heirs of their two bodies, the word ‘heirs’ is a word of limitation, because an estate is given to both the persons, from whose bodies the heirs are to issue. But when it is given to one only and the heirs of two (as to the wife and the heirs of her and A. B.), there the word ‘heirs’ is a word of purchase. For

PERRIN v. BLAKE.

(Court of King's Bench, 1769. 1 W. Bl. 672.)

Action of trespass: special verdict.

William Williams, by his last will, after giving portions to his three daughters, disposes of his "temporal estate in manner following: It is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his life; and, to that intent, I give, devise, and bequeath, all the rest and residue of my estate to my son John Williams, and any son my wife may be ensient of at my death, for and during the term of their natural lives; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons, John Williams and the said infant; the remainder to the heirs of the bodies of my said sons, John Williams and the said infant lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid." William Williams died 4th February, 1723, leaving issue one son, named John Williams, and three daughters, Bonneta, Hannah, and Anne, and his wife not ensient. John Williams suffered a recovery, and declared the uses to himself and his heirs.

no estate tail can be made to one only, and the heirs of the body of that person and another. This appears from Lit. § 352, according to the true reading collected from the original editions. The common editions make the estate Cypres, therein mentioned, to be to the widow and, 'les heirs de corps sa baron de luy engendres,' which is not as near as might be to the original estate intended if the husband had lived, viz. to the husband and wife and the heirs of their two bodies. But the original edition by Letton and Macklinia in Littleton's life-time, and the Roan edition, which is the next (both which my Brother Blackstone has), read it thus, 'les heirs de les corps de son baron et luy engendres;' which is quite consonant to the original estate. And this estate to the widow for life, and the heirs of the body of her husband and herself begotten, Littleton, in the same section, declares not to be an estate tail. The same is held in Dyer, 99,—in Lane and Pannel, 1 Roll. Rep. 438, and in Gossage and Taylor, Styles, 325; which, from a manuscript of Lord Hale in possession of my Brother Bathurst, appears to have been first determined in Hil. 1651; which accounts for some expressions of Chief Justice Rolle in Style's Case, which was in T. Pasch. 1652. There it was expressly held, that this was a contingent remainder to the heirs of both their bodies. The only difference of these three cases from the present is, that there the wife had an express estate for life, and here not. But upon legal principles the cases are just alike. An estate 'to A. and the heirs of his body,' is the same as an estate 'to A. for life, remainder to the heirs of his body.' We are therefore all of opinion that this was a contingent remainder to the issue, and not being capable of taking effect at the determination of the particular estate, is therefore gone forever." Per Wilmot, C. J., in Frogmorton v. Wharrey, 2 W. Bl. 728, 731 (1770). See Fearne, C. R. 38; 2 Jarm. Wills (4th Ed.) 340-343.

N. B. This was a case from Jamaica, and in fact, instead of a recovery, the supposed estate tail of John Williams was endeavored to be barred, by a lease and release enrolled, according to the local law of that country. It came on before a committee of the Privy Council, who directed a case to be stated for the opinion of the Court of King's Bench, who refused to receive it in that shape. And therefore, a feigned action was brought and the case above stated was by consent reserved at the trial.

It was argued in this [Easter] and Trinity Terms; the question being merely this, Whether John Williams took by this will an estate for life or in tail. And in Michaelmas Term following it was adjudged by LORD MANSFIELD, C. J., ASTON and WILLES, JJ., that he took only an estate for life; YATES, J., contra, that he took an estate tail. But I was not present when the judgment of the court was delivered.¹⁰

JESSON v. WRIGHT.

(House of Lords, 1820. 2 Blich, 1.)

Ejectment ¹¹ in the King's Bench for land in Stafford. At the trial in March, 1815, before Dallas, J. the jury found a special verdict in substance as follows: In 1773 Ezekiel Persehouse died and devised to "William, one of the sons of my sister Ann Wright, before marriage, all that messuage," &c., being the land in question, "to hold the same premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair; and from and after his decease I give and devise all the said dwelling-houses," &c., "unto the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, in such shares and proportions as he the said William shall" by deed or will "give, direct, limit or appoint, and for want of such gift, direction, limitation or appointment,

¹⁰ This case did not come before the court on a special verdict, but upon a demurrer to the replication in a feigned action of trespass. See 1 Doug. 343 note. The opinions of the judges are given in 1 Harg. Coll. Jur. 283, 296.

A writ of error was brought upon this judgment in the Exchequer Chamber, and was there argued several times, for the last time in May, 1771. On January 29, 1772, the judges delivered their opinions. Parker, C. B., Adams, B., Gould, J., Perrott, B., Blackstone and Nares, JJ., were for reversal. De Grey, C. J., and Smyth, B., were for affirmance. Mr. Justice Blackstone's opinion will be found in Harg. Law Tracts, 487.

A writ of error was brought to carry the case to the House of Lords, where it was kept pending for several years, but in 1777 it was compromised, without a hearing.

For the controversy to which this case gave rise, see Fearné, C. R. 155-173; Fearné's Letter to Lord Mansfield appended to the First Volume of the Fourth Edition of the Treatise on Contingent Remainders; 3 Campbell, Chief Justices (3d Ed.) 305-312.

¹¹ The statement of the case is abbreviated from that in the report.

then to the heirs of the body of the said William, son of my said sister, Ann Wright, lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue," then over.

William Wright married Mary Jones, by whom he had issue, his eldest son Edward, and several other children. In 1800 he, his wife and his son Edward, suffered a recovery. The lessors of the plaintiff were the heirs of Ezekiel Persehouse, and the younger children of William Wright.

The Court of King's Bench gave judgment for the plaintiff, and the defendants brought a writ of error in the House of Lords. The principal error assigned was, that the court below, by their judgment, had decided that "William Wright took only a life-estate under the will of, &c., with remainder to his children for life; and that the recovery suffered by William Wright, Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas the plaintiffs in error contended, that the testator intended to embrace all the issue of William Wright, which intention could only be effected by giving William Wright an estate tail, for which purpose the words of the will are fully sufficient."

THE LAW CHANCELLOR [LORD ELDON]. The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the court, by their judgment, have decided "that the said William Wright took only a life estate under the said will of the said E. Persehouse, with remainder to his children for life; and that the recovery suffered by the said William Wright, and Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas, the said R. Jesson, J. Hatley, W. Whitehouse, J. Watton, E. Dangerfield the elder, and T. Dangerfield, allege for error, that the testator intended to embrace all the issue of the said William Wright, which intention can only be effected by giving to the said William Wright an estate tail, and the words of the will are fully sufficient for that purpose." I will not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one, of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long that it would be to remove the landmarks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is de-

finitively settled as a rule of law that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the court below has proceeded upon the notion, that no such paramount intent is to be found in this will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the plaintiffs in error, are to be found the words "appointee in tail general of the lands, &c., thereafter granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto William, one of the sons of my sister Ann Wright before marriage, all that messuage, &c., to hold the said premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair." If we stop here it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and after his decease, I give and devise all the said dwelling-houses, &c., unto the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares and proportions as he, the said William, shall by deed, &c., appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the plaintiffs in error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, limitation, or appointment, then to the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar) that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs of the body," in this part of the will, must mean the same class of persons as the "heirs of the body," among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one child, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body and his issue would have been heirs of the body; but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "for want of such issue," which follow, it is said, mean for want of children; because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words "share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words heirs of the body, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue"), there is an end of the question. I do not go through the cases. That of Doe v. Goff [11

East, 668] is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary; because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law than to provide against the hardships of particular cases.

LORD REDESDALE. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson v. Colson* [2 Atk. 246] it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe v. Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, it has been held that the words "tenants in common" do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinc-

tions, which only mislead parties, but look to the words used in the will. The words, "for want of such issue," are far from being sufficient to overrule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The defendants in error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words "heirs of the body" to mean children in this will. I think it is necessary, before I conclude, to advert to the case of *Doe v. Goff*. It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe v. Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean—they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe v. Goff* is not law.

In this case, even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the proportions would have been changed, and after-born children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.¹²

¹² "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin, it was merely descriptive of the operation of the rule in *Shelley's Case*; and it has since been laid down in

JORDAN v. ADAMS.

(Exchequer Chamber, 1861. 9 C. B. [N. S.] 483.)

CHANNELL, B.¹³ The question is what estate William Jordan took under the fifth head of devise in the will of John Jordan set out in the case.

The testator by his will devised the lands in dispute to trustees. By the fifth head of his will he directed and appointed the trustees to stand seised thereof, to permit the said William Jordan to occupy the same or receive the rents and profits thereof for his own use during his natural life, and, after his decease, then to permit and suffer the heirs male of the body of the said William Jordan to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan their father should direct, limit, or appoint; and, in

others, where technical words of limitation have been used, and other words, showing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson v. Wright*. This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject." Per Lord Denman, C. J., in *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621, 640 (1833).

"Another rule of construction has been referred to by several of the Irish as well as by some of the English judges, viz., that the general intention of the testator was to prevail over the particular intention. This doctrine, which commenced, I believe, with Lord Chief Justice Wilmot, and has prevailed a long time, had, I thought, notwithstanding the use of those terms by Lord Eldon in the leading case of *Jesson v. Wright*, been put an end to by Lord Redesdale's opinion in the same case, and by the powerful arguments against its adoption in Mr. Hayes's *Principles*, by Mr. Jarman in his excellent work on Wills, and by the judgment of the court delivered by Lord Denman in *Doe v. Gallini*, in which the opinion of Lord Redesdale is approved and adopted. And, certainly, if accuracy of expression is important, the use of those terms had better be discontinued, though if qualified and understood as explained in the last-mentioned case and in the opinion of some of the judges—Mr. Baron Watson, for example—it can make no difference in the result. Lord Redesdale says 'that the general intent shall overrule the particular is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise.'" Per Lord Wensleydale, in *Roddy v. Fitzgerald*, 6 H. L. C. 823, 877 (1858).

See also *Hayes, Principles*, 44, 106; 2 *Jarm. Wills* (4th ed.) 484 et seq.

But the notion that the Rule in *Shelley's Case* has for its object to carry out the "general intention," is very hard to kill. See *Bowen v. Lewis*, 9 Ap. Cas. 890, 907 (1884).

¹³ The opinions only are given.

default of such issue male of the said William Jordan, then upon trust to and for the use of his brother, Richard Jordan, and his heirs male, in such parts, shares, and proportions, manner and form as the said Richard Jordan should appoint, charged, in case the said Richard Jordan or his heirs should become seised thereof, with the sum of £2,000 in favor of the daughters, if any, of the said William Jordan. Subject to the performance of the trusts the testator limited and appointed the estates to the right heirs of Robert Jordan, forever.

The Court of Common Pleas decided that William Jordan took under the will an estate for life. With the greatest respect for the judgment of that court, I am of opinion that William Jordan took an estate in tail male; and that the decision appealed against ought to be reversed. I agree in the opinion expressed by my Brother Williams in the judgment of the court below, as reported in the 6th Common Bench Reports, N. S. p. 765, that, but for the use of the words "their father," in the power of appointment, an estate in fee would pass by the gift to the heirs male of the body of William Jordan. This consequence seems to me to follow from our giving to the words "heirs male of the body" their legal import, and from the intention apparently expressed in the will that the estate should go over to Richard Jordan and his heirs male, upon failure of the issue male of William Jordan, and not until such failure. But I am unable to concur with my Brother Williams in the conclusion at which—no, I think, without great doubt and hesitation—he ultimately arrived, that the words "their father" demonstrated that the words "heirs male of the body" meant "sons," or that the words "heir of the body" could be controlled by the words "their father," in the power of appointment, as interpreting words, showing in what sense the words "heirs male of the body" had been used by the testator.

The authorities cited on the argument before us are the same as those which were cited in the Court of Common Pleas, with the exception of *Roddy v. Fitzgerald*, decided by the House of Lords (6 House of Lords Cases, 823). All these authorities, excepting the last, are, I believe, collected in *Jarman on Wills*, 2d edit., by Wolstenholme and Vincent, vol. 2, pages 267 and 299 and following pages, ch. 37, particularly in s. 3. I do not profess to reconcile all the authorities. I think it unnecessary to go through them in detail. But I may observe that the case of *White v. Collins*, Com. 289, much relied on by the Court of Common Pleas as an express authority, does not appear to me to be so.

The devise there was, to one for life, and, after his decease, to the heir male (in the singular), not "heirs," in the plural. There are other cases in which the word used was "heir," and not "heirs." This distinction is not, I think, immaterial. The word "heir" may be understood as pointing to an individual, whereas the word "heirs" points to a class.

The leading cases appear to me to be *Jesson v. Wright*, 2 Blich, 1, and *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823.

The rule in *Jesson v. Wright*, as I understand it, is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. *Roddy v. Fitzgerald* upholds and explains the former case of *Jesson v. Wright*. These decisions appear to me to give the rule of construction which we must apply to the present case. In *Roddy v. Fitzgerald* the opinions of the judges, both in Ireland and in England, were reviewed by the House of Lords. In their opinions the judges were nearly equally divided; indeed, but for a circumstance noticed by Lord Chancellor Cranworth in the report of the case, the opinions of the judges would have been equally divided. In unison with the opinions expressed by a minority of the judges, I humbly submitted that the words "issue" in *Roddy v. Fitzgerald*,—words more flexible than "heirs of the body,"—had been in that case by the whole context of the will explained and interpreted by the testator himself to mean "children." The House of Lords unanimously rejected this construction, and held that the words "issue" there used must have their ordinary legal import and effect.

This case of *Roddy v. Fitzgerald* is treated by the Court of Common Pleas as deciding that words that would create an estate tail are to have that effect, unless a judicial mind sees with reasonable certainty from other parts of the will that the testator's intention was that those words should not operate as words of limitation of the inheritance, but should be words of purchase, creating an estate in remainder in the persons coming within the designation of heirs male of the body, and within the further description contained in the will.

This is no doubt so. But if, by reference to the words "their father," in the power of appointment in the will in question, the words "heirs of the body" are explained to be, and are to be read as, sons (the only ground on which, as it appears to me, the decision of the Court of Common Pleas can be supported), then it would seem to me to follow, that, if William Jordan had died having had an only son who had died in his lifetime, but had left a son who survived his grandfather, such grandson would take nothing under the will. I cannot suppose this to have been the testator's intention; and I am therefore unable to adopt the argument that the testator has interpreted the words "heirs of the body" as meaning "sons."

In determining whether the legal import of the words "heirs of the body" is to be cut down, we must not surmise, but must see very clearly that the alleged interpreting words do cut down other words which carry with them a recognized legal meaning.

Consistently with *Roddy v. Fitzgerald*, I cannot hold, either from the power of appointment or the general context of the will, that such was in the present case the intention of the testator.

I am of opinion that the judgment of the Court of Common Pleas ought to be reversed.

MARTIN, B. This is an appeal from the judgment of the Court of Common Pleas: and the question is, whether, upon the construction of

a devise in the will of John Jordan, dated the 8th of May, 1825, William Jordan took an estate in tail male. The substance of the devise is as follows: "As to certain land (describing it), I direct my trustees to stand seised thereof, and permit William Jordan to occupy the same or receive the rents and profits thereof for his own use during his natural life; and, after his decease, then to permit and suffer the heirs male of his body to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, their father, should by deed or will, duly executed, direct, limit, or appoint; and, in default of such issue male of the said William Jordan, then upon trust to and for the use of Richard Jordan and his heirs male, in such parts and proportions, manner and form, as he should by deed or will direct or appoint, but charged with the sum of £2,000 for the daughters (if any) of the said William Jordan; and after the performance of the said trusts, and subject thereto, that the said trustees should stand seised of the said lands to and for the use of the right heirs of Robert Jordan, forever." The Court of Common Pleas were of opinion that William Jordan took an estate for life only. All agree that the true rules of construction are laid down in *Jesson v. Wright, 2 Bligh, 1*, and *Roddy v. Fitzgerald, 6 House of Lords Cases, 823*. If the devise had not contained the powers of appointment, I apprehend there would have been no doubt but that it would have given an estate in tail male to William Jordan. It would have been a devise to him for life, and, after his death, to the heirs male of his body, to occupy the same or take the rents and profits for their several natural lives in succession, according to their respective seniorities, and, in default of such issue male, to Richard Jordan. This would express the intention of the testator that William Jordan should have the land for his life, and that, after his death, his male heirs as a class, that is, in succession according to their respective seniorities, should have it. It is true it was his intention that they should have it for their lives only, and with no greater power over it than tenants for life have: but this the law does not permit; and it seems to me nothing more than the expression of an intention which by law cannot be effected. Applying the rule in *Shelley's Case, 1 Co. Rep. 93 a*, which is a technical rule of law, and the doctrine of *Jesson v. Wright and Roddy v. Fitzgerald*, by construction of law the estate of William Jordan would be an estate in tail male. I think it impossible to express more clearly than these words do the original estate tail contemplated by the Statute de Donis, viz. an estate for life in the donee, and a series of life-estates continuing so long as there were heirs of the body of the donee, they taking in succession in the order and according to the rule of lineal inheritance. This is what an estate tail in substance was, until the courts of law converted it for all practical purposes into an estate in fee simple.

The judgment of the Common Pleas is, that William Jordan took an estate for life, and that the words "heirs male of his body" meant "sons;" so that, if he had died having had an only son, who had died in his father's lifetime, leaving a son who survived his grandfather, this grandson would take nothing under the devise. Is this correct either in construction of law or as the true expression of the will of the testator? The cases of *Jesson v. Wright* and *Roddy v. Fitzgerald* are authorities that the words "heirs of the body" have not only a plain natural meaning, but are also words of known legal import, and *prima facie* denote and mean the whole of the descendants or issue as a class, and are to be read and understood in this their natural and legal sense, unless it be clear that the testator intended to use them in a different sense. Lord Wensleydale's expression in *Roddy v. Fitzgerald* is, "unless a judicial mind sees with reasonable certainty from other parts of the will an opposite intention."

I agree with Mr. Justice Williams that the only other parts of this will to show the opposite intention are the words "their father," in the power of appointment. The testator certainly wished that the heirs of his body should take life-estates. This is what nine tenths—probably ten tenths—of testators who make entails wish; but there is nothing in the expression of it to show that he desired that the grandchildren or more remote descendants of William should not take at all. If the words had been "the father," or "the ancestor," I apprehend they could not have had the effect of altering the legal import of the words "heirs male of the body." And, in my opinion, that which the testator has expressed, and in all probability meant and intended, was, that William Jordan should have a power to appoint amongst his sons, but not that the estate or estates previously given to the heirs male of his body should be altered or affected otherwise or beyond the alteration effected by the exercise of the power.

It appears to me that the use of the words "in default of such issue," and not "in default of such sons," strongly confirms this view. Had the words used been "in default of issue," I should have thought it conclusive. Suppose that William Jordan were dead, and the litigant parties were his grandson and Richard Jordan,—can it be said that a judicial mind would clearly see from the language of the will that the testator meant Richard to take, and not the grandson? I think not; and, to decide against the grandson, the law requires that this must be made out, and that clearly. The result is, to say the very least, that I do not think there is sufficient in the will to justify the alteration or cutting down of the words "heirs male of the body," which are words having a plain, clear, natural meaning, and are also technical words of a known legal import and meaning, into "sons." I cannot bring my mind to the conclusion that the testator has expressed his will to be that Richard Jordan should take in exclusion of William's grandchild.

If there were any decision upon the point, I would readily yield; but none has been cited before us. It is said in the judgment of the Common Pleas that the case of *White v. Collins*, 1 Comyns, 289, is in point for the defendant. I do not agree in this at all. The devise there was to a son, F., to enjoy during his life, and, after his death, to the heir male of the body of F. (in the singular number), during the term of his natural life, and, for want of such heir male, to another son, C., a brother of F.'s. Whatever doubts may have existed at the time when this case was decided, the works of Mr. Fearne, a subsequent writer, have abundantly cleared them up: and it seems to me that the words of that will clearly express, that by the word "heir," was meant an individual, and not the heir of the body of F. as a class.

I quite concur with Mr. Justice Blackstone (1 Hargr. Tracts, page 505) that common-sense showed the meaning of the expression used. I concur also with the Court of Common Pleas as to the importance of adhering to the doctrine of *Jesson v. Wright*, confirmed in *Roddy v. Fitzgerald*; and I do so in expressing my opinion that William Jordan took an estate tail.

WIGHTMAN, J. I am of opinion that the judgment of the Court of Common Pleas is right, and that the plaintiff took only an estate for life in the premises in question, and not an estate tail, either legal or equitable.

The testator by his will devised all his freehold and leasehold estates to trustees, and directed them, as to the premises in question, "to permit and suffer the plaintiff to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life, and, after the decease of the plaintiff, then to permit and suffer the heirs male of his body to occupy and enjoy the same or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan (the plaintiff), their father, should by deed or will direct: and, in default of such issue male of the said William Jordan, then over."

The question is, whether the words "heirs male of his body," as used in this devise, are words of limitation or words of purchase; and it appears to me, that, taking the whole clause together, they are words of purchase, and mean the sons of the plaintiff, who are to take for their lives in succession, according to seniority or in such proportions, manner and form amongst them as their father (the plaintiff) should by deed or will direct. I am unable to give any other meaning to the clause in question; and, though, by the use of the words "heirs male of the body," the testator may be supposed to have intended to give an estate in tail to the plaintiff, as those words standing alone and unexplained by the rest of the clause would be words

of limitation and not of purchase, yet the subsequent words, that they (the heirs male) are to take the profits, &c., of the estate for their natural lives in succession, according to their respective seniorities, or in such manner as their father shall by deed or will direct, show too clearly in my opinion to admit of doubt, that the testator, by "heirs male of the body," meant the "sons" of the plaintiff, who were to take in succession for life, or in such parts and proportions between them as their father should direct.

I have forbore to observe upon the cases which were cited upon the argument, the question in all the cases, as in this, being, what was the intention of the testator by the terms he used in his will; and as everything depends upon the words used, it seems to me that little assistance is derived from decisions upon terms which are not the same as those used in the will in question. I therefore think, drawing my conclusion from the terms actually used by the testator in this case, that the court below was right in the conclusion to which it came, and that the judgment should be affirmed.

COCKBURN, C. J. I am of opinion that the judgment of the Court of Common Pleas should be affirmed; but being unable to concur in all the reasons on which the decision of the majority of that court appears to have been founded, I think it necessary to explain the grounds on which the conclusion I have arrived at is based.

We are called upon to construe a devise, whereby a testator gives certain estates to trustees, in trust to permit one William Jordan to occupy and enjoy or to receive and take the rents and profits for his own use and benefit, during his natural life, and, after his decease, to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents and profits, for and during their natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, their father, shall by deed or will duly executed and attested direct, limit, and appoint; and, in default of such issue male of William Jordan, then over.

The question is, whether under this devise William Jordan (who is the plaintiff in this action) took an estate for life or an estate tail; or—to put the same thing in another form—whether the heirs male of his body took an estate by purchase or by descent.

Three things occurring in this devise are relied on to take it out of the ordinary rule that a gift to a man for life, with remainder to the heirs of his body, creates in point of law an estate tail in the ancestor. These are, first, that the devise to the heirs is for their natural lives; secondly, that their estate is subject, with reference both to the order of succession and quantity of estate, to the appointment of the ancestor; thirdly, that the ancestor is distinctly described as the father of the heirs male of the body, from which it is said to be plain that the words "heirs male of the body" must necessarily be read as sons.

I am of opinion that, in construing this devise, the two first circum-

stances cannot be taken into account. I take the effect of the authorities on this subject clearly to be, that where land is devised to a man for life, with remainder to his heirs or the heirs of his body, no incident superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration, however express or emphatic, of the deviser, can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs, or the heirs of his body, the law inexorably converts the entire devise in favor of the ancestor, notwithstanding the clearest indication of the intention of the donor to the contrary. Thus, with reference to the estate for life, although the donor may have superadded to it some incident of an estate of inheritance,—for instance, as in *Papillon v. Voice*, 2 P. Wms. 471, unimpeachability of waste,—or, as in *King v. Melling*, 2 Lev. 58, a power of jointuring, both which provisions would have been superfluous if an estate of inheritance had been intended; or although, as in *Coulson v. Coulson*, 2 Str. 1125, he may have interposed trustees to preserve contingent remainders,—a provision palpably inconsistent with the estate of the ancestor being other than an estate for life; or though he may have declared in express terms, as in *Perrin v. Blake*, 4 Burr. 2579, 1 Sir W. Bl. 672, that his intention in creating the estates for life was to prevent any of his children from disposing of his estate for longer than his life; or although, as in *Robinson v. Robinson*, 1 Burr. 38, he may have expressly declared that the estate for life should last for the life of the devisee and no longer; or, as in *Roe d. Thong v. Bedford*, 4 M. & Selw. 362, has declared that the devisee should have no power to defeat his intent,—none of these provisions or declarations will avail anything. So, on the other side, with reference to the estate to the heir, although the deviser may have annexed to it incidents wholly inconsistent with an estate by descent,—as, that the heirs shall take according to the appointment of the ancestor (as in *Doe d. Cole v. Goldsmith*, 7 Taunt. 209), or that the heirs shall take as tenants in common (as in *Bennett v. The Earl of Tankerville*, 19 Ves. 170), or share and share alike (as in *Jesson v. Wright*, 2 Bligh, 1), or without regard to seniority of age (which, though held in *Doe d. Hallen v. Ironmonger*, 3 East, 533, to prevent the operation of the rule, would nowadays, it seems, receive an opposite construction; see 2 Jarm. Wills, 303),—no inference arising from such provisions can be allowed to prevail against the rule of law; nay, even although a deviser should expressly declare that the heirs should take by purchase and not by descent, the declaration would be set aside as unavailing (see Harg. Law Tracts, 562).

When once the donor has used the terms “heirs,” or “heirs of the body,” as following on an estate of freehold, no inference of inten-

tion, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular.

Such being the principle involved in the decisions of the House of Lords in the cases of *Perrin v. Blake*, 4 Burr. 2579, 1 W. Bl. 672; *Jesson v. Wright*, 2 Bligh, 1; and *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823, it appears to me that we cannot give any effect to the provisions of this devise that the heirs shall take by appointment, or, in default of it, in succession, for their natural lives. If, indeed, the matter were *res integra*, I should entirely concur with the majority of the Court of Common Pleas in thinking that these provisions ought to be conclusive as to the intention of the testator. Speaking under the shadow of the great names of Lord Mansfield and Lord Ellenborough, and the eminent judges of the Court of Queen's Bench who were parties to the decisions of that court in *Perrin v. Blake* and *Doe d. Strong v. Goff*, 11 East, 668, and of those who in the Common Pleas decided the cases of *Crump d. Woolley v. Norwood*, 7 Taunt. 326, and *Gretton v. Haward*, 6 Taunt. 94, I have no hesitation in saying, that, but for the decisions of the supreme court of appeal, I should certainly have held that an arbitrary rule of law as to the effect of certain words might well be made to yield, as similar rules have in other instances been made to yield, in construing a devise, to the rule,—one of paramount importance in construing wills and devises,—that effect is to be given to the intention of the testator; conformity to which is in my opinion ill obtained by forcing on the testator a meaning directly the reverse of what he really intended. But we are, of course, bound by the decisions of the House of Lords; and as the law has been there settled, so we must apply it.

But although the rule thus established is inflexible to the extent I have stated, there is, nevertheless, one quarter from which it permits light to be let in and effect to be given to the real intention of the testator: this is where by some explanatory context, having a direct and immediate bearing upon the term "heirs," or "heirs of the body," the deviser has clearly intimated that he has not used these words in their technical, but in their popular sense, namely, that of sons, daughters, or children, as the case may be. An illustration of this branch of the rule is given by Lord Brougham in his judgment in *Fetherston v. Fetherston*, 3 Cl. & F. 67: "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the words 'heirs of the body'

to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

This appears to me to be directly applicable to the present case, with reference to the direction of the testator, following immediately on the devise to the heirs male of the body of William Jordan, that they shall take "in such parts, proportions, manner, and form, and amongst them, as the said William Jordan, their father, shall direct." We cannot reject these words: there is no authority for saying that the particular intent is to yield to the general one,—at all times an unsatisfactory rule,—to the extent that, where the testator has himself afforded a clear indication of the sense in which he has used the words, we are to reject his own interpretation, in order to preserve the legal effect of the term "heirs of the body:" on the contrary, the cases of *Lowe v. Davies*, 2 Ld. Raym. 1561 (per nom. *Law v. Davis*, 2 Stra. 849, 1 Barnard. 238), of *Lisle v. Gray*, 2 Lev. 223, and *Goodtitle d. Sweet v. Herrin*, 1 East, 264, 3 B. & P. 628 (in which last case the judgment of the Queen's Bench was affirmed in the House of Lords), and the cases of *North v. Martin*, 6 Sim. 266, and *Doe d. Woodall v. Woodall*, 3 C. B. 349, establish conclusively, that where, following on a gift to heirs of the body, the term "son or sons," "daughter or daughters," or "child or children," is used in apposition, as it were, to the term "heirs of the body," the latter is to be taken in its more restricted and not in its legal sense. The cases of *Pope v. Pope*, 14 Beav. 591; *Gummoe v. Howes*, 23 Beav. 184; and *Smith v. Horsfall*, 25 Beav. 628, are equally in point as establishing that the same effect is produced in limiting the term "issue," which, when unexplained by the context, has, as is now well established, the same force as the term "heirs of the body." In *Smith v. Horsfall*, the Master of the Rolls says: "Issue here means children; and such is its signification in all cases where a direct reference is made to the parent of the issue. I entertain no doubt on the point; and I should be unsettling the law if I were to hold the contrary."

It is quite plain, according to these authorities, that if, in the present devise, the deviser, after the gift to the heirs male of the body of William Jordan, had gone on to say, "the said sons of the said William Jordan to take in such parts, &c., as the said William Jordan shall appoint," this direction must have had the effect of giving to the term "heirs male of the body" the more limited meaning of "sons." Now this although in another form, the testator has to all intents and purposes done; for what possible difference can there be between speaking of the heirs of the body as the sons of the first taker, and of the first taker as the father of the heirs? Instead of using the one form of expression, the testator has used the correlative and corresponding one, and one altogether equipollent in effect. He has given his own key to the meaning of the words "heirs of the body of William Jordan," namely, those heirs of the body of William Jordan of whom William Jordan is the father; that is, the sons of William Jordan.

The authorities are as strong for giving effect to such an exposition of a testator's meaning of the term "heirs of the body," where it exists, as for enforcing the technical meaning where it does not. We have no right, as it seems to me, to reject these words, or to hold them to mean something else, so as to give to William Jordan an estate tail; more especially as all the other provisions of the devise lead only to the conclusion that the testator never entertained the intention to give him any such estate.

Nor am I embarrassed by the use of the words "in default of such issue," which follow in the ensuing limitation. The word "issue" is; as every one knows, a flexible term; if the term "heirs of the body" can be controlled by an explanatory context, the term "issue" cannot be less susceptible of being modified in like manner. The "issue" here spoken of are plainly the same as were previously spoken of as "heirs male of the body." If the latter are shown by the context to have been the sons of William Jordan, such also must be the meaning of the term "such issue."

The judgment of the House of Lords in the case of *Roddy v. Fitzgerald*, which was pressed on us in the argument, does not, as it appears to me, conflict with this view. It was not at all intended by that decision, as I read the judgments of Lord Cranworth and Lord Wensleydale, to overrule the numerous cases at common law and in equity to which I have last referred; or all that class of cases (collected in 2 Jarm. Wills, 273-277), in which the term "issue" has been cut down to mean sons, daughters, or children, by the testator having used one or other of those terms in the context of the will. Lord Cranworth expressly says,—“Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter;” and again, “The word ‘issue’ when used in a will is prima facie a word of limitation; but if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase.” The question in the case, as put by Lord Cranworth, was, whether in a devise to testator's son William for life with remainder to his issue, in such manner, shares, and proportions as he should appoint, and in default of such appointment, then to the issue equally, if more than one, and if only one child, to the said child; and on failure of issue, over,—there was anything in the context to control the ordinary effect of the term “issue.” And the House of Lords held that there was not. “Issue” being, as was pointed out by Lord Wensleydale, prima facie equivalent to heirs of the body, the direction that the heirs should take according to the appointment of the ancestor, or, in default of appointment, in equal shares, was altogether inoperative, as settled by the authority of *Jesson v. Wright*. The further provision, which seems to have been added by the testator unnecessarily and ex nimia cautela, that in the event of there being but one child, that child should take the whole, did not appear

to their Lordships strong enough to control the larger sense of the word "issue." But there is nothing to show that, if the context had been sufficiently clear and strong for that purpose, their Lordships would not have given effect to it. On the contrary, as I have pointed out, Lord Cranworth's language is a clear recognition of the existence of the rule as I have stated it farther back. Looking at that language, I cannot but think that if, in *Roddy v. Fitzgerald*, the testator had, as in the present instance, described the first taker as the father of those whom he spoke of as his issue, effect would have been given to so striking an exposition of his meaning. I find no intimation of any intention to overrule the numerous cases already referred to in which the more general terms "heirs of the body" and "issue" have been restricted, by words used in juxtaposition importing issue in the first generation only, to the latter more limited meaning. Nor can I suppose that their Lordships would have overruled such a series of authorities silently, and, as it were, by implication, or without a clear intimation of their intention to do so. I therefore consider them as still in force and binding upon us.

Being, then, of opinion that the deviser has afforded a clear indication of the sense in which he has used the term "heirs male of the body," namely, that of sons,—from which, of course, it would follow that no estate of inheritance was created, and that consequently William Jordan took only an estate for life,—I hold—but on this ground alone—that the judgment of the Court of Common Pleas should be affirmed.

The court being thus equally divided, the Lord Chief Justice intimated that if the parties wished to carry the case further, one of its members would withdraw his opinion, so that the judgment of the Court of Common Pleas might stand.

Affirmed.¹⁴

¹⁴ In *Evans v. Evans*, [1892] 2 Ch. 173 (C. A.), the limitations were to A. for life, then to such persons as A. should appoint by will, and in default of appointment "to the use of such person or persons as at the decease of the said A. shall be his heir or heirs at law, and of the heirs and assigns of such person or persons." Held, the rule in *Shelley's Case* did not apply.

In the following cases it was held that the rule in *Shelley's Case* did not apply: *Peer v. Hennion*, 77 N. J. Law, 693, 76 Atl. 1084, 29 L. R. A. (N. S.) 945 (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 Grat. (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, 26 N. E. 895, 22 Am. St. Rep. 652 (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.

In *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404, the rule in *Shelley's Case* was held to apply where the remainder was limited "to such person or per-

ÆTNA LIFE INS. CO. v. HOPPIN.

(Circuit Court of Appeals, Seventh Circuit, 1914. 214 Fed. 928, 131 C. C. A. 224.)

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Ejectment by the Ætna Life Insurance Company against Franklin M. Hoppin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William Jack, of Peoria, Ill., for plaintiff in error.

Albert M. Kales, of Chicago, Ill., for defendants in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was plaintiff in this action of ejectment. The cause was submitted to the court, without a jury, on an agreed statement of facts. Judgment was for defendants.

In 1862 Fassett, owner in fee of land in Illinois, deeded it to "Franklin Hoppin and Sarah Hoppin, his wife, during their natural lives and the life of the survivor of them, and at the death of the survivor to the heirs of the body of said Sarah, their heirs and assigns."

Franklin died in 1865; Sarah, in 1908. In 1862, when the Fassett deed was made, defendants Hoppin and Garland, son and daughter of Franklin and Sarah, were in being; and they were the only children

sons 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 seised in fee thereof.

In *Van Grutten v. Foxwell*, [1897] App. Cas. 658 (H. of L.), the limitations were in substance to the testator's child or children for life, and after the death of such child or children to the heirs of the body and bodies of such child or children, if more than one, to be equally divided between them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns forever. Power was given to the trustees in the meantime to apply the rents and profits in and about the maintenance and education of such heirs of his child or children. There was a gift over if it should happen that the testator should depart this life leaving no child or children, or issue of any child or children, or if such child or children as he should leave and the issue of such child or children should die before he, she, or they should attain the age of twenty-one years or be married. It was held that the rule in *Shelley's Case* did apply.

Superadded words of limitation and distribution alone do not prevent the application of the rule in *Shelley's Case*. *Mills v. Seward*, 1 J. & H. 733; *Anderson v. Anderson*, 30 Beav. 209. The following cases, contra, must be regarded as overruled in England: *Doe v. Laming*, 2 Burr. 1100; *Gretton v. Howard*, 6 Taunt. 94; *Crump v. Norwood*, 7 Taunt. 362.

A fortiori, when superadded words of limitation only are used, the rule applies. *Wright v. Pearson*, 1 Eden. 119; *Measure v. Gee*, 5 B. & Ald. 910; *Kinch v. Ward*, 2 S. & St. 409. Many American jurisdictions follow the same ruling. *Barlow v. Barlow*, 2 N. Y. 386; *Brown v. Lyon*, 6 N. Y. 419; *Wight v. Thayer*, 1 Gray (Mass.) 284; *Hall v. Thayer*, 5 Gray (Mass.) 523; *Manchester v. Durfee*, 5 R. I. 549; *Ex parte McBee*, 63 N. C. 332; *Clark v. Neves*, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298; *Carroll v. Burns*, 108 Pa. 386; *Kepler v. Larson*, 131 Iowa, 438, 108 N. W. 1033, 7 L. R. A. (N. S.) 1109.

ever born to Sarah. Defendant Vangieson is tenant of his codefendants.

Plaintiff claims title under an execution sale on a judgment against defendants Hoppin and Garland. Judgment was rendered in 1874; execution was levied and sale was had in 1875; and deed thereon was made in 1877.

Ever since territorial days there has been a provision in Illinois (Ill. St. An. c. 28, § 1) that the common law of England and the general acts of Parliament in aid thereof, prior to 1606, shall be in force until repealed by legislative authority. Since 1819 for descent by primogeniture has been substituted descent to surviving children and descendants in equal parts, descendants of a deceased child taking the child's share in equal parts. Ill. St. An. c. 39, § 1. The statute de donis (a part of the English law adopted by Illinois), by which a conditional fee was converted into a fee tail, has been barred since 1827 from taking effect, and what would be a fee tail under the English law has been changed to a life estate in the donee and a remainder in fee simple to the next taker. Ill. St. An. c. 30, § 6.

If by the Fassett deed "the heirs of the body of Sarah" took a contingent remainder, plaintiff does not deny that the execution sale was ineffective to pass any interest in the land. Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; Hull v. Ensinger, 257 Ill. 160, 100 N. E. 513.

So the question is: What estate or estates were created by the Fassett deed in 1862 under the common law as modified in the two particulars named?

Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669, is an exact precedent. That was an ejectment case between these parties, involving the same Fassett deed and the same execution sale. Plaintiff prevailed in the trial court. On appeal the judgment was reversed and the cause remanded for retrial. Thereupon plaintiff dismissed, and on appeal its right to do so was upheld. 255 Ill. 115, 99 N. E. 375. Though the decision has no force as an adjudication, it is, what cited authorities rarely are, a case squarely in point on the very language presented to us for construction. Exercising an undoubted right, plaintiff asks us to say whether that case was correctly decided.

Shelley's Case has no application, and therefore section 6 of chapter 30 is to be disregarded. In a deed to A. and his heirs, or heirs of his body, the word "heirs" is descriptive of the quality of estate given to A. "Heirs," in the absence of a contrary definition clearly furnished by the donor, intends an unending line of succession by inheritance. Though A. has a fee simple or fee tail, his capacity to enjoy the estate, if not alienated, is coterminous with his life. So, when a conveyance to A. for his use during life and then to his heirs or heirs of his body came up for construction, it was held in Shelley's Case that the word "heirs" was a word of limitation, descriptive of A.'s estate, and

not a word of purchase, descriptive of grantees in remainder; that the donor either actually intended A. to have an estate in fee, or, if his intent was that A. should take only a life estate, his failure to supply a new lexicography for "heirs" left his wish as one impossible of gratification, namely, that the law should not be enforced. In the present deed, however, the context displays the sense in which the grantor used the words "heirs of the body of Sarah." The context is "Sarah for life, then the heirs of her body, their heirs and assigns." He did not intend that Sarah should have a fee simple, for there is no limitation to her general heirs in unending succession. He did not intend that she should have a fee tail, for the words of limitation are not restricted merely to the stream of her blood so long as it shall continue. He intended, what he plainly said, that Sarah should have only a life estate; and since, therefore, the heirs of the body of Sarah were not to take from her by descent, he intended that they should take by purchase; and since the description of the purchasers is followed by the words of limitation "their heirs and assigns," he intended that those purchasers should take the remainder in fee simple. Such we believe is the natural reading of the deed, and such an interpretation is likewise required by the rule in Archer's Case, 1 Co. 66b, decided in 1597, when read with primogeniture in mind.

There the devise was to Robert Archer for life, and "afterwards to the next heir male of Robert, and to the heirs male of the body of such next heir male." If the devise had been to Robert for life, and then to his next heir male, the word "heir" could have been construed in a collective sense to denote an indefinite succession through Robert's blood in the male line, and so under Shelley's Case an estate in fee tail would have been created. But the added words, "and to the heirs male of the body of such next heir male," required attention to be given to the facts that the drafter of the instrument was using the plural form "heirs" when he intended an indefinite succession by inheritance; that the indefinite succession was to spring, not from Robert, but from the next heir male of Robert; and that the singular form, "next heir male of Robert," therefore, could not properly be taken as nomen collectivum, but was a description of that person who by primogeniture could at Robert's death answer as his next heir male. Consequently the holding was that the next heir male of Robert took by purchase and constituted a new stock of descent. Robert's next heir male became the first holder of a fee tail. If the added words of limitation had been to the general heirs of such next heir male, so that the next heir male as purchaser would have acquired a fee simple, as is the wording here, there would have been even less room for contending that Robert Archer was given a fee tail.

Under the English law of primogeniture no ancestor could leave surviving him more than one heir. If he left sons, the eldest was his heir. If daughters only, they took as one heir as coparceners. So a deed to A. for life and then to the heir of his body might have different mean-

ings. If there was no context, it was considered that the singular form was used collectively to indicate indefinite succession, and Shelley's Case applied. But a context might show that the singular form was employed to describe the person who by survival would become the heir of A.'s body, and that such heir should constitute a new stock of descent. But a deed to A. for life and then to the heirs of his body contained no ambiguity under English law. "Heirs" could not be taken as descriptive of the one person; it could only mean the indefinite succession from generation to generation. Therefore, in a deed to A. for life and then to the heirs of his body, their heirs and assigns, the added words were ineffectual to obviate the rule in Shelley's Case. "Heirs of the body," being usable only to create an estate in tail, could not be descriptive of coexistent persons who on the death of the donee for life could then answer as the heirs of his body, and whose estate would be defined by the added words "their heirs and assigns" as a remainder in fee simple. The application of the rule in Shelley's Case to this last supposed deed (*Wright v. Pearson*, 1 Ed. 119, *Measure v. Gee*, 5 B. & Ald. 910) is entirely consistent with the rule in *Archer's Case* where primogeniture prevails. *Bayley v. Morris*, 4 Ves. Jr. 788; *Evans v. Evans* [1892] 2 Ch. 173. But in Illinois, and in this country generally, where the surviving children as tenants in common stand for the surviving eldest son, "heirs" may have different meanings, just as under English law the singular form "heir" might have different meanings. If there is no context, "heirs" must be held to indicate the indefinite succession by inheritance, and Shelley's Case applies. But a context may demonstrate that "heirs" was a description of purchasers who should constitute a new stock of descent. *Ætna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669, where *Archer's Case* was relied on. And see, also, *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; *De Vaughn v. De Vaughn*, 3 App. D. C. 50; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661; *Dott v. Willson*, 1 Bay (S. C.) 457; *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 141; *McIntyre v. McIntyre*, 16 S. C. 290; *Jarvis v. Wyatt*, 11 N. C. 227; *Tucker v. Adams*, 14 Ga. 548; *Taylor v. Cleary*, 29 Grat. (Va.) 448; *Peer v. Hennion*, 77 N. J. Law, 693, 76 Atl. 1084, 29 L. R. A. (N. S.) 945; *Earnhart v. Earnhart*, 127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652; *Wescott v. Meeker*, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947; *Archer v. Brockschmidt*, 5 Ohio N. P. 349; *Hamilton v. Wentworth*, 58 Me. 101; *Canedy v. Haskins*, 54 Mass. (13 Metc.) 389, 46 Am. Dec. 739; *Findlay v. Riddle*, 3 Bin. (Pa.) 139, 5 Am. Dec. 355.

Did the purchasers who were described as the "heirs of the body of Sarah" take a vested or a contingent remainder?

A remainder is vested when throughout its existence it stands ready to take effect in possession whenever and however the preceding estate determines. A remainder is contingent when it is limited on an event which may happen before or after, or at the time of or after the termination of the particular estate. *Williams, Real Prop.* (21st Ed.) 356-

358; Gray, Rule against Perp. § 134; Williams, Real Prop. (21st Ed.) 345; Gray, Rule against Perpetuities, § 101; Fearn, C. R. p. 3; Butler's Note to Fearn, C. R. p. 9; Challis, Real Prop. (3d Ed.) pp. 125-126; Leake, Digest of Land Law (2d Ed.) p. 233; Archer's Case, 1 Co. 66b; Bayley v. Morris, 4 Ves. Jr. 788; 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; Festing v. Allen, 12 M. & W. 279; Rhodes v. Whitehead, 2 Dr. & Sm. 532; White v. Summers, (1908) 2 Ch. 256; Doe v. Scudamore, 2 B. & P. 289; Price v. Hall, L. R. 5 Eq. 399; Cunliffe v. Brancker, 3 Ch. Div. 393; City of Peoria v. Darst, 101 Ill. 609; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332; Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; Chapin v. Crow, 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Phayer v. Kennedy, 169 Ill. 360, 48 N. E. 828; Madison v. Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; Golladay v. Knock, 235 Ill. 412, 85 N. E. 649, 126 Am. St. Rep. 224; Bond v. Moore, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669; Irvine v. Newlin, 63 Miss. 192; Bennett v. Morris, 5 Rawle (Pa.) 9; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Waddell v. Rattew, 5 Rawle (Pa.) 231; Redfern v. Middleton, Rice (S. C.) 459; Craig v. Warner, 5 Mackey (16 D. C.) 460, 60 Am. Rep. 381; McElwee v. Wheeler, 10 S. C. (Rich.) 392; Faber v. Police, 10 S. C. (Rich.) 376; Watson v. Dodd, 68 N. C. 528; Watson v. Dodd, 72 N. C. 240; Abbott v. Jenkins, 10 Serg. & R. (Pa.) 296; Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71; Young v. Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107; Henderson v. Hill, 77 Tenn. (9 Lea) 26; Roundtree v. Roundtree, 26 S. C. 450, 471, 2 S. E. 474; Blanchard v. Brooks, 12 Pick. (Mass.) 47.

The remainder given to the "heirs of the body of Sarah" is not vested, because it does not stand ready throughout its existence to take effect in possession whenever and however the preceding estate determines. If before Sarah's death the life estate should terminate by forfeiture or merger or surrender, the remainder would not stand ready, according to its terms, to come into possession. The remainder is contingent, because it is limited on an event (the death of Sarah, when the heirs of her body can be ascertained) which may not happen until after the termination of the life estate, while it may be coincident with the termination of the life estate.

There is no escape from holding that the remainder is contingent, except by construing "heirs of the body of Sarah" as meaning her children living at the date of the deed and those subsequently born, instead of denoting such children and descendants as should survive her. But in our judgment this cannot be done. When it is found that Shelley's Case does not apply, and that the words "heirs of the body" are de-

scriptio personarum of remaindermen who are given an estate in fee simple, the question whether the remainder, which is inevitably contingent according to the legal definition and the maxim that no one can be heir of the living, can be treated as a vested remainder in children alive or as born, must be determined by observing whether or not a definition contrary to the legal one has been furnished by the donor. In Archer's Case no extra legal definition was supplied, and the remainder was held to be, not a remainder that vested in Robert's eldest son when born, but a remainder that was contingent upon a person's surviving Robert who could then answer to the legal description. When the parties to the present controversy were before the Supreme Court of Illinois, that tribunal, after finding that Shelley's Case was inapplicable, ruled that: "There is no ground whatever in this case for saying that the words 'heirs of the body' were intended to have any other than their ordinary definite legal meaning, for there are no words in the deed which in any way qualify them."

This accords with the general holdings that in the absence of a special context there is nothing to do but accept the legal definition. *Bayley v. Morris*, 4 Ves. Jr. 788; *Canedy v. Haskins*, 54 Mass. (13 Metc.) 389, 46 Am. Dec. 739; *Hamilton v. Wentworth*, 58 Me. 101; *Frogmorton v. Wharrey*, 2 Wm. Black Rep. 728; *Mudge v. Hammill*, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802; *Harvey v. Ballard*, 252 Ill. 57, 96 N. E. 558; *Thurston v. Thurston*, 6 R. I. 296, 300; *Mercer v. Safe Deposit Co.*, 91 Md. 102, 117, 45 Atl. 865; *Kirby v. Brownlee*, 7 O. C. D. 460, 463; *Hanna v. Hawes*, 45 Iowa, 437, 440; *Zuver v. Lyons*, 40 Iowa, 513; *Crosby v. Davis*, 2 Clark (Pa.) 403; *Wood v. Burnham*, 6 Paige (N. Y.) 513; *Tallman v. Wood*, 26 Wend. (N. Y.) 9; *Jarvis v. Wyatt*, 11 N. C. 227; *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 141; *Tucker v. Adams*, 14 Ga. 548; *Sharman v. Jackson*, 30 Ga. 224; *Smith v. Butcher*, L. R. 10 Ch. Div. 113; *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Jones v. Rees*, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734; *Johnson v. Jacob*, 74 Ky. (11 Bush) 646; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570, 53 N. E. 513; *Putnam v. Gleason*, 99 Mass. 454; *Richardson v. Wheatland*, 48 Mass. (7 Metc.) 169; *Read v. Fogg*, 60 Me. 479; *Williamson v. Williamson*, 57 Ky. (18 B. Mon.) 329; *Fulton v. Harman*, 44 Md. 251, 264; *Horsley v. Hilburn*, 44 Ark. 458; *In re Estate of Kelso*, 69 Vt. 272, 37 Atl. 747; *In re Well's Estate*, 69 Vt. 388, 38 Atl. 83; *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Morris v. Stephens*, 46 Pa. 200; *Winslow v. Winslow*, 52 Ind. 8.

In the cases cited by plaintiff to support the contention that "heirs of the body" should be construed to mean "children alive or as born" there was either a special context or when the question of rights arose the "children" were in fact survivors answering to the description of heirs of the body. *Doe v. Laming*, 2 Burr. 1100; *Doe v. Graff*, 11 East, 668; *Gretton v. Haward*, 6 Taunt. 94; *Crump v. Norwood*, 7 Taunt. 362; *Right v. Creber*, 5 B. & C. 866; *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827.

We therefore conclude that the Supreme Court of Illinois, when considering the deed now in question, correctly determined and applied the Illinois law as it stood in 1862; that is, the common law of England and the general acts of Parliament in aid thereof, prior to 1866, as modified by the Illinois statute of descent.

Plaintiff, citing no Illinois cases prior to 1862, insists that the Illinois decision between these parties is opposed to *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, decided in 1873, and has been virtually overruled by *Moore v. Reddel*, 259 Ill. 36, 102 N. E. 257, decided in June, 1913.

Though there were no apposite Illinois decisions before 1862, the law of Illinois, a common-law state, is to be regarded as settled in 1862 in accordance with the settled common law. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. If this Fassett deed in 1862 conferred upon defendants a contingent remainder in fee simple under the law then in force, that right in real estate could not be impaired or destroyed by subsequent legislation or subsequent decision.

Moore v. Reddel, if it does conflict with *Ætna Life Ins. Co. v. Hoppin*, can be allowed no effect. On this writ the question is whether the trial court committed error in looking to the evidences of the Illinois law in force in 1862. Error cannot be predicated on the trial court's failure to foresee that the Supreme Court of Illinois would not merely overturn a rule of property as declared shortly before by the same judges, but would undertake to abrogate the common law—a right reserved by chapter 28, § 1, exclusively to the Legislature. *Morgan v. Curtenius*, 20 How. 1, 51 L. Ed. 823; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147; *Western Union Tel. Co. v. Poe* (C. C.) 64 Fed. 9; *King v. Dundee* (C. C.) 28 Fed. 33.

This case is at an end, but it may perhaps be not unfitting to say that we believe plaintiff is mistaken in asserting a conflict between the cases named. In *Butler v. Huestis*, in *Moore v. Reddel*, and in the additional case of *Winchell v. Winchell*, 259 Ill. 471, 102 N. E. 823, the foundational finding was that a fee tail was created, on which section 6 of chapter 30 would operate. "As to limitations controlled by that section, the only use made of the rule [in *Shelley's Case*] is for the purpose of determining whether by the common law a fee tail would have been created." *Winchell v. Winchell*, supra. Construction of section 6 of chapter 30 was within the province of the Supreme Court of Illinois; and if, in interpreting the legislative will in abrogating the common law respecting entails, the court found that "heirs of the body" of the first taker was intended by the Legislature to mean "children alive or as born," such statutory construction throws no light on the meaning of "heirs of the body" at common law in an instrument where the rule in *Shelley's Case* fails to bring section 6 into play. This substantially was stated in *Ætna Life Ins. Co. v. Hoppin*. The court

there recited the settled construction of section 6, citing the cases cited in *Moore v. Reddel*, and then proceeded to say that: "These cases are not decisive of this case, which does not involve the application of the statute, but is merely a question of the construction of the conveyance without reference to any statute."

And the correctness of the position taken in *Ætna Life Ins. Co. v. Hoppin* with respect to the scope and meaning of section 6 was recognized in *Moore v. Reddel*. We perceive no conflict between the two lines of decisions, and we believe none was intended.

The judgment is affirmed.¹⁵

¹⁵ In the following cases, where the only superadded words of limitation did not contain the word "heirs," the rule was held to apply: *Moore v. Reddel*, 259 Ill. 36, 102 N. E. 257 ("assigns forever"); *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670 ("in fee simple by his [the life tenant's] heirs and their assigns forever"); *Winter v. Dibble*, 251 Ill. 200, 95 N. E. 1093 ("in fee simple absolute"); *Clark v. Neves*, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298; *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486; *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435.

But see the following cases where the superadded words of limitation did not contain the word "heirs" but only such expressions as "in fee simple," or "assigns forever," and where the rule was held not to apply. *Wescott v. Mæcker*, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947; *Archer v. Brockschmidt*, 5 Ohio N. P. 349; *Tucker v. Adams*, 14 Ga. 548.

NOTE ON THE APPLICATION OF THE RULE IN SHELLEY'S CASE TO PERSONAL PROPERTY.—The rule in *Shelley's Case* does not apply to limitations of personal property. Where, therefore, personal property is limited to A. for life and then to A.'s heirs, A. takes a life estate only, with a contingent future interest to the persons described: *Smith v. Butcher*, L. R. 10 Ch. Div. 113; *In re Russell*, 52 L. T. R. 559; *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Gross v. Shoeler*, 7 Houst. (Del.) 280, 31 Atl. 812; *Jones v. Rees*, 6 Pennwill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734. See, also, *Siceloff v. Redman's Adm.*, 26 Ind. 251, 262.

But where personal property is limited to A. for life and then to the heirs of A.'s body, it is settled by the English cases (*Theobald on Wills* [6th Ed.] p. 642) and in many American jurisdictions, that A. takes an absolute interest. *Dott v. Cunningham*, 1 Bay (S. C.) 453, 1 Am. Dec. 624; *Polk v. Farris*, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400; *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 Ex'r*, 34 Ala. 379; *Machen v. Machen*, 15 Ala. 373. See, also, *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352; *Horne v. Lyeth*, 4 Har. & J. (Md.) 431. This must rest upon the conclusion that a prima facie guide to construction has been fixed by the authorities that an absolute interest was intended to be created. Of course, at this day, such a prima facie rule is artificial and contrary to the fact. Hence it may be expected to yield readily to a context which tends to show that a life interest only was intended (see *Gray Rule* against Perpetuities [2d Ed.] § 647, n. 3; *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221; *Evans v. Weatherhead*, 24 R. I. 502, 53 Atl. 866; *Dull's Estate*, 137 Pa. 112, 20 Atl. 418; *Bennett v. Bennett*, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. [N. S.] 470, *semble*, or to be abandoned entirely (*Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Clemens v. Heckscher*, 185 Pa. 476, 40 Atl. 80).

PROPOSED LEGISLATION

Where any grant or devise hereafter taking effect of any property shall limit an estate for life or of freehold to any person and an estate in remainder to the heirs (or the heirs of any particular description) of such person, such person shall not be deemed to take an estate of inheritance, and the persons who, upon the taking effect of such remainder in possession, shall be the heirs (or the heirs of the class described as the same may be) of such person, shall take by virtue of the remainder so limited to them: it being the intent of this provision to abrogate the rule of law commonly known as the rule in Shelley's Case.¹⁶

¹⁶ Prepared by Professor Ernst Freund and embodied in the draft of a bill presented to the Illinois Legislature at its sessions in 1907 and 1909. See, also, 1 Ill. Law Rev. 374-376.

CHAPTER VIII

FUTURE INTERESTS IN PERSONAL PROPERTY

SECTION 1.—CHATTELS REAL

MANNING'S CASE.

(Court of Common Pleas, 1609. 8 Coke, 94b.)

In debt for 200 marks by William Clark plaintiff, and Matthew Manning administrator of Edward Manning deceased, upon plene administravit pleaded, the jury gave a special verdict to the effect following, which plea began Mich. 4 Jacobi Rot. 1829. Edward Manning the intestate, anno 30 Eliz., was possessed of the moiety of a mill in Clifton in the county of Oxford, for the term of fifty years, of the clear yearly value of £40, and afterwards the said Edward Manning, 30 Eliz., made his will in writing, and thereby devised his indenture and lease of the farm and mill in Clifton, and all the years therein to come to Matthew Manning after the death of Mary Manning my wife (which farm and mill my will is, that Mary Manning my wife shall enjoy during her life) conditionally, that the said Matthew shall not demise, sell, or give the said lease, but to leave it wholly to John his son, &c. "In the mean time my will and meaning is, that Mary Manning my wife shall have the use and occupation both of the farm and mill, &c. during her natural life: yielding and paying therefore yearly to the said Matthew Manning, &c. during her natural life £7 at the feasts of St. Michael the Archangel, and the Annunciation of our Lady," and made Mary his wife sole executrix, and died; Mary took upon her the charge of the will, and had not sufficient to pay the debts of the said Edward Manning above the said term; but she entered into the said farm and mill, and paid to Matthew Manning the yearly sum of £7 according to the said will; and said, that if she died, the said Matthew Manning should have the farm and mill aforesaid; and afterwards the said Mary, sixteen years after the death of her husband, died intestate, after whose death the said Matthew Manning entered into the said farm and mill, and was thereof possessed prout lex postulat; and afterwards administration of the goods of the said Edward by the said Mary not administered was committed to the said Matthew, and that none of the profits of the said farm and mill, which accrued in the life of the said Mary came to the hands of the said Matthew besides the said £7 yearly as aforesaid. And the doubt of the jury was, if the resi-

due of the said term in the said farm and mill should be assets in the hands of the said Matthew. But I conceived on the trial of the issue at Guildhall in London, that the devise to Matthew was good, and that there was sufficient assent to the legacy, by the said payment of the rent of $\text{£}7$. But yet upon the motion of the plaintiff's counsel, I was contented that the whole special matter should be found as is afore-said. And the case was argued at the bar, and at divers several days debated at the bench, and prima facie Walmsley, Justice, conceived, that the devise to Matthew Manning after the death of the wife was void, for the wife having it devised to her during her life, she had the whole term, and the devisor could not devise the possibility over no more than a man can do by grant in his life; for that which the testator cannot by no advice of counsel in his life, the testator, who is intended to be inops consilii, shall not do by his will; but by grant in his life he could not grant the land unto the wife for her life, the remainder over to another, for by the grant the wife had the whole term at least if she so long lived, and a possibility cannot be limited by way of remainder; and although the later opinions in the case (where a man possessed of a lease for years devises it to one for life, the remainder to another) have been that the remainder was good, yet he said that the old opinion, which hath more reason, as he conceived, was, that the remainder in such case was void, 28 H. 7, 7 Dyer, Baldwin and Shelley, that the remainder is void, Englefield contrary, 6 E. 6, 74, acc. by Hales and Montague, 2 E. 6, tit. Devise, Brook, 13, that the remainder is void, for the devise of a chattel for one hour is good forever. But Coke, Chief Justice, Warburton, Daniel, and Foster contrary, that the devise was good to Matthew Manning; and five points were by them resolved: 1. That Matthew Manning took it not by way of remainder, but by way of an executory devise, and one may devise an estate by his last will in such manner as he cannot do by any grant or conveyance in his life, as if a man is seised of lands in fee held in socage, and devises that if A. pays such a sum to his executors, that he shall have the land to him and his heirs, or in tail, or for life, &c. and dies, and afterwards A. pays the money, he shall have the land by this executory devise, and yet he could not have it by any grant or conveyance executory at the common law; but it stands well with the nature of a devise; so in the case at bar when the wife dies it shall vest in Matthew Manning as by an executory devise, as if he had devised that after a son has paid such a sum to his executors, that he shall have his term; or that after the death of A. that B. shall have the term; or, that after his son shall return from beyond the seas, or that A. dies, that he shall have it, in all these cases and other like, upon the condition or contingent performed, the devise is good, and in the mean time the testator may dispose of it; and therefore in judgment of law, ut res magis valeat, the executory devise shall precede, and the disposition of the lease, till the contingent happen, shall be subsequent, as in the case at bar it was, and so all shall well stand together; for when he made the

executory devise, he had a lawful power, and might well make it: and afterwards in the same will he had lawful power, and might well devise the lease till the contingent happened, and therefore it is as much as if the testator had devised, that if his wife died within the term, that then Matthew Manning should have the residue of the term; and farther devised it to his wife for her life. 2. The case is more strong, because this devise is but of a chattel, whereof no præcipe lies; and which may vest and re-vest at the pleasure of the devisor, without any prejudice to any. And therefore if a man makes a lease for years, on condition that if he do not such a thing, the lease shall be void, and afterwards he grants the reversion over, the condition is broken, the grantee shall take benefit of this condition by the common law, for the lease is thereby absolutely void: but in such case if the lease had been for life, with such condition, the grantee should not take the benefit of the breach of the condition; for a freehold (of which a præcipe lies) cannot so easily cease; but is voidable by entry after the condition broken, which cannot by the common law be transferred to a stranger; and therewith agrees 11 H. 7, 17a, and Br. Conditions, 245, 2 Mariæ, by Bromley the same difference. 3. There is no difference when one devises his term for life, the remainder over; and when a man devises the land, or his lease, or farm, or the use or occupation, or profits of his land; for in a will the intent and meaning of the devisor is to be observed, and the law will make construction of the words to satisfy his intent, and to put them into such order and course that his will shall take effect. And always the intention of the devisor expressed in his will is the best expositor, director, and disposer, of his words; and when a man devises his lease to one for life, it is as much as to say, he shall have so many of the years as he shall live, and that if he dies within the term that another shall have it for the residue of the years; and although at the beginning it be uncertain how many years he shall live, yet when he dies it is certain how many years he has lived, and how many years the other shall have it, and so by a subsequent act all is made certain. 4. That after the executor has assented to the first devise, it lies not in the power of the first devisee to bar him who has the future devise, for he cannot transfer more to another than he has himself. 5. In many cases a man by his will may create an interest, which by grant or conveyance at the common law he cannot create in his life; and therefore when Sir William Cordell, Master of the Rolls, devised his manor of Melford, &c., in the county of Suffolk, to his executors for the payment of his debts, and until his debts should be paid, the remainder to Edward his brother, &c., and made George Carey and others his executors, and died, and after his death the debts were paid; and his wife demanded dower, and one question amongst others was moved, what interest or estate the executors had? for if they had a freehold, then the wife should not have dower and if they had but a chattel determinable upon the payment of the debts, then she should be endowed; and this case was referred to Anderson, Chief Justice of the Common

Pleas, and Francis Gawdie, Justice of the King's Bench, before whom the case was at several days debated, Pasch. 36 Eliz., and I was of counsel with the executors; and it was resolved by them that the executors had but a chattel, and no freehold; for if they should have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid; but the law adjudges it a particular interest in the land, which shall go to the executors of the executors, as assets for payment of his debts. But if such estate be made by grant, or conveyance at the common law, the law will adjudge it an estate of freehold, and so a more favorable interpretation is made of a will in point of interest or estate to satisfy the will of the dead for the payment of his debts, than of a grant or conveyance in his life; which he may enlarge, or make other provision at his pleasure. And so was it resolved in the beginning of the reign of Queen Elizabeth that where a man had issue a daughter, and devised his lands to his executors for the payment of his debts, and until his debts were paid, and made his executors and died, the executors entered, the daughter married, and had issue and died, and after the debts were paid, it was resolved in the case of one Guavarra that he should be tenant by the curtesy. Vide 3 H. 7, 13. 27 H. 8, 5. 21 Ass. p. 8. 14 H. 8, 13. .

Note, reader, it has been of late often adjudged according to these resolutions, sc., in Weldon's Case, 2 Brownl. 309, Plowd. Com., in Communi Banco. In Paramour's Case, 2 Brownl. 309, Plowd. Com., in the King's Bench, Mich. 26 and 27 Eliz. in a writ of error in the King's Bench, on a judgment given in the Common Pleas, the case was such: Thomas Amner brought an ejectione firmæ against Nicholas Loddington on a demise made by Alice Fulleshurst for seven years of certain houses in London, and on not guilty pleaded, the jury gave a special verdict. Hugh Weldon was seised of the said houses in fee, and 24 H. 8, demised them to Thomas Pierpoint for ninety-nine years, who by his will in writing 1544, devised his said lease in these words: "I devise my lease to my wife during her life, and after her death I will it go to her children unpreferred," and made his wife his executrix, and died. His wife entered and was possessed *ratione boni et legationis*, and married with Sir Thomas Fulleshurst, and afterwards 2 and 3 Phil. and Mar., Bestwick recovered against Sir Thomas £140 debt in the Common Pleas, and by force of a *fieri facias* directed to Altham and Mallory, sheriffs of London, the said term was sold to Nicholas Loddington, the now defendant, and afterwards the judgment against the said Sir Thomas Fulleshurst was reversed in a writ of error in the King's Bench, *et quod ad omnia quæ amisitatione judicis præd, restituatur*, and afterwards Alice the wife and executrix died. Alice Fulleshurst being then the only daughter who was unpreferred, entered and made the lease to the plaintiff Thomas Amner. And this case was often argued at bar by the serjeants in the Common Pleas, and at last by the judges; and in this case three points by them were

resolved: 1. That the said executory devise of the lease after the death of the wife to the daughter unpreferred, was good; and there is no difference when the term, or lease, or houses, and when the use or occupation, &c., is devised, and that in all these cases the executory devise is good. 2. That the sale either by Alice the wife, or by the sheriff on the fieri facias, after the wife was possessed as legatee, should not destroy the executory devise, although the person to whom the executory devise was made was then uncertain, as long as Alice the wife lived; for the said Alice the daughter might have been preferred in her life, and then she should take nothing, so that such executory devise which has dependence on the first devise may be made to a person uncertain, and this possibility cannot be defeated by any sale made by the first devisee, &c. 3. That the sale by the sheriff by force of the fieri facias should stand, although the judgment was after reversed, and the plaintiff in the writ of error restored to the value, for the sheriff who made the sale, had lawful authority to sell, and by the sale the vendee had an absolute property in the term during the life of Alice the wife; and although the judgment, which was the warrant of the fieri facias, be afterwards reversed, yet the sale, which was a collateral act done by the sheriff, by force of the fieri facias, shall not be avoided; for the judgment was that the plaintiff should recover his debt, and the fieri facias is to levy it of the defendant's goods and chattels, by force of which the sheriff sold the term which the defendant had in the right of his wife, as he well might, and the vendee paid money to the value of it. And if the sale of the term should be avoided, the vendee would lose his term, and his money too, and thereupon great inconvenience would follow that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done. And according to these resolutions judgment was given in the Common Pleas for the plaintiff, and in the King's Bench upon a writ of error the case was often argued at the bar before Sir Christopher Wray, and the court there, and at length the judgment was affirmed, and so the said three points were adjudged by both courts: and by these latter judgments you will better understand the law in the books, in which there are variety of opinions. 37 H. 6, 30. 33 H. 8. Br. tit. Chattels 33. 2 E. 6, tit. Devise, Br. 13. 28 H. 8, Dyer 277. Plow. Com. in Weldon's and Paramour's Case, &c. Quia judicia posteriora sunt in lege fortiora.¹

¹ Lampet's Case, 10 Co. 46 b (1612), accord. See Gray, Perpetuities, §§ 148-152.

CHILD v. BAYLIE.

(Courts of King's Bench and Exchequer Chamber, 1618. Cro. Jac. 459.)

Ejection of a lease of Thomas Heath of lands in Alchurch.

Upon Not guilty pleaded, a special verdict was found upon the case; which was, that William Heath, possessed of a lease for seventy-six years of the land in question, let it to one Blunt from the day of his death until the first of May, 1629 (which was three months before the end of the lease), if Dorothy his wife lived so long. Afterwards he devised, that William Heath his son and his assigns should have the said tenements, and the reversion of them, and all his title and interest in the said tenements, for all the others of the said seventy-six years which should be unexpired at the time of his wife's death, "provided, that if the said William die without issue living at the time of his death, that Thomas his son (the now lessor) should have it for all the residue of the seventy-six years unexpired from the death of his said wife, and of William without issue; and if he died without issue, then to his daughters;" and made his wife his executrix, and died. The wife assented to the legacies; William assigned all this lease and his interest thereto to the said Dorothy, who assigned it to Mr. Comb, under whom the defendant claims: afterwards Dorothy died, and then William died without issue. Thomas the devisee enters, and makes this lease to the plaintiff.

After divers arguments at the bar, it was adjudged for the defendant.

First, it was resolved, where a lessee for years let it after his death until the first of May, 1629, that it was a good lease, which began immediately by his death, he dying within that time.

Secondly, that the lease being made to begin after his death unto the first of May, 1629, the lease being made (12 August, 1553), if Dorothy his wife should so long live, he did not thereby convey the interest and remainder of the term, viz. from the first of May, 1629, to 12 August, 1629, and the possibility of a long term if Dorothy died before the first of May, 1629, which interest and possibility together he might devise to William Heath his son.

The third and main question was, whether this devise being to William Heath and his assigns, with a proviso, that if he died without issue living, that Thomas Heath should have it, and he aliens it, and afterwards dies without issue, whether this alienation shall bind Thomas Heath, or that he may avoid it?

It was resolved, that this alienation shall bind; for when he limited to him and his assigns, all the estate was vested in him, and he had an absolute power to dispose thereof; for the law doth not expect his dying without issue. The difference therefore is, where a lease is devised to one if he live so long, and afterward to another, the first hath but a qualified estate, and the other hath the absolute interest, and therefore

this alienation shall not prejudice him who hath the absolute estate; but when it is limited to him and his assigns, then the proviso thereto added, is void to restrain the alienation: and the limitation to the heirs of the body, and the proviso, are all one; for all long leases would be more dangerous than perpetuities: and therefore this case differs from the cases in 8 Co. 96, and 10 Co. 46, *Lampet's Case*, that a devisee for life could not bar him in remainder: and *Lewknor's Case*, Easter Term, 14 Jac. 1; 1 Roll. Rep. 356, in the Exchequer Chamber, was cited. Wherefore it was adjudged for the defendant.

Note.—Upon this judgment a writ of error was brought in the Exchequer Chamber; and the error assigned in point of law, that the remainder of this term limited to Thomas Heath after the death of William without issue then living, was good, and the alienation of William shall not bind him in remainder.

It was argued by *Bridgman*, and afterward by *Humphrey Davenport*, for the plaintiff in error, that it was a good limitation of the remainder of the term to William and his assigns, with the proviso, that if he died without issue then living, the then remainder should be to Thomas, &c., and that it is no more in effect than after his death; and therefore it differs from *Lewknor's Case*, adjudged in the Exchequer, where a devise of a term to one, and the heirs of his body, and if he die without issue, that it shall remain to another, was held to be a void remainder; for he cannot limit a remainder upon a term after the death of another without issue: but here it is but a remainder after the death of one without issue, viz. *William dying without issue then living*; so upon the matter it depended upon is death, and therefore not like to the said case; but it is agreeable to the reasons put in the cases of 8 Co. 94, *Matth. Manning's Case*, and 10 Co. 46.²

But it was now argued on the other part by *Thomas Crew* and *George Croke*, that the judgment was well given in the King's Bench; for here the limitation being to William after the death of the devisor's wife, of all his estate and interest to him and his assigns, it is but a remainder; for the wife may outlive all the term, and then this devise of the remainder of the term is given to him in particular, and *William* hath but a possibility; and then to limit it to *Thomas* after the death of *William* then living, is to limit a possibility upon a possibility, which is against the rules of law, as it is held in the *Rector of Chedington's Case*, 1 Co. 156, and *Lord Stafford's Case*, 8 Co. 73.

² Palmer reports Serjeant Davenport as saying: "There is no danger of perpetuity by such a conveyance. For he took a diversity when the contingency is such as can or ought [doet] to happen in the life of the devisee. There a remainder limited on such an estate in case of a devise of a chattel is good, as in our case, if he should die without issue of his body living at the time of his death, so that it does not exceed his life. But if the contingency be such as is foreign [forrain], or is to commence in futuro after the death of the first devisee, there, because such a limitation tends to make a perpetuity, a remainder limited on it is bad, as if he should die without issue or without heir, that then it shall remain over. And on this diversity they strongly [fortement] rely." *Child v. Baylie*, Palm. 333, 334.

Secondly, that this limitation to Thomas after the death of William without issue then living, is all one as if it had been limited upon his death without issue: and the addition "then living," doth not alter the case; for at the first limitation, non constat that he should die without issue; and the law shall not expect his death without issue; and it is not like to the case when it is limited after the death of one; for it is certain that one must die, and it may be that he may die during the term, and the law may well expect it; but that one should die without issue, the law will never expect such a possibility, nor regard it: and it would be very dangerous to have a perpetuity of a term in that manner; for it would be more mischievous than the common cases of perpetuities which the law hath sought to suppress: and therefore it was said, that this case was like to some of the cases which had been adjudged, that the remainder of a term after the death of one person is good, and should not be destroyed by the alienation of the first devise. Vide 8 Co. 94, Manning's Case. 10 Co., Lampet's Case. Plowd. 520 and 540; Dyer 74, 277.

After divers arguments, all the judges of the Common Pleas, viz. HOBART, WINCH, HUTTON, and JONES, and all the Barons (except TANFIELD, Chief Baron) agreed with the first judgment: for they said, that the first grant or devise of a term made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it.—But for the case in question, where there was a devise to one and his assigns, and if he died without issue then living, that it would remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term.—And although Tanfield, Chief Baron, doubted thereof, especially by reason of a judgment given before in the King's Bench in Rethorick v. Chappel, Hil. 9 Jac. 1; 2 Bulst. 28; Godol. 149, where "William Cary possessed of a term for years devised it to his wife for her life, and afterwards that John his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, that then Jasper his younger son should have the occupation thereof as long as he had issue of his body; and if he died without issue unmarried, he devised the moiety to Dorothy his daughter, the other moiety to Robert and William his sons, and made his wife executrix, who assented to the legacies and died. John and Jasper died without issue, unmarried; and afterward Robert and William entered upon the defendant, claiming the moiety, and let to the plaintiff. Upon a special verdict, all this matter being discovered, it was adjudged for the plaintiff, that he should recover the moiety, which is all one case with the case in ques-

tion. But the defendant's counsel in the writ of error showed, that there was a difference betwixt the said cases: for first, in that there is a devise but of the occupation only; but here, of the term itself. Secondly, it is a devise here of his estate and term to him and his assigns, wherein is authority given that he may assign. Thirdly, the limitation is there, if he die without issue unmarried, which is upon the matter, that if he die within the term; for if he be not married he cannot have issue"—but in the case here, he might have issue; and yet if that issue should die without issue in his life-time, it should remain; which the law will neither expect nor will suffer: yet the Justices and Barons, by the assent of Tanfield, all agreed, that judgment should be affirmed: and in Hilary Term, 20 Jac. I., it was affirmed.

COTTON v. HEATH.

(Court of King's Bench, 1638. 1 Roll. Abr. 612, pl. 3.)

If A., possessed of a term for years, devises it to B., his wife, for eighteen years, and then to C., his eldest son, for life, and then to the eldest issue male of C. for life, although C. has no issue male at the time of the devise and death of the devisor, yet if he has issue male before his death, such issue male will have it as an executory devise, because, although it be a contingency upon a contingency, and the issue not in esse at the time of the devise, yet as it is limited to him but for life, it is good, and all one with Manning's Case. On a reference out of Chancery to the Justices JONES, CROKE, and BERKELEY, by them resolved without question.

DUKE OF NORFOLK'S CASE.

(Court of Chancery, 1682. 3 Ch. Cas. 1.)

LORD NOTTINGHAM, Ch.³ This is the case. The plaintiff, by his bill, demands the benefit of a term for two hundred years, in the barony of Grostock, upon these settlements.

Henry Frederick, late Earl of Arundel and Surrey, father of the plaintiff and defendant, had issue, Thomas, Henry, Charles, Edward, Francis, and Bernard; and a daughter, the Lady Katharine: Thomas Lord Maltravers, his eldest son, was non compos mentis, and care is taken to settle the estate and family, as well as the present circumstances will admit. And thereupon there are two indentures drawn,

³ In this case Lord Chancellor Nottingham was assisted by Lord Chief Justice Pemberton, Lord Chief Justice North, and Lord Chief Baron Montague. The judges delivered their opinions in succession on March 24, 1682, agreeing that the limitation in question was void. The opinions are reported 3 Ch. Cas. 14-26. The Lord Chancellor differed from the judges, and delivered the opinion here printed, which sufficiently states the facts.

and they are both of the same date. The one is an indenture between the Earl of Arundel of the one part: and the Duke of Richmond, the Marquis of Dorchester, Edward Lord Howard of Eastcricke, and Sir Thomas Hatton of the other part: it bears date the twenty-first day of March, 1647. Whereby an estate is conveyed to them and their heirs; to these uses: to the use of the earl for his life.

After that to the countess his wife for her life, with power to make a lease for twenty-one years, reserving the ancient rents.

The remainder for two hundred years to those trustees, and that upon such trusts, as by another indenture, intended to bear date the same day, the earl should limit and declare; and then the remainder of the lands are to the use of Henry, and the heirs male of his body begotten, with the remainders in tail to Charles, Edward, and the other brothers successively.

Then comes the other indenture, which was to declare the trust of the term for two hundred years, for which all these preparations are made, and that declares that it was intended this term should attend the inheritance, and that the profits of the said barony, &c. should be received by the said Henry Howard, and the heirs male of his body, so long as Thomas had any issue male of his body should live, (which was consequently only during his own life, because he was never likely to marry) and if he die without issue in the life-time of Henry, not leaving a wife privement ensient of a son, or if after his death, the dignity of Earl of Arundel should descend upon Henry; then Henry or his issue should have no farther benefit or profit of the term of two hundred years. Who then shall? But the benefits shall redound to the younger brothers in manner following. How is that? To Charles and the heirs male of his body, with the like remainders in tail to the rest. Thus is the matter settled by these indentures; how this family was to be provided for, and the whole estate governed for the time to come.

These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's clerks; I knew them to be so.

This attestation of these deeds is a demonstration to me they were drawn by Sir Orlando Bridgman.

After this the contingency does happen: for Thomas Duke of Norfolk dies without issue, and the earldom of Arundel as well as the dukedom of Norfolk, descended to Henry now Duke of Norfolk, by Thomas his death without issue: presently upon this the Marquis of Dorchester, the surviving trustee of this estate, assigns his estate to Marriot; but he doth it upon the same trusts that he had it himself: Mr. Marriot assigns his interest frankly to my Lord Henry, the now duke, and so has done what he can to merge and extinguish the term by the assigning it to him, who has the inheritance.

To excuse the Marquis of Dorchester from co-operating in this matter, it is said, there was an absolute necessity so to do; because the

tenants in the north would not be brought to renew their estates, while so aged a person did continue in the seignior, for fear, if he should die quickly, they should be compelled to pay a new fine. But nothing in the world can excuse Marriot from being guilty of a most wilful and palpable breach of trust, if Charles have any right to this term: so that the whole contention in the case is, to make the estate limited to Charles void; void in the original creation; if not so, void by the common recovery suffered by the now duke, and the assignment of Marriot. If the estate be originally void, which is limited to Charles, there is no harm done; but if it only be avoided by the assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the trusts, then most certainly they must make it good to Charles in equity, for a palpable breach of trust, of which they had notice. So that the question is reduced to this main single point, whether all this care that was taken to settle this estate and family, be void and insignificant; and all this provision made for Charles and the younger children to have no effect?

I am in a very great strait in this case: I am assisted by as good advice, as I know how to repose myself upon, and I have the fairest opportunity, if I concur with them, and so should mistake, to excuse myself, that I did *errare cum patribus*; but I dare not at any time deliver any opinion in this place, without I concur with myself and my conscience too.

I desire to be heard in this case with great benignity, and with great excuse for what I say, for I take this question to be of so universal a concernment to all men's rights and properties, in point of disposing of their estates, as to most conveyances, made and settled in the late times and yet on foot, that being afraid I might shake more settlements than I am willing to do, I am not disposed to keep so closely and strictly to the rules of law as the judges of the common law do, as not to look to the reasons and consequences that may follow upon the determination of this case.

I cannot say in this case, that this limitation is void, and because this is a point, that in courts of equity (which are not favored by the judgments of the courts of law) is seldom debated with any great industry at the bar; but where they are possessed once of the cause, they press for a decree, according to the usual and known rules of law; and think we are not to examine things. And because it is probable this cause, be it adjudged one way or other, may come into the parliament, I will take a little pains to open the case, the consequences that depend upon it, and the reasons that lie upon me, as thus persuaded, to suspend my opinion.

Whether this limitation to Charles be void or no, is the question. Now, first, these things are plain and clear, and by taking notice of what is plain and clear, we shall come to see what is doubtful.

1. That the term in question, though it were attendant upon the

inheritance, at first, yet upon the happening of the contingency, it is become a term in gross to Charles.

2. That the trust of a term in gross can be limited no otherwise in equity, than the estate of a term in gross can be limited in law: for I am not setting up a rule of property in chancery, other than that which is the rule of property at law.

3. It is clear, that the legal estate of a term for years, whether it be a long or a short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; that is flat and plain, for that is a direct perpetuity.

4. If a term be limited to a man and his issue, and if that issue die without issue, the remainder over, the issue of that issue takes no estate; and yet because the remainder over cannot take place, till the issue of that issue fail, that remainder is void too, which was Reeve's Case; and the reason is, because that looks towards a perpetuity.

5. If a term be limited to a man for life, and after to his first, second, third, &c. and other sons in tail successively, and for default of such issue the remainder over, though the contingency never happen, yet that remainder is void, though there were never a son then born to him; for that looks like a perpetuity and this was Sir William Backhurst his Case in the sixteen of this king.

6. Yet one step further than this, and that is Burgiss's Case. A term is limited to one for life, with contingent remainders to his sons in tail, with remainder over to his daughter, though he had no son; yet because it is foreign and distant to expect a remainder after the death of a son to be born without issue, that having a prospect of a perpetuity, also was adjudged to be void.

These things having been settled, and by these rules has this court always governed itself: but one step more there is in this case.

7. If a term be devised, or the trust of a term limited to one for life, with twenty remainders for life, successively, and all the persons in esse, and alive at the time of the limitation of their estates, these though they look like a possibility upon a possibility, are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation, and so was Alford's Case. I will yet go farther.

8. In the case cited by Mr. Holt, Cotton and Heath's Case, a term is devised to one for eighteen years, after to C. his eldest son for life, and then to the eldest issue male of C. for life, though C. had not any issue male at the time of the devise, or death of the devisor, but before the death of C. it was resolved by Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a life that would speedily be worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the Rector of Cheding-

ton's Case, looks like a reason of art; but, in truth, has no kind of reason in it, and I have known that rule often denied in Westminster Hall. In truth, every executory devise is so, and you will find that rule not to be allowed in *Blanford* and *Blanford's Case*, 13 Jac. I. part of my Lord Rolls, 318, where he says, if that rule take place, it will shake several common assurances: and he cites *Paramour's* and *Yardley's Case* in the commentaries where it was adjudged a good devise, though it were a possibility upon a possibility.

These conclusions, which I have thus laid down, are but preliminaries to the main debate. It is now fit we should come to speak to the main question of the case, as it stands upon its own reason, distinguished from the reasons of these preliminaries; and so the case is this.

The trust of a term for two hundred years is limited to Henry in tail, provided if Thomas die without issue in the life of Henry, so that the earldom shall descend upon Henry, then go to Charles in tail; and whether this be a good limitation to Charles in tail, is the question; for most certainly it is a void limitation to Edward in tail, and a void limitation to the other brothers in tail: but whether it be good to Charles is the doubt who is the first taker of this term in gross: for so it is (I take it) now become, and I do, under favor, differ from my Lord Chief Justice in that point; for, if Charles die, it will not return to Henry; for that is my Lord Coke's error in *Leonard Loveis's Case*; for he says, that if a term be devised to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body; but it was resolved otherwise in *Leventhorp's* and *Ashby's Case*, 11 Car. B. R. Rolls's adjudgment, title devise, fol. 611, for these words are not the limitation of the time, but an absolute disposition of the term.

But now let us, I say, consider whether this limitation be good to Charles or no. It hath been said,

Object. 1. It is not good by any means; for it is a possibility upon a possibility.

Answ. That is a weak reason, and there is nothing of argument in it, for there never was yet any devise of a term with remainder over, but did amount to a possibility upon a possibility, and executory remainders will make it so.

Obj. 2. Another thing was said, it is void, because it doth not determine the whole estate, and so they compare it to *Sir Anthony Mildmay's Case*, where it is laid down as a rule, that every limitation or condition ought to defeat the entire estate, and not to defeat part and leave part not defeated; and it cannot make an estate to cease as to one person, and not as to the other. But,

Answ. I do not think, that any case or rule was ever worse applied than that to this; for if you do observe this case, here is no proviso at all annexed to the legal estate of the term, but to the equitable estate.

that is built upon the legal estate, unto the estate to Henry, and the heirs male of his body, to attend the inheritance with a proviso if Thomas die without issue in Henry's life, and the earldom come to Henry, then to Charles: which doth determine the estate to Henry, and his issue; but the other estate given to Charles doth arise upon this proviso, which makes it an absurdity to say, that the same proviso, upon which the estate ariseth, should determine that estate too.

Obj. 3. The great matter objected is, it is against all the rules of law, and tends to a perpetuity.

Answ. If it tends to a perpetuity, there needs no more to be said, for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do so, and let us see what a perpetuity is, and whether any rule of law is broken in this case.

A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate: such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and the policy of the law, and therefore not to be endured.

But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.

Let us examine the rule with respect to freehold estates, and see whether there it will amount to the same issue.

There is not in the law a clearer rule than this, that there can be no remainders limited after a fee-simple, so is the express book-case, 29 Hen. VIII. 33, in my Lord Dyer; but yet the nature of things, and the necessity of commerce between man and man, have found a way to pass by that rule, and that is thus; either by way of use, or by way of devise: therefore if a devise be to a man and his heirs, and if he die without issue in the life of B. then to B. and his heirs: this is a fee-simple upon a fee-simple, and yet it has been held to be good.

My Lord Chief Baron did seem to think, that this resolution did take its original from Pell's and Brown's Case; but it did not so, the law was settled before; you may find it expressly resolved 19 Eliz. in a case between Hynde and Lyon, 3 Leonard. Which, of the books that have lately come out, is one of the best; and it was there adjudged to be so good a limitation, that the heir who pleaded *riens per descent* was

forced to pay the debt, and it had the concurrence of a judgment in 38 Eliz. grounded upon the reason of Wellock and Hammond's Case, cited in Beraston's Case, where it is said, Crook, Eliz. 204, in a devise it may well be, that an estate in fee shall cease in one, and be transferred to another: all this was before Pell's and Brown's Case, which was in 18 Jac. It is true, it was made a question afterwards in the serjeant's case; but what then? We all know that to be no rule to judge by; for what is used to exercise the wits of the serjeants, is not a governing opinion to decide the law. It was also adjudged in Hil. 1649, when my Lord Rolls was Chief Justice, and again in Mich. 1650, and after that indeed in 1651, it was resolved otherwise in Jay and Jay's Case, but it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity. And I oppose it to that rule which was taken by one of the lords and judges, that where no remainders can be limited, no contingent remainders can be limited, which I utterly deny, for there can be no remainder limited after a fee-simple, yet there may a contingent fee-simple arise out of the first fee, as hath been shown.

Thus it is agreed to be by all sides in the case of an inheritance; but now say they, a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of a chattel-estate. Now as to this point, the difference between a chattel and an inheritance is a difference only in words, but not in substance, nor in reason, or the nature of the thing; for the owner of a lease has as absolute a power over his lease as he that hath an inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no rule of law is broken.

The reasons that do support the springing trust of a term as well as the springing use of an inheritance, are these.

1. Because it hath happened sometimes, and doth frequently, that men have no estates at all, but what consist in leases for years; now it were not only very severe, but (under favor) very absurd, to say that he who has no other estate but what consists in leases for years, shall be incapable to provide for the contingencies of his own family, though these are directly within his view and immediate prospect. And yet if that be the rule, so it must be; for I will put the case; a man who has no other estate but leases for years, chattels real, treats for the marriage of his son and thereupon it comes to this agreement: these leases shall be settled as a jointure for the wife, and provision for the children: says he, I am content, but how shall it be done? Why thus: you shall assign all these terms to John A. Styles, in trust for yourself and your executors, if the marriage take no effect; but then, if it takes effect, to your son while he lives, to his wife after while she lives, with remainders over. I would have any one tell me whether this were a void limitation upon a marriage settlement; or if it be, what a strange

absurdity is it, that a man shall settle it if the marriage take no effect, and shall not settle if the marriage happen.

2. Suppose the estate had been limited to Henry Howard and the heirs male of his body, till the death of Thomas without issue, then to Charles, there it had been a void limitation to Charles: if then the addition of those words, if Thomas die without issue in the life of Henry, &c. have not mended the matter, then all that addition of words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice Pemberton; and when I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned, and if Thomas die without issue male, living Henry, so that the earldom of Arundel descend upon Henry, then the term of two hundred years limited to him and his issue, shall utterly cease and determine, but then a new term of two hundred years shall arise and be limited to the same trustees, for the benefit of Charles in tail. This he thinks might have been well enough, and attained the end and intention of the family, because then this would not be a remainder in tail upon a tail, but a new term created.

Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference, why I may not raise a new springing trust upon the same term, as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world.

4. Another reason I go on is this; that the meanness of the consideration of a term for years, and of a chattel-interest, is not to be regarded: for whereas this will be no reason anywhere else; so I shall show you, that this reason, as to the remainder of a chattel-interest, is a reason that has been exploded out of Westminster Hall. There was a time indeed that this reason did so far prevail, that all the judges in the time of my Lord Chancellor Rich, did 6 Edvardi VI. deliver their opinions, that if a term for years be devised to one, provided that if the devisee die, living J. S. then go to J. S. that remainder to J. S. is absolutely void, because such a chattel-interest of a term for years is less than a term for life, and the law will endure no limitation over. Now this being a reason against sense and nature, the world was not long governed by it, but in 10 Eliz. in Dyer, they began to hold the remainder was good by devise; and so 15 Eliz. seems to, and 19 Eliz. it was by the judges held to be good remainder; and that was the first time that an executory remainder of a term was held to be good. When the chancery did begin to see that the judges of the law did govern themselves by the reason of the thing, this court followed their opinion, the better to fix them in it, they allowed of bills by the remainder-man,

to compel the devisee of the particular estate, to put in security that he in remainder should enjoy it according to the limitation. And for a great while so the practice stood, as they thought it might well, because of the resolution of the judges, as we have shown; but after this was seen to multiply the chancery suits, then they began to resolve that there was no need of that way, but the executory remainder-man should enjoy it, and the devisee of the particular estate should have no power to bar it. Men began to presume upon the judges then, and thought if it were good as to remainders after estates for lives, it would be good also as to remainders upon estates-tail: that the judges would not endure, and that is so fixed a resolution, that no court of law or equity ever attempted to vreak [sic] in the world. Now then come we to this case, and if so be where it does not tend to a perpetuity, a chattel-interest will bear a remainder over, upon the same reason it will bear a remainder over upon a contingency, where that contingency doth wear out within the compass of a life, otherwise, it is only to say, it shall not, because it shall not: for there is no more inconveniences in the one than in the other.

Come we then, at last, to that which seems most to choke the plaintiff's title to this term, and that is the resolution in Child and Bayly's Case; for it is upon that judgment, it seems, all conveyances must stand or be shaken, and our decrees made. Now therefore I will take the liberty to see what that case is, and how the opinion of it ought to prevail in our case.

1. If Child and Bayly's Case be no more than as it is reported by Rolls, part 2d, fol. 119, then it is nothing to the purpose: a devise of a term to Dorothy for life, the remainder to William, and if he dies without issue, to Thomas, without saying, in the life of Thomas; and so it is within the common rule of a limitation of a term in tail, with remainder over, which cannot be good.

But if it be as Justice Jones has reported it, fol. 15, then it is as far as it can go, an authority; for it is there said to be, living Thomas. But the case, under favor, is not altogether as Mr. Justice Jones hath reported it neither; for I have seen a copy of the record upon this account; and, by the way, no book of law is so ill corrected, or so ill printed as that.

The true case is, as it is reported by Mr. Justice Crook; and with Mr. Justice Crook's report of it, doth my Lord Rolls agree, in his abridgment, title Devise, 612. There it is, a term of seventy-six years is devised to Dorothy for life, then to William and his assigns all the rest of the term, provided if William die without issue then living, then to Thomas; and this is in effect our present case; I agree it. But that which I have to say to this case is,

First, it must be observed, that the resolution there did go upon several reasons, which are not to be found in this case.

1. One reason was touched upon by my Lord Chief Baron, that Wil-

liam having the term to him and his assigns, there could be no remainder over to Thomas, of which words there is no notice taken by Mr. Justice Jones.

2. Dorothy the devisee for life, was executrix, and did assent and grant the lease to William, both which reasons my Lord Rolls doth lay hold upon, as material, to govern the case.

3. William might have assigned his interest, and then no remainder could take place, for the term was gone.

4. He might have had issue, and that issue might have assigned, and then it had put all out of doubt.

5. But the main reason of all, which makes me oppose it, ariseth out of the record, and is not taken notice of in either of the reports of Rolls, or Jones, or in Rolls' abridgment. The record of that case goes farther, for the record says: there was a farther limitation upon the death of Thomas without issue to go to the daughter, which was a plain affectation of a perpetuity to multiply contingencies. It further appears by the record, that the father's will was made the 10 of Eliz. Dorothy, the devisee for life, held it to the 24, and then she granted and assigned the term to William; he under that grant held it till the 31 of Eliz. and then re-granted it to his mother, and died; the mother held it till the 1 of R. James, and then she died; the assignees of the mother held it till 14 Jac. and then, and not till then, did Thomas, the younger son, set up a title to that estate; and before that time it appears by the record, there had been six several alienations of the term to purchasers, for a valuable consideration, and the term renewed for a valuable fine paid to the Lord. And we do wonder now, that after so long an acquiescence as from 10 Eliz. to 14 Jac. and after such successive assignments and transactions, that the judges began to lie hard upon Thomas, as to his interest in law, in the term, especially when the reasons given in the reports of the case, were legal inducements to guide their judgments, of which there are none in our case? But then,

Secondly, at last, allowing this case to be as full and direct an authority as is possible, and as they would wish, that rely upon it; then I say—

1. The resolution in Child and Bayly's Case, is a resolution that never had any resolution like it before nor since.

2. It is a resolution contradicted by some resolutions; and to show, that the resolution has been contradicted, there is—

1. The case of Cotton and Heath, which looks very like a contrary resolution; there is a term limited to A. for eighteen years, the remainder to B. for life, the remainder to the first issue of B. for life, this contingent upon a contingent was allowed to be good, because it would wear out in a short time. But

2. To come up more fully and closely to it, and show you, that I am bound by the resolutions of this court, there was a fuller and flatter case 21 Car. 2, in July 1669, between Wood and Saunders. The trust of a long lease is limited and declared thus: to the father for sixty

years if he lived so long; then to the mother for sixty years, if she lived so long; then to John and his executors if he survived his father and mother; and if he died in their lifetime, having issue, then to his issue; but if he die without issue, living the father or mother, then the remainder to Edward in tail. John did die without issue, in the lifetime of the father and mother, and the question was, whether Edward should take this remainder after their death? and it was resolved by my Lord Keeper Bridgeman, being assisted by Judge Twisden and Judge Rainsford, that the remainder to Edward was good, for the whole term had vested in John, if he had survived; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it.

Thus we see, that the same opinion which Sir Orlando Bridgeman held when he was a practiser, and drew these conveyances, upon which the question now ariseth, remained with him when he was the judge in this court, and kept the seals; and by the way, I think it is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration for his learning and integrity.

Object. They will perhaps say, where will you stop if not at Child and Bayly's Case?

Answ. Where? why everywhere, where there is not any inconvenience, any danger of a perpetuity; and whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said, a devise to a man and his heirs, and if he die without issue, living B. then to B. is a naughty remainder, that is Pell's and Brown's Case.

Now the ultimum quod sit, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented.

I have done with the legal reasons of the case: it is fit for us here a little to observe the equitable reasons of it; and I think this deed is good both in law and equity; and the equity in this case is much stronger, and ought to sway a man very much to incline to the making good this settlement if he can. For,

1. It was prudence in the earl to take care, that when the honor descended upon Henry, a little better support should be given to Charles, who was the next man, and trod upon the heels of the inheritance.

2. Though it was always uncertain whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without issue, and so the estate and honor come to the younger son: for it was with a careful circumspection always provided, that he should not marry till he should recover himself into such estate of body and mind, as might suit with the honor and dignity of the family.

3. It is a very hard thing for a son to tell his father, that the provi-

sion he has made for his younger brothers is void in law, but it is much harder for him to tell him so in chancery. And if such a provision be void, it had need be void with a vengeance; it had need be so clearly void, that it ought to be a prodigy if it be not submitted to.

Now where there is a perpetuity introduced, no cloud hanging over the estate but during a life, which is a common possibility where there is no inconvenience in the earth, and where the authorities of this court concur to make it good; to say, all is void, and to say it here, I declare it, I know not how to do it. To run so counter to the judgment of that great man, my Lord Keeper Bridgeman, who hath advised this settlement; and when he was upon his oath in this place decreed it good. I confess his authority is too hard for me to resist, though I am assisted by such learned and able judges, and will pay as great a deference to their opinions as any man in the world shall.

If then this should not be void, there is no need for the merger by the assignment or the recovery to be considered in the case: for if so be this be a void limitation of the trust, and they who had notice of it, will palpably break it, they are bound by the rules of equity to make it good by making some reparation. Nay, which is more, if the heir enter upon the estate to defeat the trust, that very estate doth remain in equity infected with the trust; which was the case of my lord of Thomond; so also was the resolution in Jackson and Jackson's Case: so that to me the right appears clear, and the remedy seems to be difficult.

Therefore my present thoughts are, that the trust of this term was well limited to Charles, who ought to have the trust of the whole term decreed to him, and an account of the mean profits, for the time by past, and a recompense made to him from the duke and Marriot for the time to come. But I do not pay so little reverence to the company I am in, as to run down their solemn arguments and opinions upon my present sentiments; and therefore I do suspend the enrolment of any decree in this case, as yet: but I will give myself some time to consider, before I take any final resolution, seeing the lords the judges do differ from me in their opinions.

[On June 17, 1682, the case was reargued, and the Lord Chancellor gave judgment as follows:]

LORD NOTTINGHAM, Ch. I am not sorry for the liberty that was taken at the bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible. I have as fair and as justifiable an opportunity to follow my own inclinations (if it be lawful for a judge to say he has any) as I could desire; for I cannot concur with the three chief judges, and make a decree that would be unexceptionable: but it is my decree, I must be saved by my own faith, and must not decree against my own conscience and reason.

It will be good for the satisfaction of the public in this case, to take notice how far the court is agreed in this case, and then see where they

differ, and upon what grounds they differ; and whether anything that hath been said be a ground for the changing this opinion. The court agreed thus far

That in this case it is all one, the limitation of the trust of a term, or the limitation of the estate of a term, all depends upon one and the same reason. The court is likewise agreed (which I should have said first, to despatch it out of the case, that it may not trouble the case at all) that the surrender of Marriot to the Duke of Norfolk, and the common recovery suffered by the duke, are of no use at all in this case. For if this limitation to Charles be good, then is that surrender and the recovery a breach of trust, and ought to be set aside in equity; so all the judges that assisted at the hearing of this cause agreed: if the limitation be not good, then there was no need at all of a surrender to bar it, nor of the common recovery to extinguish it.

But then we come to consider the limitation, and there it is agreed all along in point of law, that the measures of the limitations of the trust of a term, and the measures of the limitations of the estate of the term, are all one, and uniform here, and in other cases, and there is no difference at chancery or at common law, between the rules of the one and the rules of the other; what is good in one case, is good in the other. And therefore in this case the court is agreed to, that the limitations made in this settlement to Edward, &c. are all void, for they tend directly and plainly to perpetuities, for they are limitations of remainders of a term in gross after an estate-tail in that term, which commenceth to be a term in gross, when the contingency for Charles happens.

Thus far there is no difference of opinion: but whether the limitation to Charles, if Thomas die without issue, living Henry, whereby the honor of the earldom of Arundel descends upon Henry; I say, whether that be void too, is the great question of this case wherein we differ in our opinions.

It is said that is void too; and yet (sever it from the authority of Child and Bayly's Case, which I will speak to by and by) I would be glad to see some tolerable reason given why it should be so; for I agree it is a question in law here upon a trust, as it would be elsewhere upon an estate; and so the questions here, are both questions of law and equity. It was well said, and well allowed by all the judges, when they did allow the remainders of terms after estates-tail in those terms to be void. I shall not devise a term to a man in tail with remainders over; the judges have admirably well resolved in it, and the law is settled. (and Matthew Manning's Case did not stretch so far) because this would tend to a perpetuity.

Now, on the other side, I would fain know, when there is a case before the court, where the limitation doth not tend to a perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good: for though if there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason; yet the bare

limitation of the remainder after an estate-tail, which doth not tend to a perpetuity, that is not void. Why? because it is not? I dare not say so: see then the reasons why it is so. The reasons that I lie under the load of, and cannot shake off, are these:—

The law doth in many cases allow of a future contingent estate to be limited, where it will not allow a present remainder to be limited; and that rule, well understood, goeth through the whole case. How do you make that out? thus: if a man have an estate limited to him, his heirs and assigns forever, (which is a fee-simple) but if he die without issue, living J. S. or in such a short time, then to J. D. though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. And they that speak against this rule, do endeavor as much as they can to set aside the resolution of Pell and Brown's Case, which (under favor) was not the first case that was so resolved; for, as I said before, when I first delivered my opinion, it was resolved to be a good limitation. 10 Eliz. in the case of Hinde and Lyon, 3 Leonard, 64, which by the way is the best book of reports of the later ones that hath come out without authority. If that be so, then where a present remainder will not be allowed, a contingent one will. If a lease for years come to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only, and that to wear out in a short time.

But what time? and where are the bounds of that contingency? you may limit, it seems, upon a contingency to happen in a life: what if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster-Hall stands? where will you stop if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.

First of all, then, I would fain have any one answer me, where there is no inconvenience in this settlement, no tendency to a perpetuity in this limitation, and no rule of law broken by the conveyance, what should make this void? and no man can say that it doth break any rule of law, unless there be a tendency to a perpetuity, or a palpable inconvenience. Oh yes, terms are mere chattels, and are not in consideration of law so great as freeholds, or inheritances. These are words, and but words, there is not any real difference at all, but the reason of mankind will laugh at it: shall not a man have as much power over his lease as he has over his inheritance? if he have not, he shall be disabled to provide for the contingencies of his own family that are within his view and prospect, because it is but a lease for years, and not an inheritance of a freehold. There is that absurdity in it which is to me insuperable, nor is the case that was put, answered in any degree. A man that hath no estate but what consists in a lease for

years, being to marry his son, settled this lease thus: in trust for himself in tail, till the marriage take effect; and if the marriage take effect while he lives, then in trust for the married couple; is this future limitation to the married couple good or bad? if any man say it is void, he overthrows I know not how many marriage settlements: if he say it is good, why is not a future estate in this case as good as in that, when there is no tendency to a perpetuity, no visible inconvenience?

All men are agreed, (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better argument in the world to maintain my opinion, than that; for, says my Lord Chief Justice, suppose it had not been said thus; if Thomas die without issue, living Henry, then over to Charles; but thus, if it happens that Thomas die without issue in the life of Henry, &c. then this term shall cease, and there shall a new term arise and be created to vest in Charles in tail, and that had been wonderful well, and my lord of Arundel's intention might have taken effect for the younger son. This is such a subtilty as would pose the reason of all mankind: for I would have any man living open my understanding so far, as to give me a tolerable reason why there may not be as well a new springing trust upon the same term to go to Charles, upon that contingency, as a new springing lease upon the same trust: for the latter doth much more tend to a perpetuity than the former doth, I am bold to say it.

But I expect to hear it said from the bar, and it has been said often, the case of Child and Bayly is a great authority; so it is. But this I have to say to it, first, the point resolved in Child and Bayly's Case was never so resolved before, nor ever was there such a resolution since. Pell and Brown's Case was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish Child and Bayly's Case from this, though the word (assists) and the grant of the remainder by the mother, who was executrix, are things that Rolls lays hold on as reasons for the judgment. But I know not why I may not, with reverence to the authority of that case, and the learning of those that adjudged it, take the same liberty as the judges in Westminster-Hall sometimes do, to deny a case that stands single and alone of itself. And I am of opinion the resolution in that case is not law, though there it came to be resolved upon very strange circumstances to support such a resolution; for the remainder of a term of seventy-six years is called in question when but fifteen years of it remained, and after the possession had shifted hands several times, and therefore I do not wonder that the consideration of equity swayed that case.

But I put it upon this point; pray consider, there is nothing in Child and Bayly's Case that doth tend to a perpetuity, nor anything in the settlement of the estate there, that could be called an inconvenience, nor any rule of law broken by the conveyance; but it is absolutely a

resolution *quia volumus*. For it disagrees with all the other cases before and since; all which have been otherwise resolved; but it is a resolution, I say, merely because it is a resolution. And it is expressly contrary to Wood and Saunder's Case, which no art or reason can distinguish from our case or that. For here was that case which was clipped and minced at the bar, but never answered. Wood and Saunder's Case is this: to the husband for sixty years, if he lived so long; to the wife for sixty years, if she lived so long; then if John be living at the time of the death of the father and mother, then to John; but if he die without issue, living father or mother, then to Edward. Suppose these words (living father or mother) had been out of the case, and it had been to John, and if he die without issue, to Edward, will any man doubt, but then the remainder over had been void, because it is a limitation after an express entail? How came it then to be adjudged good! because it was a remainder upon a contingency, that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it? Now, that is this case; nay, ours is much stronger: for here it is only during one life, there were two.

The case of Cotton and Heath in Rolls comes up to this; a term is devised to A. for eighteen years; the remainder to B. for life, the remainder to the first issue male of B. which is a contingent estate after a contingency, and yet adjudged good, because the happening of the contingency was to be expected in so short a time. Now that case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, as Wood and Saunder's Case was by my Lord Keeper Bridgeman, Mr. Justice Twisden, and Mr. Justice Rainsford; so that however I may seem to be single in my opinion, having the misfortune to differ from the three learned judges who assisted me, yet I take myself to be supported by seven opinions in these two cases I have cited.

If then this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savors not of perpetuity, tends to no ill example, why this should be void only, because it is a lease for years, there is no sense in that.

Now if Charles Howard's estate be good in law, it is ten times better in equity. For it is worth the considering, that this limitation upon this contingency happening, (as it hath, God be thanked) was the considerate desire of the family, the circumstances whereof required consideration, and this settlement was the result of it, made with the best advice they could procure, and is as prudent a provision as could be made. For the son now to tell his father that the provision that he had made for his younger brother is void, is hard in any case at law; but it is much harder in chancery, for there no conveyance is ever to be set aside, where it can be supported by a reasonable construction, and here must be an unreasonable one to overthrow it.

I take it then to be good both in law and equity; and if I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case: I would do so, if I could justify it; but expedition is as much the right of the subject, as justice is, and I am bound by Magna Charta, nulli negari, nulli differre justitiam. I have taken as much pains and time as I could to be informed; I cannot help it if wiser men than I be of another opinion; but every man must be saved by his own faith, and I must discharge my own conscience.

I have made several decrees since I have had the honor to sit in this place, which have been reversed in another place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this decree which I do make in this case be reversed too; yet I am obliged to pronounce it, by my oath and by my conscience. For I cannot adjourn a case for difficulty out of an English court of equity into the parliament; there never was an adjournment propter difficultatem, but out of a court of law where the proceedings are in Latin. The proceedings here upon record are in English, and can in no way now come into parliament, but by way of appeal, to redress the error in the decree. I know I am very likely to err, for I pretend not to be infallible; but that is a thing I cannot help. Upon the whole matter, I am under a constraint, and under an obligation which I cannot resist. A man behaves himself very ill in such a place as this, that he needs to make apologies for what he does; I will not do it. I must decree for the plaintiff in this case, and my decree is this.

That the plaintiff shall enjoy this barony for the residue of the term of two hundred years; the defendant shall make him a conveyance accordingly, because he extinguished the trust in the other, and the term contrary to both law and reason, by the merger and surrender, and common recovery. And that the defendants do account with the plaintiff for the profits of the premises by them or any of them received since the death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the masters of the court, to take the said account, and to make unto the defendants all just allowances; and what the said master shall certify due, the said defendants are to pay unto the plaintiffs, according to the master's report herein to be made: and that the defendants shall forthwith deliver the possession of the premises to the plaintiff, and that the plaintiff shall hold and enjoy the said Barony of Grostock, with the lands and tenements thereunto belonging, for the residue of the said term of two hundred years, against the defendants, and all claiming by, from, or under them. And it is further ordered and decreed, that the said defendants do seal and execute such a conveyance of the said term

to the plaintiff as the master shall approve of, in case the parties cannot agree to the same; but the defendants are not to pay any costs of the suit.*

EYRES v. FAULKLAND.

(Court of Common Bench, 1697. 1 Salk. 231.)

H. possessed of a term for ninety-nine years devised his term to A. for life, and so on to B. and five others successively for life; all seven being now dead, the question was, Who should have the residue of the term? Et per TREBY and POWELL: Anciently, if one having a term devised to A. for life, remainder to B., such remainder was void: 1st. Because an estate for life is a greater estate; and, 2dly, Because the term included the whole interest, so that when he devised his term, nothing remained to limit over. Afterwards the law altered; for a devise of the term to B., after the death of A., was held good; and by the same reason to A. for life, remainder to B., for it was but disposing of the interest in the mean time; but a devise to A. in tail, remainder over, is too remote; so if it be to A., and if he die without issue, remainder over. As to the principal case, they held that all the remainders were good; and that the first devisee, and so every devisee in his turn, had the whole term vested in him; during which the next man in remainder, and so every other after him, had not an actual remainder, but a possibility of remainder, and the executor of the deviser a possibility of reverter; for there may be a possibility of reverter, even where no remainder can be limited, as in the case of a gift to A. and his heirs while such a tree stands: No remainder can be limited over, and yet clearly the donor has a possibility of reverter, though no actual reversion; a fortiori, there shall be a possibility of reverter, where a remainder may be limited over; for the testator gave but a limited estate, and what he has not given away must remain in him; and the words for life can be no more rejected in the last limitation than in the first.

* This decree of Lord Chancellor Nottingham was reversed on bill of review by Lord Keeper North, May 15, 1683; but, on appeal to the House of Lords, the decree of the Lord Keeper was, June 19, 1685, reversed, and the decree of the Lord Chancellor affirmed. 3 Ch. Cas. 53, 54.

SECTION 2.—PERSONAL PROPERTY OTHER THAN
CHATTELS REAL

HIDE v. PARRAT.

(Court of Chancery, 1696. 2 Vern. 331.)

The plaintiff, Hide's father, devised the goods in his house at Hoddesden in these words, "I give and bequeath unto my wife all my household goods that are in my dwelling-house at Hoddesden, in the parish of Much-Amwell, during her natural life: and after her decease I give and bequeath my said household goods unto my son Joseph forever." The question was, whether the devise over of these personal chattels (as the will was worded) was good or not.

It was insisted by the defendant's counsel that the devise over was void, and relied on the difference taken in the books, where the thing itself was devised, as in this case the goods were devised, the devise over was void; but where only the use of them is devised to one for life, it is otherwise; and for that purpose cited the case 37 H. 6, 30, Brook's Abridgment, tit. Devise, Plowden's Commentaries, 521 b, Owen's Reports, 33, and March's Reports, 106, where a prohibition was granted out of the Court of Common Pleas to the Court of the Marches of Wales for proceeding for the devise over of a personal chattel.

For the plaintiff it was answered that all these authorities cited were built upon the case 37 H. 6, but of latter times it had been otherwise resolved upon great debate, and instanced in the case of Lord Ferrars. Hart and Say, and Vachel and Vachel, 1 Ca. in Ch. 129, &c., and that in the present case, the same arising upon a will, a construction (as far as the law will admit) is to be made, that the intention of the testator may take place. And therefore if a man possessed of a term for years grants the term to one for life, the remainder over, the remainder over is void; but in the case of a will, or of an assignment by way of trust, there the remainder over is good.

The LORD KEEPER [Sir JOHN SOMERS] held that the devise over was good, for as to the personal chattels, the civil and canon law is to be considered, and there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the devise of the thing itself, and therefore allowed the remainder over to be good.⁴

⁴ S. C. 1 P. Wms. 1.

"J. S. deviseth £500 to his daughter, and if she die before thirty years of age unmarried, then to be divided between three; she does receive the money, and dies before that time. And resolved that the money should be divided, and her executor chargeable, as possessed in trust for the devisees in remainder." Anon., Freem. Ch. 137, pl. 172.

HOARE v. PARKER.

(Court of King's Bench, 1788. 2 Term R. 376.)

Trover for plate by the plaintiffs, who claimed under a remainderman, against the defendant, to whom it was pawned by the tenant for life. Admiral Stewart by will gave his plate to trustees for the use of his wife durante viduitate, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it with the defendant for a valuable consideration, who had no notice of the settlement; and before the commencement of this action she died. A demand and refusal was proved. A special case was reserved before Buller, J., at the last sittings at Westminster, stating these facts; and the question was, Whether the defendant were bound to deliver up the plate without being paid the money he had advanced on it?

Baldwin, for the defendant, declared that he could not argue against so established a point.

Gibbs, for the plaintiff.

PER CURIAM. This point is clearly established, and the law must remain as it is till the legislature think fit to provide that the possession of such chattels shall be a proof of ownership.

Postea to the plaintiffs.

EVANS v. WALKER.

(Chancery Division, 1876. 3 Ch. Div. 211.)

John Brown, by his will, dated the 13th of February, 1812, made the following disposition of his property: "I give and bequeath unto Maria Evans £50 per annum from the day of my decease during the term of her natural life, and from and after her decease to the children she may have born in wedlock, equally to be divided between them, share and share alike, during their natural lives, the said annuity to be paid half-yearly; and from and after the decease of the survivors herein named to go to my nephew Edwin Walker, and my two nieces, Sally Brown Walker and Eliza Walker, equally between them, and I hereby desire that my nephew and nieces will see it fulfilled. I declare this my last will and testament."

This suit was instituted in 1816 for the purpose of having a sum of money set apart out of the estate of the testator to answer the annuity of £50, and a sum of £1666 13s. 4d. was accordingly paid into court for that purpose. Maria Evans died without having been married, in 1874. The nephew and two nieces of the testator died some time since, and a petition was now presented by their legal personal representatives to have the money paid out of court to them in equal shares.

MALINS, V. C. The first point is, whether the gift to the nephew

and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life, and then to an ascertained person, provided the vesting is not postponed. That point I commented upon in *Stuart v. Cockerell*, Law Rep. 7 Eq. 363. Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons. Therefore the circumstance of there being life estates given to all the children unborn of Maria Evans does not create a perpetuity if there are persons capable of taking immediately, and here there are such persons. So they take immediate vested interests.⁵

[The court then decided that the gift after the decease of the survivors of Maria Evans' children, "to my nephew Edwin Walker, and my two nieces Sally Brown Walker and Elizabeth Walker, equally between them," gave to each an absolute interest. The balance of the opinion on this point is omitted.]

In re TRITTON.

Ex parte SINGLETON.

(High Court of Justice, 1889. 6 Morrell's Bankruptcy Cases, 250.)

This was an application on behalf of the trustee in the bankruptcy for an order declaring that he was entitled to certain pictures bequeathed to the bankrupt by his father subject to the life interest of the bankrupt's mother.

The case was taken specially on the ground of urgency, before Mr. Justice Wills, sitting for the Bankruptcy Judge during the absence of Mr. Justice Cave on circuit.

The father of the bankrupt by his will gave and bequeathed to his wife Elizabeth Ann Tritton for her own absolute use and benefit certain watches, jewelry, trinkets, &c., and the will continued: "I also give to my said wife the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and, subject as aforesaid, I give and bequeath all my said pictures to and for my son, H. J. Tritton, for his own absolute use and benefit."

The testator died, and Mrs. Tritton, who is still alive, retained possession of the pictures under the right so given to her.

On March 28th, 1884, H. J. Tritton executed an assignment in favor of one Raymond by way of security for an advance of £2,500, by which as mortgagor and beneficial owner he assigned inter alia, "All that the share and interest of him the said H. J. Tritton under the will and

⁵Accord: *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73.

codicil of his father, Henry Tritton, deceased, and of and in the sums of money, hereditaments, and premises, devised and bequeathed thereby expectant upon the decease of his mother, Elizabeth Ann Tritton."

On April 26th, 1888, a receiving order was made against H. J. Tritton, upon which he was adjudicated bankrupt, and the pictures were now claimed by the trustee subject to the life interest of Mrs. Tritton, on the ground that the assignment in question required to be registered as a bill of sale.

WILLS, J. I wish to preface my judgment with a short statement why I allowed this case to be taken as urgent at this time, and when the state of business is in the condition in which it is owing to nearly all the judges being away from London. I do not want there to be any risk of the opinion going abroad that I am willing always to certify a case as urgent if I am asked to do so. From what was represented to me there is urgency here, because an offer has been made to the trustee for the purchase of these pictures, which offer is only open until September, and the question therefore had to be settled. That appeared to be a reason why I should hear the case at this exceptional time.

Now having said that, I must say that notwithstanding the discussion as to the difficulty of the present case, I do not entertain any doubt as to which way my judgment should go, and so I will give judgment at once. In my opinion the case of the trustee fails, and it fails upon the short ground that the only interest which Tritton, the bankrupt, had in these pictures was a chose-in-action, and therefore expressly excepted from the Bills of Sale Acts by section 4 of the Act of 1878. It seems to me clear upon the authorities that you cannot have life estates and remainders out of personal chattels, and that the interest which this lady took is definite and it comes first, and entitles her to the enjoyment and possession of these things—that is, to the property in these things during her lifetime. It seems to me that the interest of the son was an executory bequest, which creates no present or vested interest, and which, if the mother survived him, would never come into operation. In my opinion it is clearly in the nature of a chose-in-action—or I will say it is a chose-in-action—and nothing higher, and expressly excepted from the operation of the Bills of Sale Act. I found my judgment on that, and I do not think it necessary to travel further into the thorny paths of the law relating to Bills of Sale, which has already given rise to many difficulties. The motion must be refused, and the trustee must pay the costs, but he may recoup himself out of the estate if there is any.

Application refused.

ANONYMOUS.

(Superior Court of North Carolina, 1802. 3 N. C. 161.)

Testator had devised a negro to his wife and also lands for life; and the executors of the testator sued for the negro.

JOHNSTON, Judge. The words "and also" continue the clause, and the words "for life" refer to all that precedes. She had an interest for life in the negro as well as in the lands, and there remained a reversion which vested in the executors; and although the next of kin may be entitled to it, yet the executors must distribute it, and must recover in the first instance, in order to that distribution.

Judgment accordingly.⁶

DUKE v. DYCHES.

(Court of Appeals of South Carolina, 1829. 2 Strob. Eq. 353, note.)

Moses Duke, the plaintiff's testator, in his lifetime made a deed of gift of certain negro slaves to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. An action was brought for their recovery by the executors, and a nonsuit ordered on circuit, on the ground that the plaintiffs showed no title in themselves. The case was heard, on appeal from this order, at Columbia, December Sittings, 1829, and the following is the opinion of the Court of Appeals:

NORR, J. Moses Duke, the plaintiff's testator, in his lifetime made a deed of gift of the negroes in question to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. The copy of the deed of gift is as follows:

"To all to whom these presents shall come, I, Moses Duke, do send greeting. Know ye that I, the said Moses Duke, of Barnwell District, in the State of South Carolina, for and in consideration of the love, good will and affection which I have and do bear towards my loving daughter, Esther Benson, of the same place, have given and granted, and by these presents do freely give and grant, unto the said Esther Benson, her heirs, executors and administrators, one certain negro boy slave named Arthur, and one negro girl slave named Jane, to be and remain as her proper right and property after the death of the said Moses Duke, or at any time previous thereto, if the said Duke shall think fit to do so. But it is the true intent and meaning of the said Moses Duke that if the said Esther Benson shall die without lawful

⁶ Accord: *Boyd v. Strahan*, 36 Ill. 355. See, also, *Gray*, Rule against Perp. (2d Ed.) §§ 97, 852. *State v. Savin*, 4 Har. (Del.) 56, note; *Merkel's Appeal*, 109 Pa. 235, are contra.

issue, then the said negroes, viz.: Arthur and Jane, shall go to the lawful heirs of the said Moses Duke, to be and become thereafter the rightful property of his said heirs, in as full and ample manner as if this present deed had never been made or given. And the said Esther Benson the said property shall and may hold, upon the terms and conditions above mentioned, as her proper goods and chattels, without any sort of reserve whatever. Witness my hand and seal this 4th day of August, in the year of our Lord one thousand eight hundred and four, and in the 29th year of American Independence.

"Moses Duke. [L. S.]

"Signed, sealed and delivered in the presence of
J. Hughes and Micajah Hughes."

And the only question now submitted to us is whether personal property can be limited over by deed to take effect after the termination of a life estate. 1 Fearn. 26; 1 Mad. Ch. 223. It was formerly held that no such limitation could be made, either by deed or will; but a gift for life, or even for a day, carried the whole estate. Fearn., supra; 1 Pr. Wms. 1, Hyde v. Parrot et al.; do. 500, Tessin v. Tessin; do. 651, Upwal v. Halsy. The first deviation from that rule was by way of distinction between the gift of the use of a thing, and a gift of the thing itself. Since those decisions the distinction between the use and the thing itself has been laid aside, and a gift of the chattel itself, for life, is considered as a gift of the use only. 1 Fearn. 241. But it is contended that those decisions apply only to, executory bequests by will, or to trusts, and not to cases where the property is given immediately by deed. And I do not know that such a limitation by deed has ever been held good in England; neither do I recollect any modern decision where the contrary has been held. And it now remains for this court to decide whether that distinction, between deeds and wills, is still to be maintained, or whether it is now time to lay aside that distinction also, or rather whether any such distinction has ever prevailed in this State. And I would here remark that the invasion of the common law principle, in England, has not been by legislative authority, but by the courts alone. And if a gift by will for life conveys nothing but the use, why may not the same words in a deed have the same operation? If the courts have the power in one case to effect such a change, as being more consistent with reason and common-sense, and more consistent with the intention of the party, why may they not in the other? I am not, however, friendly to that kind of judicial legislation which authorizes judges to innovate upon an established rule of law because they think it is time that it should be changed. And if I found the current of decisions running against the principle which I am advocating, I should feel bound to go with them. But I have already remarked that it is a subject on which the late English authorities are almost silent, and on which I think I shall be able to show that I am well supported by the decisions of our own courts. I mean, however, to confine my remarks exclusively to the species of property now under con-

sideration. For although, by our law, slaves are considered as personal estate, yet we have, in various respects, made a distinction between that species of property and other personal chattels. The limitation over of a female slave has been held to carry with it a limitation over of the offspring born during the life estate, which is not the case with any other animal. The conversion of a female slave to the use of a person, renders the party liable for damages, to the amount of the value of the issue, born during the time of the possession, as well as the value of the mother, contrary to the rule in case of female brutes.

And in the case of *Geiger v. Brown*, 2 Strob. Eq. 359 note, decided at our last court, we held that a bequest of a female slave for life, without any limitation over, carried only a life estate, and that the slave and her issue, at the termination of the life estate, were unbequeathed assets in the hands of the legal representatives, for which the administrators might maintain an action. We have thus given to this kind of property attributes of realty which do not belong to other personal chattels. And to hold it not capable of limitation over after a life estate, would be inconsistent with the character which has been ascribed to it by the whole current of our decisions. But the question is not left to inference. It is supported by the express opinions and direct decisions of our courts. In the case of *Dott v. Cunningham*, 1 Bay, 453, 1 Am. Dec. 624, it is said, "It cannot be denied that in many cases personal chattels or terms for years, may be limited over, either by executory devises, or deeds, as effectually as real estate, if it is not attempted to render them unalienable beyond the duration of lives (in being), or twenty-one years after (see page 456). And although in that case it was held, that the property vested in the first taker, yet it was on the ground that the limitation was too remote, and not that a limitation over after a life estate, was not good. On the contrary, throughout the whole argument of the court it is manifest the limitation over would have been supported, if it had not gone so far as to create a perpetuity. In the case of *Stockton v. Martin*, 2 Bay, 471, similar language is used. And although in that case, also, it was held that the contingency on which the property was to go was too remote, being after an indefinite failure of issue, yet it was on that ground and on that alone that the limitation was not supported. In the case of *Tucker v. Executors of Stevens*, 4 Desaus. 532, the question was directly decided. That was a deed of gift of a brother to his sister for life, with a limitation over to such issue as should be living at the time of her death, and the court supported the right of the children under the deed. That was indeed only a circuit decision, and therefore cannot be relied on as a binding authority. But it was the opinion of a very able and learned chancellor, whose opinion is always of high authority, and the acquiescence of the counsel is evidence of the prevailing opinion of the bar. We are supported, then, by the opinions of the highest tribunals of the country from the year 1794. And those not expressed as mere speculative and

doubtful opinions, but as the settled principles of law. And those successive opinions, from such sources, for such a length of time, though not expressed in the most solemn form, ought now to be considered as conclusive authority upon this court. I concur therefore in the opinion of the presiding judge on the effect of this deed. I have not entered into the inquiry whether it may not be supported upon some other construction. For the view which I have taken of it covers the whole ground, and if correct renders it perfectly immaterial whether it is not susceptible of some other construction which would lead to the same conclusion. I am of opinion that the plaintiffs showed no title in themselves, and that the nonsuit was properly ordered. The motion must therefore be refused.

COLCOCK, J., and JOHNSON, J., concurred.

Motion refused.⁷

BRUMMET v. BARBER.

(Court of Appeals of South Carolina, 1834. 2 Hill, 543.)

Trover for negroes. The plaintiff claimed as the son of Spencer Brummet, and the defendant as the administratrix of Nathaniel Barber, dec'd. The jury, in a special verdict, found the following facts: That the negroes Sine and Mille, who (with their increase) are the subjects of this action, originally belonged to Spencer Brummet and Daniel Brummet; that they gave the negroes to Comfort Perry, their niece; and, through William Brummet, delivered them to her father, Zadock Perry, who, at the time, signed the following receipt or acknowledgment in writing, as containing the terms and limitations of the gift: "I say received of William Brummet, for the use of my daughter Comfort Perry and the heirs of her body, two negro girls, named Sine and Mille; but should the said Comfort die without children to heir the said negroes, then the said negroes are to return to the sons of Spencer and Daniel Brummet, and their heirs forever. This 8th day of January, 1792. (Signed) Zadock Perry."

That Comfort Perry intermarried with Nathaniel Barber, and the negroes in question thereupon went into his possession, on which occasion he signed the following instrument, referring to the former receipt

⁷ Accord: *McCall v. Lee*, 120 Ill. 261, 11 N. E. 522 (limitations created by a writing not under seal and delivery). See Gray, *Rule against Perp.* (2d Ed.) §§ 95, 849.

Contra: North Carolina: Gray, *Rule against Perp.* (2d Ed.) §§ 92-94. In that state a grant by deed of a life interest in a chattel passes the absolute property. There can be no reversion and attempted gifts over are void. Gray, *Rule against Perp.* (2d Ed.) § 92.

But even in North Carolina a future limitation after a life estate in chattels personal is valid when created by will. The same is true of other American jurisdictions: Gray, *Rule against Perp.* (2d Ed.) § 88.

of Zadock Perry, and acknowledging that he took the negroes agreeably to its terms, to wit:

“Received of Zadock Perry two negro women, named Sine and Mille, and their increase, agreeable to a receipt in the hands of Daniel and Spencer Brummet, it being in full of all debts and demands of the same, likewise a clear receipt for all dues and demands for myself, of the above-named Zadock Perry. I say received by me, this 30 December, 1798. (Signed) Nath’l Barber.”

Comfort Perry (then Mrs. Barber) died in 1829 without issue, having borne a child who died before her death. The negroes afterwards continued in the possession of Nath’l Barber until his death, when they passed into the hands of the present defendant, his widow and administratrix, who holds and claims them in right of her intestate. Daniel Brummet died without issue, and Spencer Brummet died leaving the plaintiff, his only son, who claims under the limitation over on the gift to Comfort Perry. If the court should be of opinion, from these facts, that the plaintiff is entitled to recover, the jury find for the plaintiff eight thousand five hundred dollars; but if the court should hold otherwise, they find for the defendant.

The presiding judge ordered the postea to be delivered to the defendant.

The plaintiff appealed, and moved to reverse the decision of the Circuit Court, and for leave to enter judgment for the plaintiff, on the ground: That upon the proper construction of the instruments in writing, connected with the facts found by the jury, the conditions and limitations therein expressed are valid and effectual, and the plaintiff entitled to recover.

The defendant also appealed, and moved for a nonsuit or a new trial, on the grounds:

1. That the receipt signed by Zadock Perry was improperly received in evidence.
2. That the finding of the jury that the negroes belonged to Spencer and Daniel Brummet was without evidence.
3. That the limitation condition, or trust of the gift, was by parol, and cannot, therefore, be sustained.

O’NEALL, J. In this case several questions are made on the appeal by both the plaintiff and the defendant. Those made by the latter are precedent to the main question involving the plaintiff’s right to recover. They will be first considered.

1. It is contended that the paper signed by Zadock Perry, and containing the terms on which he received the slaves from the Brummetts, for the use of Comfort Perry, was improperly received in evidence. Regarding Zadock Perry as the bailee or trustee of the property for Comfort Perry and the other parties entitled to take under the bailment or trust, there can be no doubt that the paper is properly in evidence. It is, indeed, the evidence of the bailment made or trust

created. For it is the undertaking of the bailee or trustee to deliver over the property to the uses which the bailors or donors directed when they put it into his possession.

But if there could be any doubt about the matter after this illustration of it, still, in another point of view, it would be removed. The verdict of the jury has found the fact that Nathaniel Barber, the husband of Comfort Perry, and the intestate of the defendant, when he received the possession of the said property from Zadock Perry, "executed the paper signed N. Barber, bearing date 30th December, 1798, referring to the former receipt of Zadock Perry, and acknowledging that he received the negroes agreeable to that receipt." This made the paper signed by Zadock Perry the same as if it had been signed by Nathaniel Barber; and it is, hence, his admission of the manner in which he held possession of the said slaves. In this point of view, it is perfectly clear that it was properly admitted to be read in evidence on the trial of this cause.

2. It is supposed that the jury improperly found the said slaves to have been the property of Spencer and Daniel Brummet, the supposed donors. The fact, that Zadock Perry received from William Brummet the negroes for the use of his daughter, and the heirs of her body; but if she should die without children, then that they were to return to the sons of Spencer and Daniel Brummet, goes, in itself, very far to show that Spencer and Daniel were the owners and donors. For the words "to return" mean, in ordinary acceptance, to go back; as used in this paper, they would fairly mean and imply, that if the donee and her descendants could not enjoy the property, then that it should go back to a part of the family of the persons from whom it came. When the receipts of Perry and Barber are connected with the testimony of Mrs. Gregory, they abundantly sustain the verdict in this behalf.

3. It is urged by the defendant that a limitation over in personalty cannot be created by a writing not under seal. To meet this objection fairly, this case ought to be considered in two different points of view: 1st, as a trust in chattels personal; 2d, as a direct gift.

Upon examining the case in the first point of view, there seems to be nothing to prevent a trust in personalty from being created by parol, either written or unwritten. The 7th and 8th sections of the Statute of Frauds and Perjuries require all declarations or creations of trusts or confidences, in lands, tenements, or hereditaments (except implied or constructive trusts), to be in writing, signed by the party, who is, by law, enabled to declare such trust, or by his last will in writing. P. L. 83. This provision applies altogether to land, leaving personal property still, as at common law; but it is useful to see that even in real estate, and by Statute, it is not necessary to declare or create a trust, that the same should be declared or created by deed. What is a trust in personalty at common law? It is a mere bailment, the delivery of a thing to one person, on the confidence that he would de-

liver it to another. The illustrations of the principle established in *Jones v. Cole*, 2 Bailey, 332, show that this is the correct notion of a trust in personal property. This being so, it may be created by any words or acts which show that the party in possession received it for another; or for himself and another together; or for himself for his own life, or the life of another, and then that it go over in remainder or reversion. Each of these cases, as well as all other cases of qualified interests in personal property in possession, are, most generally, nothing more than legal trusts, or, as they are more technically termed, bailments. These arise from the fact that the possession is fiduciary, and not in one's own right. That parol is competent to qualify possession, has never been doubted. But to show the admissibility of mere word of mouth, to make out a trust, in personal property, to the satisfaction of every one, let us state a plain and common case. A. is in the possession of goods, which he verbally admits he is entitled to hold only for his own life, and then that they are to go over to B. or to return to the donor C. Who would doubt that on proof of such an admission, B. or C. (as the case might be), would be entitled, after the termination of A.'s life estate, to recover against his personal representatives, who might be in possession of the goods? Why is this so? Because his admission shows that his right of property extended only during his own life, and this being consistent with his possession, the latter could confer no higher or greater right; and that thus being a tenant for life, in possession, acknowledging the remainder or reversion, he is a trustee for the preservation of the same.

In the case under examination, connect *Zadock Perry's* receipt with *Nathaniel Barber's* (which is the true position of the case), and divest it, for the present, of the question as to the validity of the limitation over, and a plain acknowledgment, on the part of *Nathaniel Barber*, is made out, that he held the negroes absolutely, if his wife *Comfort* should die leaving children; but if she should die without having children, then that the negroes should go over to the sons of *Spencer* and *Daniel Brummet*. This is not a covenant to stand seised to uses, which, as is very properly said in *Porter v. Ingram*, 4 M'Cord, 201, applies altogether to real estate; but it is an acknowledgment that *Nathaniel Barber* is in possession, on the trust and confidence, that on the death of his wife without children, he would deliver over the slaves to the remaindermen, or, as it really turned out, to the remainderman the plaintiff. There is nothing to prevent such a future expectancy, by way of trust, from being created by any instrument of writing. For in *Powell v. Brown*, 1 Bailey, 100, it was held that a future interest in a chattel personal might be created or reserved, by way of remainder or reversion by deed. Let it be borne in mind, that to pass personal property, a deed is not necessary; that it was the nature of the thing itself, its perishableness, which at common law originally forbade an estate in remainder or in reversion in it. This ancient and strict notion of the

common law having given way to the change in the value and nature of personal property, such an interest is now permitted to be raised and to exist; and it follows, that if it can be created or reserved by deed, which never was essential to the transmission of personal property, it may be in any other way in which personalty may be passed from one person to another, as by delivery of possession according to mere word of mouth, or any written instrument defining the interest to be taken and enjoyed therein.

If, however, in this case, we discard all the doctrine in relation to trusts of personal property, and consider it as a gift, evidenced by the admission of Barber, properly inferred from his receipt in connection with and explained by that of Zadock Perry, I think the limitation over, created by a parol instrument of writing, is good, as between the plaintiff, the remainderman, and the defendant, the widow of Nathaniel Barber, the tenant per auter vie. It seems to be clear that anything which will be good and effectual in law to pass personal property must be equally so to limit it; and this I take to be the settled principle, properly deducible from the case of Dupree v. Harrington, and Reeves v. Harris.

In Dupree v. Harrington, Harp. 391, it was held, that a written stipulation in a note given for the purchase of a mare, "that the mare should remain the property of the vendor until half the price was paid," was good and valid; and that the property remained in the vendor, notwithstanding the possession was in the vendee, until the condition was complied with. If, by writing, the right of property may be retained after the vendor has delivered possession of personal property, it would seem to follow that the owner of it might, at the time he parts with the possession, create or reserve, by writing, any future interest which was not too remote.

In Reeves v. Harris, 1 Bailey, 563, a verbal condition on the sale of a horse, that he should still remain the property of the vendor, until the price was paid, notwithstanding the vendor delivered the possession to the vendee, was held to be legal even against a creditor. As between the vendor and a creditor, that case is, I think, an anomalous and unsound authority. For in Dupree v. Harrington, on the authority of which it professes to be decided, the question was between the vendor and the administrator of the purchaser. So far, between the parties, the principle of both cases is right; as between them any conditions which enter into their contract, either verbally or in writing, must be binding. So, too, in a gift of personalty: the donor may, in writing or verbally, annex any conditions he pleases, provided they be not in other respects contrary to law; and if the donee accept the gift under such conditions, he will be bound by them.

4. This brings up for consideration the limitation itself in the paper made by Zadock Perry, and adopted by Nathaniel Barber, the defend-

ant's intestate. Is it too remote? I think not. [The discussion on this point is omitted.]

The motion to reverse the decision of the judge below, and for leave to the plaintiff to enter up judgment for his damages on the special verdict, is granted.

JOHNSON and HARPER, JJ., concurred.⁸

⁸ See, also, Gray, Rule against Perp. (2d Ed.) §§ 846, 848. Accord: Hill v. Hill, Dud. Eq. 71 (S. C., Court of Chancery and Court of Appeal, 1836, 1837). Here the enforcement of the shifting interest created by deed was upon a bill in equity.

A fortiori, shifting interests in chattels created by will are valid. Rogers v. Randall, 2 Speers, 38 (S. C., Court of Appeal, 1842).

Contra to principal case: Wilson v. Cockrill, 8 Mo. 1 (1843), where it is apparently conceded that shifting interests created by will in personal property are valid.

PART II

CONSTRUCTION OF LIMITATIONS

CHAPTER I

INTRODUCTION

ON THE PRINCIPLES OF LEGAL INTERPRETATION, by F. Vaughan Hawkins, 2 Juridical Society Papers, 298 (1858-63): "There is obviously both a science and an art of interpretation. The business of the art is to collect and furnish practical rules and maxims for performing the process of Interpretation, in relation to this or that class of writings upon which it may have to be exercised. The business of the science is to analyse the nature of the process itself of Interpretation, and to discover, by a deductive method, the principles on which it rests, and in conformity with which the proceedings of the art are or ought to be regulated."

WIGMORE ON EVIDENCE, §§ 2458, 2459: "The process of Interpretation is a part of the procedure of realizing a person's act in the external world. * * *

"The method of it consists in ascertaining the actor's associations or connections between the terms of the act and the various possible objects of the external world. * * *

"The first question must always be, What is the standard of interpretation? The second question is, In what sources is the tenor of that standard to be ascertained? Sometimes one or the other of these questions may interpose no difficulty; but both must always be settled.

"(1) The standard of interpretation, as involved in legal acts, is the personality whose utterances are to be interpreted. There are practically four different available standards. First, there is the standard of the normal users of the language of the forum, the community at large, represented by the ordinary meaning of words. Next, there is the standard of a special class of persons within the community,—the followers of a particular trade or occupation, the members of a particular religious sect, the aliens of a particular tongue, the natives of a particular dialect, who use certain words in a sense common to the entire class, but different from that of the community at large. Thirdly, there is the standard of the specific parties cooperating in a bilateral

act, who may use words in a sense common to themselves and unknown to any others. Finally, there is the standard of an individual actor, who may use words in a sense wholly peculiar to himself; and here the question will naturally arise whether he may insist on his individual standard in the interpretation of the words of the contract, or even of a unilateral act such as a will. The first inquiry in interpretation, then, is to determine which of these standards is the proper one for the particular act to be interpreted; and for this purpose certain working rules have to be formulated.

“(2) The sources for ascertaining the tenor of the standard form the second object of inquiry. Since interpretation consists in ascertaining the associations between the specific terms used and certain external objects, and since these associations must be somehow knowable in order to proceed, the question is where they are to be looked for. So far as the standard of interpretation is solely the normal one of the community, the inquiry is a simple one; the usage of the community (as represented in dictionaries and elsewhere) is the source of information. But that standard (as will be seen) is rarely the exclusive one. The mutual standard of parties to a bilateral act, and for wills the individual standard of the testator, is constantly conceded to control; and it then becomes necessary to search among the prior and subsequent utterances of the party or parties to ascertain their usage, or fixed associations with the terms employed. In resorting to these data, the question then arises whether there is any prohibitive rule of law which limits the scope of search and forbids the use of certain data. These rules, if any, form the second part of the law of interpretation.

“Before proceeding, however, to these two parts of the subject in their order, it is necessary to fix upon a terminology and to avoid misunderstanding in the use of words. When we seek to ascertain the standard and sources of interpretation, and thereby to discover the actor's association of words with external objects, what is the term, in one word, which describes the object of the search? Is it the person's ‘meaning’? Or is it his ‘intention’? Over this difference of phraseology has persisted an endless controversy, which, like that of the two knights and the shield at the cross-roads, is after all resolvable mainly into a difference of epithets only.

“§ 2459. *Same: ‘Intention’ and ‘Meaning’ Distinguished.* The distinction between ‘intention’ and ‘meaning’ is vital. The distinction is independent of any question over the relative propriety of these names; for there exist two things, which must be kept apart, yet never can be unless different terms are used. The words ‘will’ and ‘sense’ may be taken as sufficiently indicative of these two things and free from the ambiguity of the other terms.

“Will and Sense, then, are distinct. Interpretation as a legal process is concerned with the Sense of the word used, and not with the Will to use that particular word. The contrast is between that Will, or volition to utter, which, as the subjective element of an act, makes a

person responsible for a particular utterance as his, and that Sense or meaning which involves the fixed association between the uttered word and some external object. It has already been seen (ante, § 2413) that by the general canon of legal acts, the person's actual will or intent to utter a given word can seldom be considered for legal purposes. If he has exercised a volition to utter something, then he is responsible for such utterance as is in external appearance the utterance he intended,—whether or not he actually intended it. On the other hand, the sense of his word as thus uttered—his fixed association between that symbol and some external object—may usually be given full effect, if it can be ascertained. The rules for the two things may be different. The law has thus constantly to emphasize the contrast between the prohibitive rule applicable to the creation of an act (ante, § 2413), and the present permissive rule applicable to its interpretation. Judges are desirous, when investigating the sense of the words as uttered by the person, of emphasizing that they do not violate the rule against inquiring whether he actually intended to utter those words. Hence the reiteration of the contrast between 'intention' and 'meaning':

"1789, Kenyon, L. C. J., in *Hay v. Coventry*, 3 T. R. 83, 86: 'We must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used.'

"1833, Parke, J., in *Doe v. Gwillim*, 5 B. & Ad. 122, 129: 'In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he used.'

"1833, Denman, L. C. J., in *Rickman v. Carstairs*, 5 B. & Ad. 663: 'The question * * * is not what was the intention of the parties, but what is the meaning of the words they have used.'

"The common terminology of these judicial explanations is unfortunate, because 'meaning' has a suggestion of the state of the person's mind as fixed on certain objects, and 'intention' bears the same suggestion. The constant exclusion of the state of the person's mind in one aspect, and yet its consideration in another aspect, are thus apparently contradictory and irreconcilable. But the terms 'will,' or 'volition,' and 'sense,' serve to avoid this ambiguity. They emphasize the distinction that the will to utter a specific word is one thing, and the fixed association of that word is another thing. Thus the Creation of the act and its Interpretation as created are kept distinct."

ON THE PRINCIPLES OF LEGAL INTERPRETATION, by F. Vaughan Hawkins, 2 Juridical Society Papers, 329 (1858-63): "One consideration, however, I will not pass over: I mean the great differences which exist in the measure of interpretation as applied under different judicial systems and by different judicial minds, and the consequent necessity for accumulating a certain mass of decisions, in or-

der 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. It is sometimes said, in relation particularly to testamentary interpretation, that authorities can be of no service: that to quote cases is to construe one man's nonsense by another man's nonsense, and that all a judge has to do is to read the writing and endeavour to make out from it the meaning of the testator. Now, if interpretation were, like the determination of the meaning of words whose signification is fixed, something that can be done with absolute certainty, in which one man would come to the same conclusion as another, and which is, so to speak, the same all the world over, the study of previous authorities might indeed be unnecessary. But, in truth, it would be as reasonable to say, that no authorities were to be consulted on a question of equity, that a judge ought to act upon his own notions of what was equitable, and that as circumstances are infinitely various, one case could never show what it was right to do in another. Experience shows that the limits of interpretation will be fixed at very different points by different persons; and there is, perhaps, no legal subject which brings out peculiarities of individual bias and disposition more strongly than difficult problems of construction. By the combined result of the decisions of a succession of judges, each bringing his mind to bear on the views of those who preceded him, a system of interpretation is built up, which is likely to secure a much nearer approach to perfect justice than if each interpreter were left to set up his own standard of how far it was right to go in supplying the defective expression, or of what amounted to a conviction of the intent as distinguished from mere speculative conjecture. Rules of construction are matters, the expediency of which may be more doubtful; but, that Principles of construction there must be in every system of rational interpretation, and that these are only to be gathered by a comparison of a large number of important cases, and by striking the average of a large number of individual minds, will not, I think, be denied by any one who considers interpretation to be as I have described it, a process of reasoning from probabilities, a process of remedying, by a sort of equitable jurisdiction, the imperfections of human language and powers of using language, a process whose limits are necessarily indefinite and yet continually requiring to be practically determined, and not, as it is not, a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the meaning of words."

INTERPRETATION OF WILLS, by Francis M. Nichols, 2 Juridical Society Papers, 376 (1858-63): "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. It is not necessary, however, that a testator should foresee all the consequences of his direction. The only question for the interpreter is, whether the provision logically includes the actual case. The probability, however great, that a testator would have qualified a clause if he had contemplated all its logical consequences in the actual state of circumstances, is not a sufficient reason for refusing to give effect to it."

GRAY, NATURE AND SOURCES OF LAW.—*Appendix VII. Rules of Construction:* Sec. 700. In statutes any rules of interpretation ever suggested have been of the most general character, and the same is true of legal writings generally; but in two classes of instruments, deeds of real estate and wills, particularly the latter, the limited character of provisions, probable or possible, causes language of a similar nature to be often employed, and thus gives opportunity for the establishment of rules of construction.

Sec. 701. The making of these rules was at one time carried too far in the Common Law; they were often pushed into such refinement that they lost their practical value, and, what is more, they sometimes attributed to a testator the very opposite of the intention which he was likely to have had, as with the rule that the words "dying without issue" meant an indefinite failure of issue. Against this disposition there has of late years been a decided reaction on the part of the courts. Judges have spoken with contempt of the mass of authorities collected in Mr. Jarman's bulky treatise on Wills, have declared that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder, and especially have said that each will is to be determined according to the intention of the testator and that the judicial mind should apply itself directly to that problem, and not trouble itself with rules of construction.

Sec. 702. And yet it may be doubted whether the pendulum of judicial theory and practice has not swung too far in this direction. 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. As is said in the text with reference to the Legislature, when a testator has a real intention, it is not once in a hundred times that he fails to make his meaning clear. 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. Now for cases in which a testator has not provided, it may be well that

there should be fixed rules, as there are for descent in cases of intestacy.

Sec. 703. It would seem that the first question a judge ought to ask with regard to a disputed point under a will should be: "Does the will show that the testator had considered this point and had any actual opinion upon it?" If this question be answered in the affirmative, then there is no doubt that the solution of the testator's intention must be sought in the will. But in the vast majority of cases this is not what has happened. What the judges have to do is, in truth, to say what shall be done where the testator has had no real intention; the practice of modern judges to which I have alluded 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; the older practice was to look for an established rule of construction. In the modern practice the reasoning is often of the most inconclusive character, but the judges have got to decide the case somehow, and having turned their backs upon rules of construction, have to catch at the slightest straw with which to frame a guess.

Sec. 704. Take, for instance, the word "heirs," so often, indeed almost always, put into a will to fill out the final limitations. There are jurisdictions where no counsel dares to advise on what is to be done with property that is bequeathed to "heirs." The judging of each will by itself leads necessarily to the bringing up of each will to be judged, and is responsible for a great deal of family dissension and litigation.

Sec. 705. That the unsatisfactory character of many of the rules for the interpretation of wills is largely responsible for their present unpopularity with the courts cannot be denied; but I only wish to point out that what many judges are setting up against the rules of construction of wills is, not their opinion of what testators really intended, but their guess at what the testators would have intended if they had thought of the point in question, which they did not, a guess resting often upon the most trifling balance of considerations.

EATON v. BROWN, 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730 (1904), Mr. Justice Holmes: "The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole."

CHAPTER II

MEANING OF HEIRS IN A LIMITATION TO THE TESTATOR'S HEIRS OR THE HEIRS OF A LIVING PERSON

HOLLOWAY v. HOLLOWAY.

(Court of Chancery, 1800. 5 Ves. 399.)

Edward Reeves by a codicil, dated the 21st of July, 1763, gave to trustees the sum of £5000: in trust to put the same out at interest on Government or other securities, and to pay the interest, income and produce, thereof to his daughter Hindes for and during the term of her natural life, separate and apart from her husband. The codicil then proceeded thus:

"And after the decease of my said daughter Hindes then upon this farther trust, that they, the said Augustine Batt and Benjamin Holloway, their executors or administrators, do pay the said £5000 unto such child or children of my said daughter Hindes as she shall leave at the time of her decease in such shares and proportions as she shall think proper to give the same; and in case she shall die leaving no child, then as to £1000, part of the said £5000, in trust for the executors, administrators or assigns, of my said daughter Hindes: and as to the £4000 remainder of the said £5000, in trust for such person or persons as shall be my heir or heirs at law."

The testator died in 1767; leaving his daughter Susannah Hindes and two other daughters his co-heiresses at law and his next of kin at the time of his death. Susannah Hindes having survived her husband died without issue in August, 1798.

The bill was filed by the great-grandchildren of the testator by his two other daughters, the plaintiffs being his co-heirs at law at the death of Susannah Hindes, against the representatives of the surviving trustee, and against several other persons, who with the plaintiffs were the next of kin of the testator and of Susannah Hindes; praying, that the plaintiffs, as co-heirs of the testator at the death of Susannah Hindes, may be declared entitled to the said £4000, &c.; or in case the court shall be of opinion, that any other construction ought to be put upon such bequest, then that the rights of the plaintiffs and defendants may be declared, &c.

MASTER OF THE ROLLS [Sir RICHARD PEPPER ARDEN]. This question arises upon a very doubtful clause in this codicil. Unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character. The only question is, whether upon the true construction of this codicil it must necessarily be intended, he did not mean by these

words what the law *prima facie* would, strictly speaking, intend, heirs at law at the time of his death. A testator certainly may by words properly adapted show, that by such words *persona designata*, answering a given character at a given time, is intended. But *prima facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator. It is not like the case of *Long v. Blackall*, 3 Ves. Jr. 486. The words there put it out of the power of the court to put upon it any other interpretation; though it was much contended, that it meant at the death of the testator. In that case the word "then" plainly proved that the personal representatives at the time of the death were not intended; and if that word had not occurred, there was a great deal to show, it could not be the intention (and that applies here); for there the wife was his executrix; and it would have been a strange, circuitous, way of giving it to her.

In *Bridge v. Abbot*, 3 Bro. C. C. 224, and *Evans v. Charles*, 1 Anstr. 128, a great deal of discussion took place upon such words as these. In the first of these cases it was contended, and I had for some time little doubt upon it, that it was intended to give a vested interest to a party, who was dead before: but from the absurdity of that and of letting it be transmissible from a person, in whom it never vested, I was of opinion, that upon the true construction it must have been intended such persons as at the death of the testatrix would, if John Webb had then died, have been his personal representatives. I wish to add a few words to the report of that case, to show, what the decree was. The report states, that I declared the persons entitled as legal representatives to be the persons, who would have been entitled as next of kin to John Webb at the death of Mary King. I desire, that these words may be added: "in case he had at that time died intestate." I believe, those words were added in the decree.

The case of *Evans v. Charles* arose upon similar words, but under very dissimilar circumstances. Lord Chief Baron Eyre observes upon *Bridge v. Abbot*; and though the decision of the court was different from mine, they seem to think my opinion right in that case. *Evans v. Charles* was determined upon other grounds; upon which the Court of Exchequer felt themselves obliged to give to the administratrix of the creditor. There is certainly an obvious distinction between them. It was truly said in *Evans v. Charles*, that it must always be taken together with the context. The words must have their legal meaning, unless clearly intended otherwise. In this case I was struck with the circumstance of the gift to the daughter for life, &c.; giving it to the heirs at law; of whom she would be one. But that alone would not, I apprehend, be sufficient to control the legal meaning of the words. If an estate for life was devised to one, and after his death to the right

heirs of the testator, it never would be held, that, though the tenant for life was one of the heirs, that would reduce him to an estate for life: but he would take a fee.

Long v. Blackall has that very leading distinction from this case upon the word "then"; that there could be no doubt personal representatives at a given time were intended. I must therefore hold, that, if that word had not occurred, the judgment of the Lord Chancellor would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.

In this case I cannot upon that ground alone, that the daughter named in the will was one of the heirs at law, hold, that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their prima facie construction: heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death. I have not put this construction upon it in order to avoid the difficulty, that would otherwise arise: but I am very glad, that this relieves me from the necessity of stating, who are meant by the words "heirs at law" as to the property, which is the subject of this bequest. This is personal property; and it is said, that though "heirs, &c.," have a definite sense as to real estate, yet as to personal estate it must mean such person as the law points out to succeed to personal property. I am much inclined to think so. If personal property was given to a man and his heirs, it would go to his executors. I rather think, if I was under the necessity of deciding this point, I must hold it heirs quoad the property: that is, next of kin: but I am relieved from that; as, if heirs, at his death are meant, they are the same persons; the three daughters being both heirs and next of kin; and if they did not take as heirs at law, they took an absolute interest in themselves in the personal estate. Great difficulties would arise from the construction, that heirs at law are intended, and applying it to personal property. He might have different heirs at law: heirs descending from himself as first purchaser: heirs ex parte paterna and ex parte materna. I am inclined to think, the court would in such a case consider him as the first purchaser; so as to take in both lines. However, there is no occasion to say anything upon that.

Declare, that the words "heir or heirs at law" in this will must be taken to mean heir or heirs at law at the time of the testator's death; and that the sum of £4000 vested in his three daughters.¹

¹Accord: *Abbott v. Bradstreet*, 3 Allen (Mass.) 587; *Dove v. Torr*, 128 Mass. 38; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; *Brown v. Brown*, 253 Ill. 466, 97 N. E. 680; *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; *Winn*, In re *Brook* [1910] 1 Ch. 278.

The same result is reached when the ultimate gift is to the "next of kin" of the testator. In re *Trusts of Barber's Will*, 1 Sm. & G. 118; *Lee v. Lee*, 1 Dr. & Sm. 85.

In *Allison v. Allison* [1910] 1 Ch. 278, the next of kin at the testator's death took, although the gift to such next of kin was contingent upon their sur-

WARE v. ROWLAND.

(Court of Chancery, 1847. 2 Phil. Ch. 635.)

Philip Slater, by his will dated the 18th of July 1806, directed his executors to purchase, in the 3 per cent. reduced annuities, the sum of £600 a year, upon trust to permit his wife to receive the said annuity for her life, and after her death in trust for his daughter Anna Maria Slater; and after her death, to distribute the principal amongst the

viving the life tenant, who was one of the six next of kin at the testator's death.

In some cases an additional and special context tending to show that "heirs at law" meant those who would have been the testator's heirs at law if the testator had died at the time of the death of the life tenant was held insufficient to change the primary meaning of the words. *Brown v. Brown*, 253 Ill. 466, 97 N. E. 680; 8 Ill. Law Rev. 121; *Abbott v. Bradstreet*, 3 Allen (Mass.) 587.

A fortiori, where the life tenant is not one of the heirs at law or next of kin of the testator at his death, the ultimate gift to the testator's heirs at law or next of kin, as the case may be, means primarily those who answer that description at the testator's death. *Doe dem. Pilkington v. Spratt*, 5 Barn. & Adol. 731; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660. In the latter case *Holmes, J.*, said (146 Mass. 348, 15 N. E. 662): "The general rule is settled that, in case of an ultimate limitation like that of the fund in question to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. *Dove v. Torr*, 128 Mass. 38, 40. *Minot v. Tappan*, 122 Mass. 535, 537. *Abbott v. Bradstreet*, 3 Allen [Mass.] 587. The reasons for this rule are, that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment. There is nothing to take this case out of the general rule, and it requires no discussion beyond what will be found in the decisions cited."

In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, interests were devised by a husband to his wife for life, with a remainder to the testator's heirs at law. By the third clause of his will the testator "in case his wife survived him" devised to his wife for life and then to the testator's heirs at law. By the fourth clause he provided in the alternative "in case my wife shall not survive me," then to the testator's heirs at law. "Heirs at law" in the fourth clause necessarily excluded the wife. "Heirs at law" meant the same thing in the third clause that it did in the fourth and therefore it excluded the wife in the third clause. See also, *Sears v. Russell*, 8 Gray (Mass.) 86.

NOTE ON THE MEANING OF HEIRS AT LAW OF THE TESTATOR IN A GIFT TO SUCH HEIRS WHERE THE SUBJECT OF THE GIFT IS PERSONAL PROPERTY ALONE, OR A MIXED FUND OF REAL AND PERSONAL PROPERTY.—Where personal property alone is bequeathed to heirs at law, those take who are entitled to personalty on an intestacy. *Alexander v. Masonic Aid Assn.*, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161; *Clay v. Clay*, 63 Ky. (2 Duv.) 295; *Lawton v. Corlies*, 127 N. Y. 100, 27 N. E. 847; *Ashton's Estate*, 134 Pa. 390, 19 Atl. 699; *Kendall v. Gleason*, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509.

Where a blended fund of real and personal property is devised to the trustee's "heirs," heirs has that meaning as to the whole fund which it has when applied to real estate alone. *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920; *Commonwealth v. Crowley*, 167 Mass. 434, 45 N. E. 766; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Schouler on Wills* (5th Ed.) §§ 522, 547; 2 *Jarman on Wills* (5th Am. Ed.) *62, *82. But see *Rawson v. Rawson*, 52 Ill. 62.

children of his said daughter, at their respective ages of twenty-four years, with maintenance in the meantime; after which the will proceeded as follows:—"If at the death of my said daughter she should leave no child or children living, or in the event of such child or children dying under twenty-four, then I direct my trustees to sell the said principal fund, and to pay thereout to my son-in-law J. G. Christian, and my grandson G. T. Rowland £500 each, if they should severally be alive at that time; and all the rest and residue of the said principal fund, with the interest and dividends, I give and bequeath to and amongst my heirs-at-law, share and share alike." In a subsequent passage of the will the testator gave the residue of his property to his daughter Anna Maria Slater by name.

Anna Maria Slater was the only surviving child of the testator at the date of his will, and she was also his sole heiress-at-law, and next of kin at the time of his death. Upon her death, in the year 1844, without having married, the heirs-at-law of the testator were Philip Slater Fall and Isaac Hodgson Wilson, two of his great-nephews, grandchildren of his two sisters; and his next of kin at the same time was Jemima Brune, a daughter of one of those sisters.

On the death of Anna Maria Slater, the principal fund set apart to answer the annuities, consisting of about £20,000 stock, was contested between three parties, the personal representative of Anna Maria, as the sole heiress-at-law and next of kin of the testator at the time of his death; Fall and Wilson, as his co-heirs-at-law at the death of Anna Maria; and Jemima Brune, as his sole next of kin at the same period.

The Vice-Chancellor of England having decided in favor of the first, the other two parties presented separate appeals, which came on to be argued together.

The LORD CHANCELLOR [LORD COTTENHAM]. If *Holloway v. Holloway*, 5 Ves. 399, lays down the rule correctly, there can be no doubt of its governing this case. In that case, as in this, the testator had a daughter, to whom he gave the interest, for life, of a sum of money which he directed should be taken out of his general estate and invested. In that case, as in this, after the daughter's death, her children, if any should be living at the time of her death, were to have the fund, and if she left no children, part of the fund in *Holloway v. Holloway* was to be held in trust for the personal representative of the daughter; and the remainder of the fund in trust for such person or persons as should be the testator's heir or heirs-at-law. In the present case, in the event of the daughter not leaving children the trustees were then, that is in that event, to sell the trust-monies, and to pay thereout to two other persons a certain part, if they should be severally living at that time; and then follow these words: "All the rest and residue of the said principal trust-monies, with the interest, increase, and dividends, I give and bequeath to and amongst my heirs-at-law, share and share alike;" and in a subsequent part of his will, he gave all the residue of his property to his daughter by name.

In both cases the word "then" is to be found; but in both it refers to the event and not to the time. In *Holloway v. Holloway*, the part of the fund to be separated from the rest was, in the event of the daughter not leaving children, to be her's absolutely; and the gift to the heirs is of the remainder of the fund; whereas, in the present case, if the persons to whom part of the fund was given did not survive the daughter, the gift to them was not to take effect; in which case, therefore, such part continued a constituent part of the fund, and would pass with it to the heirs. In *Holloway v. Holloway*, the trust for the heirs is, "for such person or persons as shall be my heir or heirs-at-law," there being, at the testator's death, three daughters his co-heirs-at-law and next of kin; and the word "shall" seemed to describe persons who should be found to the heirs at a future time. In this case, there being but one heir and next of kin, the testator gives "to his heirs-at-law share and share alike." He uses the plural, although there was but one: in *Holloway v. Holloway* he uses the singular, although there were three heirs. In *Holloway v. Holloway* the testator describes the duty of the trustees to arise upon the death of the daughter without issue. In the present case, after prescribing their duty as to the portion of the fund to be separated and paid to other persons, he makes a new and distinct gift to the heirs: "All the rest and residue of the said trust-monies I give and bequeath amongst my heirs-at-law, share and share alike." Having in view a provision for certain persons not to be permanent except in particular events, he no longer declares any trust of the fund so appropriated, but, in effect, lets it fall into the residue of his estate by giving the fund subject to such prior gift to "his heirs," who, being his daughter, was his general residuary legatee.

In all the particulars in which the two cases differ, the differences are in favor of the claim of the future heir in *Holloway v. Holloway*; but Lord Alvanley acting upon the authority of many earlier cases, held that the heirs at the death were the parties described. Such, he said, was the intendment of the law, and such must be understood to be the meaning of the words, unless by the context or express words they plainly appear to be intended otherwise, of which he did not find sufficient proof in that will. But if Lord Alvanley could not find such proof in that case, I certainly cannot find it in this, thinking, as I do, that there was much more of evidence tending to that proof in that case than there is in this. There is, indeed, nothing of such tendency in this case, except the description of heir in the plural. I have already observed, that there was a similar inadaptation of the expressions used to the state of the family in *Holloway v. Holloway*; but in the present case there is, I think, a very obvious solution of the apparent inconsistencies.

Suppose a testator, after making all such provisions as he was anxious about, finds that in certain events all these provisions might fail, and having no other object in view, might naturally wish that the law,

with respect to the disposition of his property, should take its course. If he so expressed his wish, his heir or next of kin would take in the event of the provisions failing; but as that might not take place until some distant period, it would be uncertain who would, at such time, stand in the place of such heirs; and the testator might therefore very naturally express such a wish in the terms used in this will; and it is not at all inconsistent with such an expression as to a future and contingent interest, that he should give the residue of his property, being a direct gift, to his daughter by name; or he might have contemplated the possibility of his daughter's death in his own lifetime.

Since *Holloway v. Holloway* several cases have occurred, and particularly *Jones v. Colbeck*, 8 Ves. 38, and *Miller v. Eaton*, Sir Geo. Cooper, 272, which, it might have been supposed, would have received a decision different from that which Sir W. Grant pronounced upon the authority of *Holloway v. Holloway*; but in none of those cases do I find any disapprobation expressed at that decision, or any intention entertained of overruling it; but in all, distinctions are taken, which, whether tenable or not, leave that authority untouched: yet in none of these is the claim of the heir at the death supported by circumstances so strong as are to be found in the present case.

There is, I think, no ground for the claim of the heir or next of kin to the exclusion of the daughter; and she filling the characters both of heir and next of kin, no question arises as to whether she took the fund in the one character or in the other; I therefore think the decree right, and that the appeals must be dismissed with costs.²

² Accord: *Bird v. Luckie*, 8 Hare, 301; *Rawlinson v. Wass*, 9 Hare, 673; *Wrightson v. Macaulay*, 14 Meeson & W. 214; *In re Frith*; *Hindson v. Wood*, 85 L. T. R. 455; *Rand v. Butler*, 48 Conn. 293; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387.

Contra: *Pinkham v. Blair*, 57 N. H. 226 (1876); *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76; *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; *Fargo v. Miller*, 150 Mass. 225, 22 N. E. 1003, 5 L. R. A. 690; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Delaney v. McCormack*, 88 N. Y. 174; *Tyler v. Theilig*, 124 Ga. 204, 52 S. E. 606.

Suppose, after an absolute interest to A., there is a gift over to the testator's heirs. *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699 (1897); *Doe v. Frost*, 3 Barn. & Ald. 546; *De Wolf v. Middleton*, 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146; *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279.

CHAPTER III

"SURVIVOR" CONSTRUED vs. "OTHER"

HARMAN v. DICKENSON.

(Court of Chancery, 1781. 1 Brown, Ch. Cas. 91.)

A bequest to two daughters of the testator, and if one should die without issue, then to the surviving daughter and her issue. One of the daughters married and died, leaving issue; then the unmarried daughter died.

LORD CHANCELLOR [THURLOW] held that the money went to the issue of the married daughter, although she did not survive her sister.¹

¹ The statement of this case is so very short and inaccurate, that it seems to require to be entirely new modelled. An exposition of it, therefore, from the Registrar's book, may be desirable:

The testator vested a sum of £10,000 New South Sea Annuities in trustees, with directions to suffer each of his two granddaughters, A. and B., to receive the dividends and interest to arise on £5000 part thereof, for her separate use; and, after the decease of each of such granddaughters, and when and as each of them should happen to die, to transfer and assign £5000 part of the said £10,000 New South Sea Annuities, unto and among such one or more of the children of each granddaughter so happening to die, who should be living at her decease, in such shares, &c., as his said granddaughter so dying should direct, &c.; and in default thereof, then in trust to assign, transfer, pay, and dispose of the said £5000 and the dividends thereof, unto or equally among all and every the children of his granddaughters so dying, which should be living at her decease, in equal proportions, &c.; the shares to be transferred to them at twenty-one, and the interest, in the meantime, for their maintenance; but in case either of his granddaughters should die without leaving issue, or that such issue should all die before their shares should become transferable respectively as aforesaid, then the £5000 so intended for the children of such granddaughters so dying without issue, or failing issue as aforesaid, and the dividends thereof should go and be paid, and transferred, &c., in manner following, viz., the yearly dividends to such surviving granddaughter for her own use for life, and the principal to go, survive and accrue, and be transferred to the child or children of any of such surviving granddaughters, in the same manner, &c., and subject to such power of distribution as were thereinbefore mentioned, concerning his or their original share of the £10,000 New South Sea Annuities intended for him, her, or them, after the decease of his, her, or their parents. And in case of the death of both his said granddaughters, without leaving issue of their or her bodies, or the death of such issue before their share should become payable, that then the trustees should transfer the said £10,000 unto, and equally between two of his testator's grandsons, therein named.

A., one of the granddaughters, married, and died in her sister's lifetime, leaving issue; then B., the other granddaughter, died unmarried.

The bill was filed on behalf of the infant children of A.

The Lord Chancellor held, on the clear manifest intention, that the whole fund went to the issue of A., the married daughter, although she did not survive her sister; and declared that the plaintiffs, the infants, were entitled to the two sums of £5000 and £5000, New South Sea Annuities, subject to the contingencies in the will of the testator concerning the same.—*Belt*.

Accord: (1) Where life interests are given to several with a remainder to the issue of each tenant for life, with a gift over on the death of any tenant

HARRISON v. HARRISON.

(Chancery Division, 1901. [1901] 2 Ch. 136.)

This was a petition by the now sole trustee of the will and seven codicils of Benson Harrison, the testator in this cause, who died in November, 1863. The object of the petition was to obtain the judgment of the court as to who, upon the proper construction of the will and codicils, became entitled on the recent death of Benson Harrison, a son of the testator, to a share of personal estate in which Benson Harrison was entitled to a life interest.

The testator had three sons, Matthew Benson Harrison, Wordsworth Harrison, and Benson Harrison, and two daughters, Mrs. Dobson and Mrs. Bollard, who all survived him.

The testator bequeathed his eight and a half sixteenth shares in the business of Harrison, Ainslie & Co. from the 1st day of January, 1864, upon trust to carry on the business in conjunction with the other partners, and stand possessed of three and a half of the shares upon trust, subject to the deduction of a sum of £250 a year during the life of his son Matthew Benson Harrison, to pay the whole or any part of the

for life without issue to the surviving tenants for life for their lives, and then to their issue with an ultimate gift over if all the tenants for life die without issue. Cases where realty involved: *Cole v. Sewell*, 4 D. & War. 1; 2 H. L. 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. 70; *Wake v. Varah*, 2 Ch. Div. 348; *Garland v. Smyth* [1904] 1 Ir. 35; *Cooper v. Cooper*, 7 Houst. (Del.) 488, 31 Atl. 1043.

(2) Where life interests are given to several with a remainder to the issue of each tenant for life, with a gift over on the death of any tenant for life without issue, to the surviving tenants for life in like manner as the original shares are given, with an ultimate gift over if all the tenants for life die without issue. Cases where real estate involved: *In re Tharp's Estate*, 1 De J. & S. 453; *In re Row's Estate*, 43 L. J. Ch. 347. Cases where personalty involved: *Holland v. Alsop*, 29 Beav. 498; *Hurry v. Morgan*, 3 Eq. 152; *In re Palmer's Trusts*, 19 Eq. 320 (ultimate gift over not mentioned).

In *Waite v. Littlewood*, L. R. 8 Ch. 70, 73 (1872), *supra*, Selborne, L. C., said: "I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word 'survivor' is to be read 'other.' I think there is certainly a very strong probability that any one using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into 'other,' and say it is used merely by mistake for the word 'other,' which is the true word to express the testator's meaning, there is undoubtedly a strong onus probandi cast upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning."

income and accumulations of income to Matthew Benson Harrison during his life at their discretion, and after his decease to hold the three and a half shares and accumulations of proceeds on the trusts declared for the children and remoter issue of the testator's son Matthew Benson Harrison (such issue to be born in his lifetime).

The testator by his will settled in the same way three shares (altered by codicil to two shares) in the business on his son Wordsworth Harrison, and the other two shares (altered by codicil to three shares) on his son Benson Harrison.

After these gifts the will proceeded: "And in case any of them the said Matthew Benson Harrison, Wordsworth Harrison, and Benson Harrison respectively shall die, and no child or other issue of such of them so dying shall acquire a vested interest in the shares hereby settled upon them respectively under the trusts or powers aforesaid, I direct that the respective shares of such of my said sons as shall so die, or so much thereof as shall not have been applied under the powers herein contained, and the annual income thereof, shall be held for the benefit of the survivors or survivor of them my said sons and their or his respective issue, in equal shares upon such and the like trusts, and to and for such and the like interests and purposes, and with, under, and subject to such and the like powers, provisos, and declarations as are herein declared with respect to their respective original share or shares."

The testator by his will also settled pecuniary legacies and one-third of his residue (altered by codicil to one-third of his ultimate residue) upon each of his three sons and their issue by reference to the settlements of the shares of his business, with gifts over in the case of the death of each son without issue who should take a vested interest in favor of the survivors or survivor and their issue. The legacy in favor of Benson Harrison and his issue was in the following terms: "And as to the sum of £26,000, the remaining part of the said sum of £66,000, and also as to one other third part of the ultimate residue of my said personal estate, I direct my said trustees or trustee for the time being to stand possessed thereof for the like interests and purposes and with the like powers in favor or for the benefit of my said son Benson Harrison and his children and other issue (such issue to be born in his lifetime), and with the like discretionary powers as to the payment of the interest or other annual produce thereof to my said son Benson Harrison during his life as are hereinbefore declared with respect to the shares in my said partnership businesses hereby settled upon him and them; and in case no child or other issue of my said son Benson Harrison shall acquire a vested interest in the said sum of £26,000 and his said share in my residuary personal estate under the trusts or powers hereinbefore contained or referred to, I direct that the same or so much thereof as shall not be applied under the said powers and the annual income thereof shall be held in trust for my surviving sons in equal proportions, upon the like trusts and for the like

intents and purposes, with the like powers, in favor of my said sons and their children or other issue, and with the like discretionary powers as to the payment of the interest or other annual produce thereof to them during their respective lives as hereinbefore declared with respect to their respective original shares in the said sum of £66,000 and in the residue of my said personal estate." There was no gift over in case all the sons died and had no issue who attained vested interests.

The testator's sons Matthew Benson Harrison and Wordsworth Harrison both died in the lifetime of their brother Benson Harrison, and left issue who took vested interests in their settled shares of the businesses and residue. Benson Harrison, the son, never had a child: he was now dead. The question raised on this petition was whether his share accrued to the shares of the issue of his deceased brothers, or whether there was an intestacy.

COZENS-HARDY, J. This petition involves the construction of the will and codicils of Benson Harrison, who died in 1863. He had three sons: (1) Matthew Benson Harrison, who died in January, 1879, having had three children; (2) Wordsworth Harrison, who died in June, 1889, having had five children; and (3) Benson Harrison the younger, who died in November, 1900, without issue. Under these circumstances the question arises who are entitled to a share in the testator's business which the son Benson enjoyed during his life, and also who are entitled to a share in the residue which he likewise enjoyed for life. [His Lordship read the material parts of the will, and continued:]

Now, it will be observed that there is no gift over on death of all three sons without issue, either as to the business or as to the residue.

On behalf of the children of Matthew Benson and Wordsworth, it has been argued that they take although their parents did not survive Benson. This contention is based (a) on the ground that there is sufficient matter in this will to justify the court in reading "surviving" as meaning "other," or (b) on the ground that "surviving" has the meaning of "stirpital" survivorship, or (c) on the ground that as a matter of construction the gifts are to the surviving sons for life and to the children or issue of the sons whether such sons survive or not.

On behalf of the next of kin it has been argued (d) that there is no justification for departing from the plain meaning of the language used, and that there is no gift except to the children or issue of sons who survived.

Reading the will without reference to authorities, I think it is reasonably clear that the only children or issue who can take Benson's share are children or issue of such of his two brothers as might survive him, and that, as neither of the two brothers survived him, there are no children or issue who can take. It is not for me to guess whether this is what the testator would have desired. My duty is to construe the language he has used.

But in a will of this nature it is not possible wholly to disregard prior decisions so far as they lay down principles, and my attention has been called, and properly called, to a great many authorities. I do not propose to discuss them at length, more particularly as the wit of man cannot reconcile them all. It is sufficient for me to say that I cannot adopt the view that "surviving" means "other," or means "surviving in person or in descendants," without running counter to *Beckwith v. Beckwith*, 46 L. J. (Ch.) 97; 25 W. R. 282, *Lucena v. Lucena*, 7 Ch. D. 255; *In re Horner's Estate* (1881) 19 Ch. D. 186, and *In re Benn*, 29 Ch. D. 839, three of which are decisions of the Court of Appeal.

I cannot, however, pass over so lightly that which I have called the third argument on the part of the children. It is supported by, if not based upon, the considered judgment of Kay, J., in *In re Bowman*, 41 Ch. D. 531. After dealing with the particular will before him, the learned judge lays down three propositions as correctly summing up the law in cases of this nature:

"It seems to me that the decisions establish the following propositions:

"Where the gift is to A., B., and C., equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. 1

"If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. 2

"They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares." 3

[repealed in this case]

Of these three propositions the first and second seem to be well established, and I adopt them without hesitation. The third proposition, which covers the present case, has caused me considerable difficulty. Kay, J., has stated this proposition as the result of the authorities, and it is necessary to consider how far the authorities cited bear out this view and how far those authorities have been overruled. They are *Hodge v. Foot*, 34 Beav. 349, *In re Arnold's Trusts* (1870) L. R. 10 Eq. 252, and *In re Walker's Estate*, 12 Ch. D. 205.²

Now, in *Hodge v. Foot*, 34 Beav. 349, Sir John Romilly proceeded partly upon the "scope and object" of the will, and the circumstance that an intestacy would result unless "surviving" was read as "other." It must, I think, be admitted that those reasons cannot now be accept-

² See also *Balch v. Pickering*, 154 Mass. 363, 28 N. E. 293, 14 L. R. A. 125; *Fox's Estate*, 222 Pa. 108, 70 Atl. 954; *Carter v. Bloodgood's Exr's*, 3 Sandf. Ch. (N. Y.) 293.

ed: see the observation of Fry, L. J., in *In re Benn*, 29 Ch. D. 842. Sir John Romilly also relied upon *Harman v. Dickenson* (1781) 1 Bro. C. C. 91, where, however, there was a general gift over such as would bring the case within Kay, J.'s second proposition, and upon *Hawkins v. Hamerton*, 16 Sim. 410. In that case Shadwell, V. C., did not lay down any general principle. There was an express direction that "after the decease of my said son and daughters, then I will and direct that the whole of such residue * * * shall be paid and divided amongst all and every the children of my said son and daughters in equal parts." The class was not limited to children of such of the son and daughters as should survive the wife. And the subsequent, and apparently unnecessary, clause, that in case any of the son and daughters should die without leaving issue, then the share given to him, her, or them so dying should go and be divided "amongst the survivor or survivors of my said children and their issue in the like equal parts, shares and proportions" was construed so as to make it consistent with the former gift. This is the view taken of that case by Wood, V. C., in *In re Corbett's Trusts*, Joh. 591.

In *In re Arnold's Trusts*, L. R. 10 Eq. 252, Malins, V. C., proceeded upon a view which has since been distinctly repudiated by the Court of Appeal. I may refer to *Wake v. Varah*, 2 Ch. D. 348. I think *In re Arnold's Trusts*, L. R. 10 Eq. 252, cannot be regarded as a binding authority: see the observation of Lindley, L. J., in *In re Benn*, 29 Ch. D. 841. In *re Walker's Estate*, 12 Ch. D. 205, was a decision of Hall, V. C.; but in the subsequent case of *In re Horner's Estate*, 19 Ch. D. 186, the Vice-Chancellor in effect said (*Ibid.* 191) that his earlier decision could not be supported having regard to *Beckwith v. Beckwith*, 46 L. J. (Ch.) 97, 25 W. R. 282. It is, I think, not incorrect to say that not one of the three decisions relied upon by Kay, J., as warranting his third proposition can now be regarded as satisfactory, or as laying down any principle which a judge of co-ordinate jurisdiction ought to follow.

Against these decisions there is a considerable body of authority. I refer especially to *Milsom v. Awdry*, 5 Ves. 465, 5 R. R. 102. There there was a residuary bequest to the testator's nephews and nieces equally per stirpes for their lives, and after the death of either of his said nephews and nieces his or her share to be paid equally unto and among his or her children. And if any of his said nephews and nieces should die without leaving any child, then the share or shares of him, her, or them so dying "should go to and among the survivors or survivor of them in manner aforesaid." The Master of the Rolls held that the words "in manner aforesaid" meant in the same manner as the original share—namely, for life only, and that the share of each, both original and accruing, went to the children, if any. This seems to be precisely the case contemplated by Kay, J., third proposition. But the Master of the Rolls held that on the death of the last nephew without

issue there would be an intestacy, although there were children of deceased nephews and nieces. *Milson v. Awdry*, 5 Ves. 465, 5 R. R. 102, was approved by Wood, V. C., in *In re Corbett's Trusts*, Joh. 591, which is indeed a strong decision in the same sense. It is true that Malins, V. C., in *In re Arnold's Trusts*, L. R. 10 Eq. 252, 256, said he was satisfied that *Milson v. Awdry*, 5 Ves. 465, 5 R. R. 102, was "contrary to a long line of subsequent authorities, and that it is no longer a binding authority." But for the reasons above stated, and having regard to the judgments of the Court of Appeal, I am not able to accept this view. *Milson v. Awdry*, 5 Ves. 465, 5 R. R. 102, must, I think, be considered as good law.

It follows that in my opinion the third proposition in *In re Bowman*, 41 Ch. D. 525, is not warranted by the authorities, and I must decline to follow it. In my view it makes no difference whether the gift of an accruing share is to the survivors for life with remainder to their children expressly, or is to the survivors and their children by reference to the limitations of the original shares.

I must therefore declare that on the death of Benson without issue, his share in the business fell into the residue, and that there is an intestacy as to his share of residue thus augmented.

This declaration will probably suffice to enable minutes to be prepared for effecting the division of the funds.³

³ Approved *Inderwick v. Tatchell*, [1901] 2 Ch. (C. A.) 738.

CHAPTER IV
VESTING OF LEGACIES

CLOBBERIE'S CASE.

(Court of Chancery, 1677. 2 Vent. 342.)¹

In one Clobberie's Case it was held, that where one bequeathed a sum of money to a woman, at her age of twenty-one years, or day of marriage, to be paid unto her with interest, and she died before either, that the money should go to her executor; and was so decreed by my LORD CHANCELLOR FYNCH.

But he said, if money were bequeathed to one at his age of twenty-one years; if he dies before that age the money is lost.²

On the other side, if money be given to one, to be paid at the age of twenty-one years; though, if the party dies before, it shall go to the executors.³

¹ The decree was confirmed in the House of Lords. S. c., sub nom. Clobberie v. Lampen, Freem. C. C. 24.

² So, where the gift is contained only in the direction to pay at the expiration of a certain number of years after the testator's death, the gift is contingent on the legatee surviving that time. *Smell v. Dee*, 2 Salk. 415; *Bruce v. Charlton*, 13 Sim. 65; *In re Eve*, 93 L. T. R. 235; *In re Cartledge*, 29 Beav. 583; *Hall v. Terry*, 1 Atk. 502; *In re Kountz's Estate*, 213 Pa. 390, 62 Atl. 1103, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427; *Id.*, 213 Pa. 399, 62 Atl. 1106; *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; *Reid v. Voorhees*, 216 Ill. 236, 74 N. E. 804, 3 Ann. Cas. 946.

Fearne on Contingent Remainders, p. 1, Butler's note: "A. conveys land by lease and release to B. and his heirs, to the use of C. and his heirs, from the 1st day of the following January, or devises land to C. and his heirs, from the 1st day of January next after the testator's decease. In the first case, the fee remains in A.; in the second, it descends to the heir at law of A. till the day arrives upon which C. is to be entitled to the land, for an estate in fee simple in possession. In the meantime, C. has not an estate in possession, as he has not a right of present enjoyment; he has not an interest in remainder, as the limitation to him depends on the estate in fee simple, which in the first case remains in A., and in the second descends to A.'s heir; he has not a contingent interest, as he is a person in being and ascertained, and the event, on which the limitation to him depends, is certain; and he has not a vested estate, as the whole fee is vested in A. or his heirs. He therefore has no estate, the limitation is executory, and confers on him and his heirs a certain fixed right to an estate in possession at a future period."

³ Accord: *In re Bartholomew*, 1 Mac. & G. 354; *Shrimpton v. Shrimpton*, 31 B. 425; *Maher v. Maher*, 1 L. R. Ir. 22; *Chaffers v. Abell*, 3 Jur. 577.

But the executor or administrator of the legatee shall not have the legacy until the legatee would have reached the time specified if he had lived. *Rodin v. Smith*, Amb. 588 (1744); *Maher v. Maher*, 1 L. R. Ir. 22 (1877). *Semble*, except where the whole interest of the legacy is given in the meantime. *Rodin v. Smith*, *supra*.

In *Furness v. Fox*, 1 Cush. (Mass.) 134, 48 Am. Dec. 593 (1848), the testator provided as follows: "In the first place I give and bequeath to my grandson, John William Furness, son of my son John C. Furness deceased, five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid

CHANDOS v. TALBOT.

(Court of Chancery, 1731. 2 P. Wms. 601.)⁴

The last question was touching the legacy of £500 which by the first part of the will of Sir Thomas Doleman was given to his nephew Lewis Doleman, to be paid at his age of twenty-five, and so a vested legacy as to the personal estate,⁵ after which the testator's real estate was charged therewith; and in regard Lewis Doleman died an infant of about the age of fifteen, and before the time appointed for the payment, it was insisted that this being a legacy charged upon land, did sink for the benefit of the hæres factus or natus; that here the premises chargeable with

over to him by my executor hereinafter named." "All the rest residue and remainder of my estate both real and personal of every sort and description and wherever situated or being I give devise and bequeath to my children" (naming five persons) "their heirs and assigns forever to be equally divided between them." The legatee, John William Furness, died before arriving at the age of 21 years, and the executor sought to recover the money which had been paid over to him. There was a verdict for the plaintiff, but exceptions were allowed and a new trial ordered, the court holding that the legacy was not contingent on the legatee surviving 21. Metcalf, J., said: "We have, therefore, only to inquire whether, in the case before us, the words, "if he shall arrive at the age of twenty-one years," relate to the words which precede, or to the words which follow them; or, in other language, whether the arrival of the legatee at the age of twenty-one years is a condition precedent to the gift of the money, or only to the payment of it into his hands. And we are of opinion that the testator meant to make an immediate bequest to the grandson, as the representative of his deceased father, but that the money should not go into his hands, during his minority. This seems to us to be the most natural construction of the mere words of the bequest, although the testator's meaning is obscured by the unfortunate collocation of those words, and the inartificial punctuation of the sentence. We are somewhat confirmed in this construction by the only other devising clause in the testator's will. After the bequest to his grandson, he gave all the residue and remainder of his property to his five children who were then alive, to be equally divided among them, without any limitation over, by express mention, of the five hundred dollars, in the event of his grandson's dying under age. It is true that this residuary clause would have passed to the five children the money bequeathed to the grandson, if the legacy to him had failed of effect; but it is hardly probable that the testator knew that such would be its legal operation."

⁴ Only part of the case is here given.

⁵ See *In re Hudsons*, Dru. & Sugd. 6, where the legacy was vested so far as it was charged upon a term.

So, if interest be given in the meantime, that will not vest the legacy so far as it is charged upon land. *Gawler v. Standerwick*, 2 Cox, 15. But see *Murkin v. Phillipson*, 3 M. & K. 257.

"It is a well-established rule as to portions or legacies payable out of lands, that if made payable at a certain age, a marriage, or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land; but if the payment be 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, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been in esse at the time of the death of the tenant for life, as in *Emperor v. Rolfe*, 1 Ves. Sen. 208; *Cholmondley v. Meyrick*, 1 Eden, 77 85; and many other cases." Per Lord Cottenham, C., in *Evans v. Scott*, 1 H. L. C. 43, 57 (1847).

this legacy, amongst other parts of the real estate of the testator, were devised to trustees and their heirs, upon the trusts and to the uses hereinbefore mentioned; it was true in case of a bequest of any sum of money out of a personal estate to one, to be paid at his age of twenty-one or twenty-five, if the legatee dies before the time of payment, it becomes notwithstanding a vested legacy transmissible to executors or administrators; but where such legacy is devised out of a real estate, and the legatee dies before the time appointed for payment, there the legacy shall sink into the land; because equity will not load an heir for the benefit of an executor or administrator.

At another day, this cause having been adjourned in order to search precedents, the LORD CHANCELLOR [KING] said he had looked into the case of Yates and Phettiplace in 2 Vern., and also that of Jennings and Lookes [2 P. Wms. 276], both which came fully up to the present case, viz., that where the personal estate was not sufficient, and the real estate in failure thereof was made liable to answer the legacies, in case of the legatee's dying before the legacy became due, the charge upon the land determined; that it seemed but a very slight and superficial diversity between a legacy given at twenty-one, and payable at twenty-one; and though it had been established in the spiritual court, as to legacies given out of a personal estate, it did not deserve to be favored or countenanced, where the legacy is charged upon land, and the infant legatee dies before twenty-one, or before the time when the legacy is made payable; that there was not any the least difference between a sum of money charged by a will on land, payable to an infant at twenty-one, and where such charge arises by a deed. That the authorities before mentioned show there is no difference where the real as well as the personal estate is charged, for in such case, as far as the executor or administrator claims out of the latter, he shall succeed according to the rule of that court where these things are determinable, even though the infant legatee dies before the time of payment, but as far as the legacy is charged upon the land, so far shall it, on the legatee's dying before the legacy becomes payable, sink; and this being the rule which has of late universally prevailed, be the legatee a child or a stranger, it would be of the most dangerous consequence, and disturb a great deal of property for him to break into it.

Wherefore he thought that the £500 legacy payable to Lewis Doleman at twenty-five, on his dying before that time, as to so much thereof as was payable out of the land, must sink.⁶

⁶ "I have often heard it said, that the reason why legacies, &c., charged on land, payable at a future day, shall not be raised, if the legatee dies before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the heir is a favorite of a court of equity, and ought to have the preference of the representative of a legatee, and likewise that the court will go as far as they can in keeping the real estate entire, and as free from encumbrances as possible.

"But I think the court has never gone upon such reason, but the true reason I take to be this, that the court will govern themselves as far as is con-

ATKINS v. HICCOCKS.

(Court of Chancery, 1737. 1 Atk. 500.)

A testator devises in these words, "I devise to my daughter Elizabeth Hiccocks, the sum of £200 to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of my two sons William and Samuel Hiccocks, or the survivor of them; and my will is, that my said daughter Elizabeth shall yearly receive, and be paid, until such time as she shall marry, the sum of twelve pounds, free and clear of all taxes and impositions whatsoever." And willed, that his leasehold estate called ———, should stand charged with the payment of the said £12 per annum, and likewise with the payment of the £200 when the same should become due, and devised the said leasehold premises, and his whole personal estate, to his two sons, and made them his executors.

Elizabeth died after 21, but without being married; and the present plaintiff, as her administrator, brought a bill against the executors of Hiccocks for the £200.

The general question, Whether the legacy vested in Elizabeth, and whether it so vested as to be transmissible to her administrator?

LORD CHANCELLOR [HARDWICKE]. I am of opinion this was not a vested legacy; in the common cases of legacies to be paid at the age of 21, there is a certain time fixed, not to the thing itself, but to the execution of it, and the time being so fixed, must necessarily come: but when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court, where it has been held that the legacy at all events should be paid. The rule as to the vesting is founded upon another rule, certum est quod certum reddi potest, and it is plain that the testator did not regard the point of time, but the fact that was to happen, the marriage, which makes it a legacy on a condition, and cannot be demanded till the condition be satisfied.

It has been argued by Mr. Attorney-General, that this bequest differs not from a legacy given to be paid at 21, which vests immediately, and the time of payment only is postponed.

But it has been always held, with regard to such a limitation of payment at 21, that it is debitum in præsentī, solvendum in futuro, and the payment postponed merely on account of the legatee's legal

sistent with equity by the rules of the common law. In the case of personal estate, the rule is the same here as in the civil law, that there may be an uniformity of judgments in the different courts; but in the case of lands, the rule of the common law has always been adhered to: as suppose a person should covenant to pay money to another at a future day, if the covenantee dies before the day of payment, the money is not due to his representative. The same rule holds in the case of a promise to pay money." Per Lord Hardwicke, C., in *Prowse v. Abington*, 1 Atk. 482, 486 (1738). See, accord *Pearce v. Loman*, 3 Ves. 135 (1796).

incapacity of managing his own affairs till that age; and this has been the established rule of this court ever since *Clobberie's Case*, 2 Ventris 342.

In the Digest, lib. 35, tit. 1, lex 75, de Conditionibus, &c., it is held that *dies incertus conditionem in testamento facit*, and these are the words of the text, and not of the commentator; so that a time absolutely uncertain is put on the same footing as a condition; but as the civil law is no further of authority than as it has been received in England, let us see what our own authors say. Swinbourn, part 4, sec. 17, page 267, old edition, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee die before, the legacy is lost. God. Orp. Leg. 452, is to the same effect.

It has been insisted, that the testator's giving £12 per annum to Elizabeth till the contingency of her marriage, is in the nature of interest for the £200 and that from thence it appears to be his intention, that the legacy should vest in the meantime; but whenever this doctrine has been allowed, the payment of the principal hath been certain, and so not similar to the present case, because here this is not meant as interest, for it is an annuity of £12 per annum charged upon, and issuing out of an estate.⁷

The case in 1 Salk, 170, *Thomas v. Howell*, was plainly a condition subsequent, and being made impossible by the act of God, it was adjudged that the condition was not broken, and consequently should not divest the estate out of the devisee.

The second point is very strong against the transmissibility, which is her marrying with the consent of her two brothers, and shows plainly the testator intended a condition precedent, that if she married she was to have £200 for her portion; but if she died before, there was no occasion to have it raised for the benefit of a stranger.

It is true indeed, as there is no devise over, the clause of consent might be only in *terrorem*, but in all cases, where the condition of marrying is annexed, it is necessary that the condition, as to the marrying at least, should be performed, though she is not obliged to marry with consent.

I am the more satisfied, because it appears to be the intention of the testator, that this £200 should be in the nature of a marriage portion, for he has taken it out of a leasehold estate; and if she did not marry, it was manifestly his design that it should sink in that estate for the benefit of his sons: therefore I think this bequest is to be considered as a condition precedent, which not being performed, the legacy did never vest, and consequently the administrator can make no title to it. The bill dismissed.⁸

⁷ See *Watson v. Hayes*, 5 Myl. & Cr. 125 (1839).

⁸ Accord: *Morgan v. Morgan*, 4 De G. & S. 164; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Corr v. Corr*, 1 R. 7 Eq. 397; *Taylor v. Lambert*, 2 Ch. D. 177.

BOOTH v. BOOTH.

(Court of Chancery, 1799. 4 Ves. Jr. 399.)

Robert Brage by his will, dated the 21st of January, 1777, devised his real estate to his great-nephew Robert Booth and his issue in strict settlement, with remainder to his brother Richard Booth and his issue in strict settlement; with similar remainders to their sisters Phœbe Booth and Ann Booth, and their issue respectively.

The testator also gave a legacy of £600 to his great-nephew Robert Booth, and £100 to Robert Lathropp, whom he appointed sole executor; and, after giving some other pecuniary legacies, he gave all the residue of his estate and effects, which should remain after paying his debts, funeral expenses, charges of proving his will, and the legacies, to Sir John Chapman and Robert Lathropp, their executors, administrators, and assigns, upon trust as soon after his decease as conveniently might be to collect and get in same, and invest same from time to time in some of the public funds or upon government or real security in their joint names or in the name of the survivor with power to change such funds; and upon trust to pay the dividends and produce thereof, as the same should from time to time become due, equally between his great-nieces Phœbe Booth and Ann Booth until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively.

The testator died soon afterwards. Richard Booth took a considerable real estate upon the death of his father.

At the date of the will Phœbe Booth and Ann Booth were both of age; and they filed the bill to have their interests in the residue declared: but the MASTER OF THE ROLLS thought that, as the plaintiffs might marry, the question was not ripe for decision.

By the decree made in that cause on the 13th of June, 1793, the fund was ordered to be transferred to the Accountant-General; and an inquiry was directed for the purpose of ascertaining who were the testator's next of kin at the time of his death.

The report stated that the plaintiffs and their two brothers Robert and Richard Booth were the testator's next of kin at the time of his death; and that the plaintiff Phœbe Booth died in June, 1797, without having been ever married. By her will, made shortly before her death, she appointed her brother, the defendant Richard Booth, and the plaintiff Ann Booth, her executors; and having disposed of certain real estates, and given a legacy of £100 to her brother Richard Booth for his trouble as one of her executors, she gave the residue of her personal estate to the plaintiff Ann Booth, but with such request annexed, as therein mentioned.

The cause coming on for farther directions, the question was, whether the share of Phoebe Booth in the residue of the personal estate of Robert Bragge under his will was an absolute vested interest in her, to be transferred to her executors, or whether in the event of her having died unmarried it belonged to the next of kin of Robert Bragge as undisposed of.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. This case deserved very great consideration, lest it should be supposed, that the court had by deciding it transgressed the rule laid down as to legacies given payable at an uncertain time. When it was argued, I was impressed with an idea, that it was distinguishable from all the cases in respect of its being not the case of a legacy, but a residue; and all the cases, in which that rule prevailed, were cases of mere legacies, to be paid out of the personal estate by the executor; the residuary legatee, or the executor, if he was to have the residue, having only to pay at the time the legacy became due, and taking the residue. But this is not that case, but the case of a residue.

I do not see, that any of the pecuniary legacies are given to Phoebe and Ann Booth; though I do not think, that would make much difference: they are both comprehended in the limitations of the real estate. It is to be observed, that Robert Lathropp only is executor: Sir John Chapman is a trustee, but not executor. Therefore it is not a gift of the residue to the executor, but to him and another person upon these trusts. Both these residuary legatees were adults at the time the residue was given to them: if it had been otherwise, it might have made some ingredient in the argument. The event that has happened, is that one of them has died without having ever been married; and the bill⁹ is filed by her sister claiming under her will, and insisting, that she was entitled, though she never married; that marriage was not a condition precedent, upon which the residue was to vest; but merely denoted the time, at which the residuary legatees were to be put in full possession of the property.

The argument upon the part of the plaintiff turned upon a ground, that is frequently taken upon legacies payable at a future day, which on account of the death of the legatee never arrives; that the time being mentioned merely as the time of payment on account of the situation and circumstances of the party is never held to defeat the legacy. The cases were commented upon on both sides. Atkinson v. Paice [1 B. C. C. 91], was mentioned; which I lay out of the case. It does not prove much. Of the other cases, Boraston's Case [3 Co. 19a], Doe v. Lea [3 T. R. 41,], Goodtitle v. Whitby [1 Burr. 228], and Mansfield v. Dugard, 1 Eq. Ca. Ab. 195, are in favor of the plaintiff: but it was properly observed, they were all cases of an absolute interest; the possession of which was to be given at a certain time. The reasoning upon them would be sufficient for the plaintiff,

⁹ A supplemental bill was filed after the report in the original cause.

if applied to this case; for the reasoning is, that though the testator has given a partial interest till that time, those words of reference as to the time are not to be considered as referring to the time, upon which only the devise is to take place, but the time, at which the devisee or legatee is to be entitled to the full and absolute benefit of the bequest; and a reason is given, which does not apply to this case, that it cannot be supposed, that, if the devisee or legatee should die before that time, leaving children, the intention was, that children should not take. I shall not comment upon the cases. The arguments of the judges, who decided them, are very full to show, that such words do not make a condition precedent, but merely denote the time of absolute possession.

It is very true, the cases relied on by the defendant, *Garbut v. Hilton* [1 Atk. 381], *Atkins v. Hiccocks* [Ib. 500], and *Elton v. Elton* [3 Atk. 504], are very distinguishable from this. First, they are all cases of mere legacy, not of a residue: secondly, in the very gift of the legacy it is perfectly clear, as Lord Hardwicke observes in *Elton v. Elton*, that they are all cases of a condition absolutely precedent. It is impossible not to see, that the testator meant the legatee to bring himself into the circumstances specified. In all those cases the legacy was given upon a marriage with a given consent. It is impossible in that sort of case to say, the legatee could be entitled without that. It would be to put a violation upon the very words of the bequest. Therefore the plaintiff's counsel are fully justified in saying, those cases cannot be brought to bear upon this question. They are cases of legacies, and conditions precedent. They were considered and determined as such.

For the defendant, besides the cases, I have mentioned, the late case of *Batsford v. Kebbell* [3 Ves. Jr. 363], was relied on; in which the Lord Chancellor took a great distinction between a bequest of a sum of money payable at a future time and a gift of the interest until a certain time and then a gift of the principal. His Lordship gives a short judgment; but upon consideration of all the cases he laid it down, that it is necessary to show, the principal was intended to be given, before the time arrived; and in that case he for that reason held, the legacy (for that was the case of a legacy) never attached.

It is to be considered, whether this case is in its circumstances distinguishable from all these cases; and I am of opinion, it is. It is distinguished from *Batsford v. Kebbell* in this respect: that this is in fact an absolute gift of the residue to trustees. It may be said, so much of the trust as is not sufficiently declared must go to the person, who would be entitled, in case there was no disposition: but I think, it is equivalent to saying, in trust for them, to pay and dispose of the dividends and interest to them till their respective marriages, and then to assign and transfer the principal: for it is not merely a gift of the interest until marriage, stopping there, and after the marriage a gift of the principal: but it is impossible not to see, that these words

are equivalent to a gift of the principal. The testator considers it as given. He speaks of it as their shares of the residue. The day of their marriage is the time, at which they are to be put into actual possession of their shares. I cannot construe this otherwise than an absolute gift of the residue, qualified only thus, that until their marriages, until when, I suppose, he thought they would not want it, they were not to have the actual possession.

That there is a difference between a bequest of a legacy and a residue with reference to this point cannot be denied either upon principle or precedent. Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property. How did this testator dispose of it? It might be supposed natural, that they would marry. It might be in his idea, that there might be a possibility, that they might not marry. If he did not mean by the residuary bequest to dispose of the absolute interest, it was natural, that he should declare, what should be the case, if they should not marry. He has done that. So much as to the principle.

Next, how far in point of precedent has a gift of the residue been held distinguished from a mere legacy? In *Monkhouse v. Holme*, 1 Bro. C. C. 298, Lord Loughborough comments upon all the cases; and among others mentions *Love v. L'Estrange* [3 P. C. C. (Toml. Ed.) 59]; upon which I mainly rely in this case. His Lordship says, that case was determined upon the ground of its being a residue; and, if the report is correct, he gives a decided opinion, that *Love v. L'Estrange*, if it had not been the case of a residue, would not have been decided as it was; being of opinion, that, if it had not been the case of a residue, but a legacy, it would not have been a vested interest. I am not now commenting upon the point, whether that argument strictly applies to *Love v. L'Estrange*. It is enough for me to avail myself of Lord Loughborough's comment upon it; who was evidently of that opinion upon the ground, upon which *Batsford v. Kebbell* was decided. In *Monkhouse v. Holme* Lord Loughborough seems to be of opinion, as he was in *Batsford v. Kebbell*, that in *Love v. L'Estrange*, there being no gift of the principal until the age of twenty-four, and only a partial gift in the meantime, from the age of twenty-one, not so much as the interest, the principal could not attach until that time, unless upon its being the case of a residue; which distinguished it from *Batsford v. Kebbell*, a case in other respects very like it. I do not find, that is mainly insisted on in the printed case of *Love v. L'Estrange*; and I see, in *May v. Wood* [3 B. C. C. 471], I stated that fact, that it was not insisted on; and that I did not see any difference between the cases of a legacy and a residue. If I did say so, I spoke with too much latitude; for I then thought, and I now think, there is a distinction; though in that case it made no difference; the words being so like those in *Doe v. Lea*, and *Goodtitle v. Whitby*; in the latter of which some principles are laid down by Lord Mansfield, with regard to all words, that may be construed words of reference to

the time, at which possession is to be given, and not words of condition, that seem to me to govern the decision of this case. The first principle laid down by Lord Mansfield is, that wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property.

In that case the estates were given to trustees and their heirs, upon trust to apply the rents and profits for the maintenance and education of the nephews of the devisor during their minorities; and when and as they should respectively attain the age of twenty-one then to the use of his said nephews.

Another principle laid down by Lord Mansfield is, that, where an absolute property is given, and a particular interest given in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him, &c., the rule is, that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession.

If this will had mentioned a particular age instead of marriage, there could be no doubt, that these cases would have absolutely governed it; for though I do not deny, that dies incertus in testamento conditionem facit, I say, admitting that principle that marriage is the time, at which they were to be put in possession. It is true, the testator fixes the marriage to the time at which they were to be put in possession. It is not a marriage under any qualification, but whenever they should marry. Where is the absurdity, that that time should be fixed, as the time for their being put into possession? The testator thought that the time at which they might want it, and until which it would be better applied upon that trust for their benefit.

Therefore, without breaking in upon that rule of the civil law, or the cases before Lord Hardwicke, to whose doctrine I wish to refer, that, it is impossible not to see, that the testator in those cases did mean those circumstances to be conditional, I am of opinion, there is nothing in this will to show a condition precedent to the vesting of this interest. Another reason may be given. Suppose, one of these sisters had married, and had children: this interpretation puts it in the power of the other to provide for those children. It has been determined, that where a legacy is given, payable at the age of twenty-four, the legatee at the age of twenty-one may dispose of it by will. The same reason applies to this case.

Upon these circumstances, and the ground, that this is a residue, and upon the words of the bequest in this case, I am of opinion that the plaintiff is well entitled under the will of her sister to her share of the residue.

The counsel for the plaintiff applied for a direction for payment of her moiety.

MASTER OF THE ROLLS. I doubt as to giving that direction. In all these cases the court has never yet accelerated the payment. It may be a vested interest, and disposable, but not tangible in the mean time.

It is worth consideration upon the question, whether the survivor has any right to demand payment and to be put in possession of this vested interest until the day of her marriage. Suppose, in Love v. L'Estrange, where the testator had anxiously given only £10 a year till Walter Nash should attain the age of twenty-four, having attained the age of twenty-one he had brought his bill: does it follow, that he would have been put in possession? No other person could have had any advantage from it in that case. It is like the case of an infant, who may dispose of property, though he cannot have possession of it, until he is of age. I will consider of this point. I am not sure, it may not be a wise provision, intended for the benefit of the legatee.

By the decree it was declared, that the plaintiff Ann Booth and the defendant Richard Booth as executor and executrix of the testatrix Phoebe Booth are entitled to one moiety of the Bank Annuities and Bank Stock, constituting the clear residue of the personal estate of the testator Robert Brage, and it was ordered, that one moiety of the said Bank Annuities and Bank Stock be transferred accordingly, to be applied by them to the purposes in the said testatrix's will mentioned; and that the interest and dividends to accrue due on the other moiety of the said Bank Annuities and Bank Stock be from time to time paid to the said Ann Booth during her life; and in case of her marriage the said Ann Booth, or in case of her death before marriage any other person interested in the said Bank Annuities and Bank Stock, are to be at liberty to apply to the court, as there shall be occasion.

SAUNDERS v. VAUTIER.

(High Court of Chancery, 1841. 1 Craig & P. 240.)

Richard Wright, by his will, gave and bequeathed to his executors and trustees thereafter named, all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon until Daniel Wright Vautier, the eldest son of his (the testator's) nephew, Daniel Vautier, should, attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely; and the testator gave, devised, and bequeathed all his real estates, and all the residue of his personal estate whatsoever and wheresoever, to his executors and trustees thereafter named, their heirs, executors, administrators, and assigns, upon trust to sell and convert into money all his said real and personal estates immediately after his decease, and to invest the produce arising therefrom in their names in the £3. per cent consolidated bank annuities, and to stand possessed thereof upon

trust for the said Daniel Vautier and Susannah his wife, and the survivor of them, during their respective lives, and from and after the decease of the survivor of them, upon trust for their children, equally, when and as they should, severally, being sons, attain the age of twenty-one years, or being daughters, attain that age or be married, with the consent of their trustees and guardians, and in the meantime to apply the interest and dividends, of the respective shares of such children for their benefit, education, or maintenance; and in case any child should die before attaining a vested interest in the fund, then the testator directed that the share of the child so dying should go and survive to the others: and the testator nominated and appointed his friends John Saunders and Thomas Saunders his executors and trustees.

The testator died on the 21st of March, 1832, at which time a sum of £2000. East India stock was standing in his name. The executors, having proved the will, left that sum standing in the testator's name, but invested the dividends on it, as they accrued, in the purchase of like stock in their own names.

Shortly after the testator's death, this suit was instituted by the executors against Susannah Vautier and her children (Daniel Vautier having died in the testator's lifetime,) for the purpose of having the trusts of the will carried into execution under the direction of the court; and a decree was accordingly made, directing the usual accounts. A petition was afterwards presented on behalf of Daniel Wright Vautier, who was then a minor, praying the appointment of a guardian, and an allowance for his past and future maintenance: and, the usual reference having been directed, the master, by his report, found, amongst other things, that the petitioner's fortune consisted of the sum of £2277. 6s. 7d. East India stock, being the amount of the above-mentioned sum of £2000., with the accumulations thereon since the testator's death, and of one-seventh share of the testator's residuary estate, which would be divisible on the death of the petitioner's mother. He also found that the petitioner had been educated and maintained, since the death of the testator, by his mother, and that she had properly expended in such maintenance the sum of £338. 2s., which he found ought to be paid to her by sale of a sufficient part of the £2277. 6s. 7d. East India stock; and he found that the sum of £100. per annum would be a proper sum to be allowed for the maintenance and education of the petitioner for the time to come during his minority, and that it should be paid out of the dividends of the East India stock.

By an order of the Master of the Rolls, (Sir C. C. Pepys,) dated the 25th of July, 1835, that report was confirmed and carried into effect, and, in pursuance of that order, the trustees continued, during the minority of Daniel Wright Vautier, to pay the sum of £100., out of the dividends of the stock, for his maintenance.

Daniel Wright Vautier attained twenty-one in the month of March, 1841, and being then about to be married, he presented a petition to

the Master of the Rolls,¹⁰ praying that the trustees might be ordered to transfer to him the East India stock, or that it might be referred to the master to inquire whether it would be fit and proper that any and what part of the stock should be sold, and the produce thereof paid to the petitioner, regard being had to his intended marriage, and for the purpose of establishing him in business.

Upon that petition coming on to be heard before the Master of the Rolls, his lordship's attention was called to the order of the 25th of July, 1835, whereupon he declined to deal with the question raised upon the petition, so long as that order remained; and it was, in consequence, arranged that the petition should stand over, for the purpose of enabling the other residuary legatees to present an appeal petition from that order to the Lord Chancellor.

An appeal petition was accordingly presented, praying, simply, that the order of the 25th of July, 1835, might be discharged or varied; and that petition now came on to be heard.

THE LORD CHANCELLOR [LORD COTTENHAM]. I cannot recognize the principle that the existence of an erroneous order as to maintenance prevents the court from making an order inconsistent with it, as to the principal fund. There was nothing to prevent the Master of the Rolls from disposing of the petition which was brought before him, notwithstanding that order. But, with respect to this petition, I do not see to what purpose I can deal with it. If the party were still a minor, and the payment of the maintenance under the order were going on, there might be a reason for applying to stop it for the future; but by discharging that order, I should be making the trustees liable for the payments they have made for maintenance. The petition presented to the Master of the Rolls is not now before me, or, with the consent of the parties, I would dispose of it.

THE LORD CHANCELLOR. I should not have thought this a case of any difficulty; but the form in which it came before me, namely, a rehearing of an order made by me at the Rolls, though not, as I at first understood, at the suggestion of the Master of the Rolls, has called upon me to give it my most careful attention. I have no recollection of the case, and have no means of knowing how far my judgment was exercised upon the construction of the will. I cannot, however, assume that the order was made without my having considered the state of the property as stated in the master's report; as that would have been contrary to the course which I have always thought it my duty to adopt in such cases.

It is argued that the testator's great nephew, Daniel Wright Vautier, does not take a vested interest in the East India stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate

¹⁰ Lord Langdale, the successor of Sir C. C. Pepys, who became chancellor with the title of Lord Cottenham. The case before Lord Langdale, Master of the Rolls, is reported 4 Beav. 115.

gift of the East India stock; it is to be separated from the estate and vested in trustees; and the question is whether the great nephew is not the cestui que trust of that stock. It is immaterial that these trustees are also executors; they hold the East India stock as trustees, and that trust is, to accumulate the income till the great nephew attains twenty-five, and then to transfer and pay the stock and accumulated interest to him, his executors, administrators, or assigns. There is no gift over; and the East India stock either belongs to the great nephew, or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it. If the gift were within the rule, there would be circumstances to take it out of its operation. There is not only the gift of the intermediate interest, indicative, as Sir J. Leach observes in *Vawdry v. Geddes*, 1 Russ. & Mylne, 203 (see p. 208), of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate the legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five. The decision in *Vawdry v. Geddes* and other cases, in which there were gifts over, cannot affect the present question. *Booth v. Booth*, 4 Ves. 399, is certainly a strong case, and goes far beyond the present, and so does *Love v. L'Estrange*, 5 Bro. P. C. 59; and it is a decision of the House of Lords. That case has many points of resemblance to the present; and although Lord Rosslyn seems in *Monkhouse v. Holme*, 1 Bro. C. C. 298, to question the principle of that decision, Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 239 (see p. 248), justifies it upon grounds, most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was to be inferred, that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case.

It was observed that the transfer is to be made to the great nephew, his executors, administrators, or assigns. It is true that the addition of those words does not prevent the lapse of a legacy by the death of the legatee in the lifetime of the testator, but they are not to be overlooked, when the question is, whether the legacy became vested before the age specified; because if it were necessary that the legatee should live till that age to be entitled to the legacy, then there would be no question about his representatives at that time.

I am therefore of opinion that the order of 1835 was right, and that the petition of rehearing must be dismissed, and with costs; which I should not have ordered, if the Master of the Rolls had recommended the parties to adopt that proceeding upon a view of the merits of the case, but which I am now informed was not the case. The order for

a transfer of the funds, upon the regular evidence of the legatee having attained twenty-one, will follow this decision upon the construction of the will.

HOATH v. HOATH.

(Court of Chancery, 1785. 2 Brown, Ch. Cas. 3.)

Upon a petition, the testator, by his will, gave a sum of £100 to Thomas Hoath, at his age of twenty-one, and directed the interest, in the mean time, to be paid to his mother for his maintenance. Thomas Hoath dying under age, the question was, whether this legacy was, or was not, vested.

LORD CHANCELLOR [THURLOW] said, it was impossible now to contend that where the interest of a legacy is given to the legatee, until the time of payment of the principal, that it is not a vested legacy; and the giving the interest for his maintenance is precisely the same thing.¹¹

BATSFORD v. KEBBELL.

(Court of Chancery, 1797. 3 Ves. Jr. 363.)

The testatrix gave and bequeathed to Robert Endly the dividends, that should become due after her decease upon £500 Three per cent Bank Annuities, until he should arrive at the full age of thirty-two years; at which time she directed her executors to transfer to him the principal sum of £500 of her Three per cent Annuities for his own use.

Robert Endly died before he attained the age of thirty-two. The bill was filed by the residuary legatee; and the question was, whether the vesting of the legacy or the time of payment only was postponed, till the legatee should attain the age of thirty-two.

May 12th. LORD CHANCELLOR [LOUGHBOROUGH]. It strikes me at present, that there is a very precise distinction here between the dividends and the fund. If I construe it a gift of the fund to him, I must strike out the suspension of it till the age of thirty-two. I wish to look at the cases.

May 13th. LORD CHANCELLOR. I have read over the will, and have looked into the cases, and am confirmed in my opinion. Upon the cases it appears, that dividends are always a distinct subject of legacy, and capital stock another subject of legacy. In this case there is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given.

¹¹ See, also, In re Hart's Trusts, 3 De G. & J. 195 (1858).

Declare, that this legacy of £500 stock in the event, that has happened, fell into the residue upon the death of Robert Endly; and direct a transfer to the plaintiff.

HANSON v. GRAHAM.

(Court of Chancery, 1801. 6 Ves. 239.)

James Graham by his will, dated the 18th of March, 1771, gave to Mary Hanson, Thomas Hanson, and Rebecca Graham Hanson, the three children of his daughter Mary Hanson, £500 apiece of Four per cent Consolidated Bank Annuities, when they should respectively attain their ages of twenty-one years or day or days of marriage, which should first happen, provided, it was with such consent of his executors and trustees as therein mentioned; and he declared, his mind and will was, that the interest of said several £500 amounting in the whole to £1500 Four per cent Consolidated Bank Annuities, so given to his three grandchildren, as aforesaid, as often as the same should become due and payable, should be laid out at the discretion of his executors and trustees in such manner as they or the survivor of them should think proper for the benefit of his said grandchildren, till they should attain their respective ages of twenty-one years or day or days of marriage, and to and for no other use, intent, or purpose whatsoever; and after devising his real and leasehold estates, and giving two legacies of £10 each, he gave all the residue of his personal estate to his son Isaac Graham; and appointed him sole executor.

The testator died soon after the execution of his will. Afterwards, in 1774, Rebecca Graham Hanson died intestate at the age of nine years; leaving her mother and her brother Thomas Hanson and her sister Mary Coates, surviving. The mother died; and bequeathed all her personal estate to her son Thomas Hanson; and appointed him executor.

The bill was filed by Thomas Hanson and Mary Coates against Isaac Graham for an account of what was due in respect of Rebecca Graham Hanson's legacy of £500 &c.

THE MASTER OF THE ROLLS [Sir WILLIAM GRANT]. The question is, whether this legacy vested. It is contended for the plaintiffs, that it did vest, upon two grounds: 1st, they say, it would have been vested; supposing, there was nothing more than the words, with which the clause begins; and that if it rested upon a legacy, when the legatee should attain the age of twenty-one or marriage, it is now settled, that these words give a vested interest; and that is established by May v. Wood, 3 Bro. C. C. 471; and undoubtedly a proposition is there laid down; which would have the effect of making this a vested legacy; if it is true in the extent there stated. The proposition is there laid down very broadly and generally by the late Master of the Rolls; that all the cases for half a century upon pecuniary legacies have deter-

mined the word "when," not as denoting a condition precedent, but as only marking the period, when the party shall have the full benefit of the gift; except something appears upon the face of the will to show, that his bounty shall not take place, unless the time actually arrived.

This proposition is stated so broadly and generally, that I rather doubt the correctness of the report. Considering the well-known diligence of the late Master of the Rolls in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined, that the word "when," as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time, at which it is to take effect in possession; but standing so-unqualified and uncontrolled it is a word of condition: denoting the time, when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say "when" or "if" it shall happen. Until it happens, that, which is grounded upon it, cannot take place. In the civil law, the words "cum" and "si," as referred to this subject, are precisely equivalent; and from that law we borrow all, or at least the greatest part, of our rules upon legacies; and particularly the rule upon the subject immediately under consideration in that case, with reference to the words, by which a testator denotes his intention as to the gift taking effect, or taking effect in possession. In the Digest it is thus laid down:—

"Si Titio, cum is annorum quatuordecim esset factus, legatus fuerit, et is ante quatuordecimum annum decesserit, verum est, ad heredem ejus legatum non transire: quoniam non solum diem, sed et conditionem hoc legatum in se continet; si effectus esset annorum quatuordecim. Qui autem in rerum natura non esset, annorum quatuordecim non esse non intellegeretur: Nec interest utrum scribatur, si annorum quatuordecim factus erit, an ita: cum priore scriptura per conditionem tempus demonstratur; sequenti per tempus conditio: utrobique tamen eadem conditio est."

It is very true: the word "when," not so standing by itself, but coupled with other expressions or circumstances, that have a reference to the time, at which the possession of the thing is to take place, has been held by the civil law not to have so absolute a sense that it cannot possibly be controlled. Another passage in the Digest is thus expressed:

"Seius Saturninus Archigubernus ex classe Britannica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum: a quo petiit ut filio suo Seio Oceano, cum ad annos sedecim pervenisset, hereditatem restitueret. Seius Oceanus, antequam impleret annos, defunctus est."

Then it states, that a claim was made by the uncle of Seius, as next of kin, which was resisted by the fiduciary heir, who contended, that,

as Seius had not lived to the age of sixteen, it was not vested. The opinion is this:

“Si Seius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, a Valerio Maximo fiduciario herede restitui debet, priusquam præfinitum tempus ætatis impleret, decessit: fiduciaria hereditas ad eum pertinet, ad quem cætera bona Oceani pertinuerint: quoniam dies fideicommissi vivo Oceano cessit: scilicet si prorogando tempus solutionis, tutelam magis heredi fiduciario permisisse, quam incertum diem fideicommissi constituisse, videatur.”

This distinction was transferred from the civil law to ours; at least so far clearly as regards pecuniary legacies. In the case cited, *Stapleton v. Cheales*, Pre. Ch. 317, it was clearly held, that the expressions “at twenty-one,” or “if,” or “when,” he shall attain twenty-one, were all one and the same; and in each of those cases if the legatee died before that time, the legacy lapsed. I do not find any case, in which this position has been ever contradicted. In *Fonnereau v. Fonnereau*, 3 Atk. 645, it was clear, if it had stood upon the first part of that bequest, it would have been held not vested. Lord Hardwicke rests entirely upon the subsequent words, as controlling the word “when;” as it would have operated, standing alone. That will sets out precisely as this does; but when it went on with words, making the intention clear, giving interest for his education, with a power to the trustees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him, when he should attain the age of twenty-five, it was clear, upon the whole, nothing but the payment was postponed.

A distinction has been introduced between the effect of giving a legacy at twenty-one and a legacy payable at twenty-one. That is also borrowed from the civil law. The Code thus states it:

“Ex his verbis, do lego Æliæ Severinæ filiæ meæ et Secundæ decem: quæ legata accipere debent, cum ad legitimum statum pervenerit: non conditio fideicommissio vel legato inserta: sed petitio in tempus legitimæ ætatis dilata videtur:”

For there the words were, that the time of payment was to be at her legitimate age:

“Et ideo si Ælia Severina filia testatoris, cui legatum relictum est, die legati cedente, via functa est: ad heredem suum actionem transmisit; scilicet ut eo tempore solutio fiat, quo Severina, si rebus humanis subtracta non fuisset, vicessimum quintum annum ætatis implesset.”

This distinction however has been held by some equity judges altogether without foundation; and by others it has been treated as too refined. Lord Keeper Wright, in *Yates v. Fettiplace*, Pre. Ch. 140, alluding to the distinction in *Godolphin* and *Swinburne* from the civil law, declared it altogether without foundation. Lord Cowper acknowledged, that it was at least a refinement; but he thought, it was now well

established. Lord Hardwicke likewise said, it was originally a refinement. But in what did that refinement consist? It was not in holding, that it should not vest before the age of twenty-one, but in holding, that it should vest, though the party should not attain that age: their opinion being that it should not vest. Then why should we refine upon a refinement by deviating still more, and holding arbitrarily, that the word "when" standing by itself does not import condition; I say, that standing by itself it does import condition; and it requires other words to show, it was meant to defer payment. But according to the report of the judgment in *May v. Wood*, it is quite the reverse; that standing alone it imports delay of payment; and other words are necessary to show a condition. That is a distinction upon a distinction; which original distinction has by several great judges been held to have been originally a refinement. The only cases alluded to in *May v. Wood* are cases of real estate; beginning with *Boraston's Case*, 3 Co. 16; and ending with *Doe v. Lea*, 3 Term Rep. B. R. 41. The principle of them all is stated by Lord Mansfield in *Goodtitle v. Whitby*, 1 Bur. 228, in a way that renders them perfectly consistent with the opinion I entertain as to the word "when," standing by itself, unqualified and uncontrolled. Lord Mansfield there lays down these rules of construction:

"1st, wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property:"

"2dly, where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him &c., the rule is, that that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession."¹²

There could be no doubt of the intention there. Everything was given to the trustees for the benefit of the infant. He was entitled ultimately to have the whole. The reason of giving to the trustees in the mean time evidently was, that he was not intended to have the possession and management until the age of twenty-one.

Upon exactly the same ground was *Boraston's Case*. It was not alleged in that case, that these were not words of contingency taken by themselves: but it was said, you must model these unapt words: so as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpose; as if he had calculated, how many years it would take to pay off his debts, and in how many years Hugh Boraston would attain the age of twenty-one; and if given to the executors, with remainder to him at twenty-one, it would be clear vested remainder. The court approves that argument of the counsel; but does not say, that "when," standing by itself, would not

¹² These rules are applied to pecuniary legacies, *Lane v. Goudge*, 9 Ves. 225 (1803); *Paekham v. Gregory*, 4 Hare, 396 (1845).

have made a condition. So, in *Manfield v. Dugard*, 1 Eq. Ca. Ab. 195, it was clear, the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife: but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this; whether, where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say, the enjoyment only is to be postponed. So in *Doe v. Lea* the devisee was intended to have the whole benefit: but trustees were interposed, to keep the management of the estate, until he should attain the age of twenty-four; with a charge out of the rents and profits to keep the building in repair. There was a reason for postponing the possession; and it was evident, nothing but the enjoyment was intended to be postponed. It was not a bare devise to him, when he should attain twenty-four.

If those cases therefore had occurred as to pecuniary legacies, there is no ground to say, the decision ought to have been different; for from the very same circumstances and expressions it might be collected, that the word "when" was used, not as a condition, but merely to postpone the enjoyment; the possession in the mean time being disposed of in another way. It is impossible, that Lord Mansfield, and there is nothing in his judgment indicating it, could have considered the word "when" standing by itself, as other than a word of condition. It is impossible; for only two days before, in *Gross v. Nelson*, 1 Bur. 226, having occasion to speak of legacies, upon a note of hand, which he compared to the case of a legacy, he says, "but if the time is annexed to the substance of the gift, as a legacy, if, or when, he shall attain twenty-one, it will not vest, before that contingency happens." He considered "when" precisely the same as "if."

Love v. L'Estrange, 3 Bro. P. C. 337, seems to have been considered a strong authority for holding "when" to operate conditionally. The late Lord Chancellor was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse v. Holme*, 1 Bro. C. C. 298, that he found it difficult to account for it otherwise than upon the distinction as to a residue; which the late Master of the Rolls in *Booth v. Booth* acknowledged there might be. But it was not necessary to resort to that; for *Love v. L'Estrange* may be warranted upon the principles laid down in *Goodtitle v. Whitby*. It was not a simple, unqualified gift; but there were many circumstances to show, that Walter Nash was meant to have the benefit absolutely; and that the enjoyment only was postponed; the testator giving it to trustees in the mean time; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere; and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit; to transfer the whole to

him, when he arrives at that age: and to make him a certain allowance in the mean time. That is very different from a simple bequest to him, when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death; and must have been paid over to the trustees immediately: and they would have managed it, until the legatee had attained the age of twenty-four.

Upon the whole view of the cases, and taking the reason of the doctrine and the origin of it into consideration, there is no ground whatsoever for the generality of the proposition, which the Master of the Rolls is represented to have laid down in *May v. Wood*. To that proposition the following words are added:

“And not, where he has merely used the word ‘when’ for the sole purpose of postponing the time of payment.”

If the Master of the Rolls meant so to qualify his former proposition, that I admit; and have no difficulty in agreeing to it. But it is evident, that this is inaccurately taken; for the two parts of the proposition do not accord. First, it is laid down generally, “that it requires words to show, ‘when’ does operate conditionally:” in the latter part it is stated, that if it appears, “when” is used only for postponing payment, it shall not operate farther. Nothing can be clearer than that.

In this cause therefore I should have determined against the plaintiffs; if it stood merely upon the first words. But then it is contended, that they are entitled; because interest is given; and that they come within an established rule of the court; that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory; and denoting, that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle; that nothing more than a maintenance can be called for; what can be shown to be necessary for maintenance: however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal; whatever that may be. But by this will it is clear, the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All, that is left to the trustees, is to determine, in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal. It is therefore the simple case of interest. It was observed for the defendants, that here is not only the period of the age, but also marriage with consent; and it was asked, supposing any of them had married without the consent of the executors, was it to vest? That is just the same question. If it is shifted to the question, whether it is to be paid, if any of them married without consent, the executors might say, no: the period of payment had

not arrived. But marriage with consent is not a condition precedent; for at the age of twenty-one, whether married with consent or not, they would be entitled. That therefore, not operating as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest; which according to the established rule has the effect of vesting it. I am therefore of opinion, that the plaintiffs are entitled.¹³

In re ASHMORE'S TRUSTS.

(Court of Chancery, 1869. L. R. 9 Eq. 99.)

Petition.

Elizabeth Ashmore, widow, by her will dated the 14th of May, 1844, bequeathed all her residuary personal estate to trustees upon trust to assign and transfer a leasehold house as therein mentioned; and further upon trust, after the decease of her daughter, Mary Ann Hopkins, to assign, transfer, and pay £1000 (part of her said estate), or the investments thereof, and all other her moneys, estate, and effects, unto and equally between such of her four grandchildren, James Joseph Hopkins, George Thomas Hopkins, Elizabeth Hopkins, and Robert Hopkins, as should be living at the decease of her (testatrix's) said daughter, and as should then have attained or should thereafter live to attain the age of twenty-one years; and in the mean time to apply the dividends and annual proceeds of the share or shares of such of them as should be under the age of twenty-one years or so much thereof as might be necessary, in or towards his, her, or their maintenance and education.

Testatrix then continued as follows:

"Provided, and my will is, that in case any of my said four grandchildren shall die in the lifetime of my said daughter leaving lawful issue, them, him, or her surviving, the share or shares of such of them so dying shall be assigned and transferred to such issue respectively, in equal shares and proportions, on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the mean time to be applied in or towards their maintenance and education."

Testatrix died on the 13th of November, 1850.

Mary Ann Hopkins, the daughter, died on the 31st of August, 1859. At that date one of the grandchildren, namely, Elizabeth Andrews, formerly Hopkins, was dead.

¹³Accord: In re Bunn, 16 Ch. Div. 47 (1880); *Scotney v. Lomer*, 29 Ch. Div. 535, 54 L. J. Ch. 558, 31 Ch. Div. 380 (1885); *Bolding v. Strugnell*, 24 W. R. 339, 45 L. J. Ch. 208 (1876).

So where the legacy is contained only in the direction to pay upon the legatee's marriage, yet the gift of interest or income in the meantime vests the legacy before marriage. *Vize v. Stoney*, 1 Dr. & War. 337, 2 Dr. & Wal. 659; In re Wrey, 30 Ch. Div. 507, 54 L. J. Ch. 1098.

Elizabeth Andrews had had four children, namely, the petitioner, Edward, who was born on the 2d of July, 1848; Elizabeth, who was born on the 27th of February, 1850, and who died in 1851; Mary Ann, who was born in 1851; and Emma, who was born in 1852.

Since the death of Mary Ann Hopkins, Mary Ann and Emma Andrews had both died infants, leaving the petitioner Edward Andrews the sole survivor of the issue of Elizabeth Andrews.

The petitioner attained twenty-one on the 2d of July, 1869; and the question now between him and his father, who had taken out administration to the infants, or some of them, was, whether the interests of the infants in their mother's share vested at the death of their mother, or whether such share vested in the only one of the issue who lived to attain twenty-one.

The surviving trustee of the will having paid Mrs. Andrews' fourth share into court, the petitioner now prayed that it might be paid out to his solicitor.

SIR W. M. JAMES, V. C. I think, on the whole, I cannot distinguish this case from *Pulsford v. Hunter*, 3 Bro. C. C. 416. My first impression was the other way, but *Pulsford v. Hunter* seems to me to be exactly the same case, with a slight alteration of the order of the words.

In *Pulsford v. Hunter* a testator, after giving two annuities, enumerated some sums of stock then in his possession, and proceeded as follows: "the interest of the remainder part to be applied for the use and education of my grandchildren till they arrive at the age of twenty-one years, and the principal to be then equally divided amongst them;" and the Lord Chancellor (Lord Loughborough) thought that however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest.

In this case the fund is given to the issue on their attaining twenty-one, and the dividends and proceeds in the mean time are to be applied in or towards their maintenance and education.

I am really not able substantially to distinguish these two cases.

I think it very probable that the decision may be sustained by another consideration,—namely, that this is a gift not of a separate share to each of the issue on attaining twenty-one, with a gift of the dividends and proceeds thereof in the meantime to be applied in maintenance; but a gift of a fund to each of the issue on attaining twenty-one in equal shares and proportions, and a gift of the dividends and interest in the mean time.

In this respect the case is exactly that of *Pulsford v. Hunter*. That authority has never been questioned, and certainly never overruled.

There will be a declaration to the effect that the interests of those of the issue who died under twenty-one passed to the survivors.¹⁴

¹⁴ *Butcher v. Leach* (1843) 5 Beav. 392 (income for maintenance); *In re Morris* (1885) 33 Weekly Rep. 895 (income for maintenance). *Bacon, V. C.*,

FOX v. FOX.

(Court of Chancery, 1875. L. R. 19 Eq. 286.)

Thomas Were Fox the elder, by his will, dated the 9th of August, 1859, gave, devised, and bequeathed unto William Fox, Mark Stephens Grigg, John Williams, and Thomas Were Fox, the son, and Henry Fox, his real and personal estate not thereby specifically disposed of, subject to the pecuniary legacies and annuity thereby bequeathed, and to the payment of his debts, funeral and testamentary expenses, upon trust, in the first place, to raise thereout and set apart therefrom the sum of £15,000, and to invest the same sum in their names as therein mentioned, and to pay the income of the said sum of £15,000 so invested as aforesaid to his wife half-yearly during her life, and after her decease to pay the income of one equal fifth part of the said sum of £15,000 so invested as aforesaid to Thomas Were Fox, the son, half-yearly during his life, and after his decease to pay the said income thereof half-yearly to his widow, if he should leave a widow, during her widowhood; but if he should not leave a widow, or if he should, then, so soon as she should marry again or die, to divide and transfer the said equal one-fifth part of the said principal sum of £15,000 to and amongst the children of the said Thomas Were Fox, the son, equally as and when they should respectively attain the age of twenty-five years; but if he should have but one child, then to transfer the whole of the said one-fifth part to such only child, applying from time to time the income of the presumptive share of each child (if more than one), or the income of the whole if an only child, or so much thereof respectively as the trustees or trustee for the time being might think proper, to and for his and her maintenance and education until such share or entirety, as the case might be, should become payable as aforesaid; but if the said Thomas Were Fox, the son, should leave no children or child him surviving, or if he should and they should all die before attaining the age of twenty-five years, then to pay and transfer the said fifth part to the testator's son, the said Henry Fox, if then living, or if dead, to his children equally amongst them (if more than one) on attaining the age of twenty-five years respectively.

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 between 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).

The testator died in February, 1860, and his widow in July, 1862.

Thomas Were Fox, the son, died on the 4th of July, 1870, leaving a widow and nine children, of whom the eldest was born on the 1st of May, 1854.

The widow of Thomas Were Fox, the son, married a second time in August, 1873.

The question was, whether the gift of one fifth of the sum of £15,000 by the will of Thomas Were Fox, the elder, to the children of Thomas Were Fox, the son, was valid.

SIR G. JESSEL, M. R. The first question is, whether a gift contained in a direction to pay to legatees on attaining a certain age, followed by a gift of the interest for maintenance, is vested?

In the case of *In re Ashmore's Trusts*, Law Rep. 9 Eq. 99, Lord Justice James, when Vice-Chancellor, held that a similar gift was not vested. He admitted that his first impression was the other way, but he decided as he did on the authority of an old case, *Pulsford v. Hunter*, 3 Bro. C. C. 416. I cannot help thinking there is some mistake in the report of *Pulsford v. Hunter*. The observations in the judgment, as reported, seem to me to point, not to a gift of the interest for maintenance, but to a gift of maintenance out of the interest, which is not in accordance with the terms of the will as given in the report. However that may be, it seems to me that the law is clearly laid down in subsequent authorities.

In *Watson v. Hayes*, 5 My. & Cr. 125, 133, Lord Cottenham says: "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the mean time, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. * * * It is therefore the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

If that be the law, it is very difficult to support the decision in *In re Ashmore's Trusts*. What the Vice-Chancellor said was this: [His Honor read the judgment].

I agree that *In re Ashmore's Trusts* is not to be distinguished from *Pulsford v. Hunter* as regards the terms of the will, but I do not find that Lord Loughborough said that giving the whole of the income for maintenance was not equivalent to giving interest. The report says that "the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest." These observations, if correctly reported (which I doubt), seem to me to point to the distinc-

tion taken by Lord Cottenham between a gift of interest to be applied in maintenance and a gift of maintenance apart from interest; but if this be not the true meaning of them, then I think they are overruled by what Lord Cottenham said and by the current of modern authorities. Indeed, I cannot think that *Watson v. Hayes* and the subsequent cases were called to the Vice-Chancellor's attention; if they had, I feel sure he would willingly and cheerfully have followed them.

One of these cases is that of *Re Hart's Trusts*, 3 De G. & J. 195, 200, 202, before the Appeal Court. There the testator gave real estate to a devisee for life, with remainder to trustees in fee, in trust to sell and out of the proceeds to pay a legacy of £500 when the legatee should attain twenty-five, and he directed that the legacy should carry interest from the death of the tenant for life, to be paid towards the legatee's maintenance until she attained twenty-five. The legatee survived the tenant for life, but died under twenty-five; and it was held that the legacy was vested. Lord Justice Knight Bruce says that the legatee, "if the gift in question had been a legacy out of the testator's personal estate merely, would, in my opinion, upon principle equally and authority, have acquired a vested right to the £500 for her absolute use, either on the testator's death (subject to his mother's life estate) or on the death of his mother. For by the will interest was made payable on the £500 from the time of the death of the testator's mother, and that interest was directed to be applied wholly for the benefit of" the legatee. Lord Justice Turner adverts to the distinction taken by Lord Cottenham in *Watson v. Hayes*, and says: "In the present case the direction is, that the legacy shall carry interest, annexing, as it seems to me, the interest to the legacy; and I do not see how we could hold this legacy not to be vested, unless we were prepared to hold that no legacy to be paid when a legatee attains a prescribed age, with interest in the mean time, vests until the legatee has attained the specific age, a conclusion which would be quite at variance with *Hanson v. Graham*, 6 Ves. 239, and many other decided cases." Both the Lords Justices take the same view, which appears to me to be quite at variance with what was decided in *Pulsford v. Hunter*.

The Vice-Chancellor, in the case of *In re Ashmore's Trusts*, 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 mean time 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 mean time. 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.

There still remains the difficulty that the gift here is not a gift of the whole income absolutely for maintenance: there is a discretionary power to apply the whole income, or so much as the trustees may think proper, and the question is, whether that is a gift of the whole interest

within the rule as laid down in *Watson v. Hayes* and the other cases I have referred to. On that point *Harrison v. Grimwood*, 12 Beav. 192, is a distinct authority. There the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest, "or a competent portion thereof," for maintenance; and the court held the legacy was vested. Lord Langdale does not appear to have considered the indication of intention derived from the direction to pay the whole income as affected by the words enabling the trustees to apply a competent portion for maintenance; he treated it as a gift of the whole income followed by a discretion to apply less than the whole income; and that appears to me to be a rational view.

Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the mean time, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose.

I also think that the gift over, if not conclusive on the question, certainly aids the construction adopted by me.

The answer to the special case must be that the gift is valid.¹⁵

In re PARKER.

(Chancery Division, 1880. 16 Ch. Div. 44.)

Martha Elizabeth Parker, widow, who died in 1863, by her will, dated in 1856, gave her residuary real and personal estate to trustees in trust for sale and conversion, and to invest the proceeds upon the stocks, funds, and securities therein mentioned, and to stand possessed of the said stocks, funds, and securities, "upon trust to pay the dividends, interest, and income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in and towards the maintenance and education of my children until my said children shall attain their respective ages of 21 years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay, assign, and transfer the said stocks, funds, and securities to my said children in equal shares, if more than one, and if but one, then to such one child; and as to each daughter's share, whether original or accruing, upon trust to settle the same," for

¹⁵ Accord: *Eccles v. Birkett*, 4 De G. & S. 105; *In re Turney*, L. R. [1899] 2 Ch. 739; *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.

the benefit of herself and her children. And the testatrix declared "that it shall be lawful for the trustees or trustee for the time being of this my will to assign, transfer, or dispose of any competent part, not exceeding one half of the presumptive share of any of my children for the preferment or advancing in life, or preparing for business, or on the marriage of any such child (being daughters) notwithstanding their minorities."

The testatrix had three children, two sons and a daughter, all of whom survived her. One of the sons died in 1873 an infant, leaving his brother and sister, who both attained twenty-one, his next of kin.

The daughter, Mrs. Barker, married in 1878 and in pursuance of the direction in the will a settlement was executed of her "moiety" of her mother's residuary estate.

The question was whether Mrs. Barker's moiety of surplus income of the infant's one third remaining unapplied by the trustees for his maintenance and education devolved upon her as one of his next of kin, or whether it was bound by her settlement; in other words, whether the infant's share was to be treated as "vested" or "contingent."

JESSEL, M. R. It appears to me that this case is different from that of Fox v. Fox, Law Rep. 19 Eq. 286. In my opinion, when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the mean time to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees "shall pay the whole or such part of the interest as they shall think fit." But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the mean time for their maintenance has been held to create a vested interest in a member of the class who does not attain that age.

The words here are plain. The trust is of residue: "to pay the dividends, interest, or income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in or towards the maintenance and education of my children, until my said children shall attain their respective ages of twenty-one years;" so that there is nothing here giving an aliquot share of income to any individual child; the direction being to pay the income of the whole fund in such shares as the trustees shall think fit. I do not think you can infer anything from the direction for the settlement of the daughters' shares.

Then follows a gift of the whole fund to the children equally on attaining twenty-one. I should have felt no difficulty if it had not been for the advancement clause, which speaks of the "presumptive share of any of my children," but I do not think that clause is sufficient to alter the effect of the preceding part of the will.

That being so, I hold that the infant did not take a vested interest

in his one-third share of the residue, and, accordingly, that Mrs. Barker's moiety of the unapplied income of that share is bound by the trusts of her settlement.¹⁶

DEWAR v. BROOKE.

(Chancery Division, 1880. 14 Ch. Div. 529.)

Petition in an administration action.

James Dewar, by his will, dated in 1866, after specific and pecuniary bequests, gave and bequeathed his real and residuary personal estate to trustees upon trust for sale, conversion, and investment, and then proceeded as follows: "Subject to the preceding trusts and directions my trustees shall stand possessed of my said estate in trust for all my children or any my child who being sons or a son shall attain twenty-five, or being daughters or a daughter shall attain the age of twenty-

¹⁶ Accord: *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, 50 Atl. 898, 56 L. R. A. 103; *Anderson v. Menefee* (Tex. Civ. App.) 174 S. W. 904.

In *In re Grimshaw's Trusts*, supra, Hall, V. C., said: "With reference to the decision of the Master of the Rolls in *Fox v. Fox*, Law Rep. 19 Eq. 286, it is sufficient for present purposes to say that the frame and scheme of the disposition in that will were different. The first trust there was of the capital fund, and after the gift of that in the first instance to the children there followed as a sort of annex to that trust these words, 'applying from time to time the income of the presumptive share of each child (if more than one), or the income of the whole if an only child, and so much thereof respectively as the trustees or trustee for the time being might think proper.' I can understand in such a case where the trust in the first instance was a trust of the capital fund with a superadded provision for maintenance, although the words were 'or so much thereof respectively as the trustees or trustee might think proper,' that it might well be considered that in substance there was a trust of the whole income, with a mere authority given to the trustee to reduce the amount to be applied for maintenance—that there was in substance a trust of the capital fund and income for the children in the first instance. That distinguishes that case from the present."

In *Pearson v. Dolman*, L. R. 3 Eq. 315, at 321, Sir W. Page Wood, V. C., said: "* * * where the principal is given at a distant epoch, and the whole income is given in the meantime, the Court, leaning in favour of vesting, has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the income from the principal, it is not vested. In this way I think some, though perhaps not all, of the cases may be reconciled where the income has been only partially given, that is to say, where a certain amount has been given to trustees for the purpose of maintenance and not the whole income of the fund."

So if the income is not given to the legatee during the period before the distribution of the principal, but is itself only given at the time of distribution and along with the principal, the gift of income is contingent, like the gift of the principal, and furnishes no argument for the vesting of the gift of the principal. *Locke v. Lamb*, 4 Eq. 372; *Russell v. Russell*, L. R. [1903] 1 Ir. 168. See also *Leake v. Robinson*, 2 Mer. 363, post, p. 519.

So if income is divided equally between parents and in case of the death of a parent before the period of distribution the income formerly payable to the parent is payable to the parent's children per stirpes and subsequently the principal is to be divided equally among all the children of the parent per capita, the gift of income furnishes no argument in favor of vesting. In *re Kountz's Estate*, 213 Pa. 399, 62 Atl. 1106.

one years or marry, and if more than one in equal shares, and to be divided and paid on the youngest of my said children attaining twenty-one years, and the share of each of my daughters to be for her separate use with remainder to her children equally, and in default of children for such person or persons as she shall by will or codicil appoint. I empower my trustees to raise any part not exceeding one-half of the vested or presumptive share of a child or remoter issue, and apply the same for his or her advancement. I empower my said trustees to apply the whole or such part as they shall think fit of the annual income to which any child or remoter issue shall be entitled in expectancy towards the maintenance or education of such child."

The testator, who died in 1867, had issue two children only, viz., the Petitioner, David Douglas Dewar, who was born on the 17th of December, 1856, and was now of the age of twenty-three years, and Jessie Ethel Dewar, who was born on the 11th of September, 1858. 43

During the infancy of Jessie Ethel Dewar an administration action was instituted on her behalf against the Petitioner and the trustees, in the course of which the estate of the testator had been administered and the clear residue thereof ascertained, under the direction of the Court, at the sum of £49,000.

Jessie Ethel Dewar attained twenty-one in September, 1879, and the Petitioner, being about to marry, and being desirous of making a settlement on his marriage, now presented this petition, praying, 1. for a declaration that according to the true construction of the will of the testator his residuary estate became divisible and payable on his daughter, the youngest child, attaining twenty-one, in equal shares between her and the Petitioner, as the only children of the testator, and that their respective shares might be ascertained and divided and paid accordingly; or 2, in the alternative, that the trustees might be directed to and might raise one-half part of the Petitioner's vested or presumptive share of the testator's residuary estate, and apply the same for his advancement, he being willing and thereby offering that such one-half part should be settled upon certain trusts for himself, his intended wife, and the issue of the intended marriage therein specified; and that the trustees might be directed to pay the income arising from the other half part of the Petitioner's vested or presumptive share to the Petitioner towards his maintenance.

HALL, V. C. The trust here is for the children who being sons or a son attain twenty-five, or being daughters or a daughter attain twenty-one or marry. In *Fox v. Fox*, Law Rep. 19 Eq. 286, the trust was a trust for sons "as and when" they attain twenty-five. Here a son who has not attained twenty-five is not one of the cestuis que trust. The maintenance clause is not inconsistent with a son under twenty-five not being a cestui que trust, it providing for the maintenance of children entitled to income in expectancy. In *Fox v. Fox* the maintenance clause did not describe the child as a child who was entitled to income in expectancy, but was in these terms: "Applying from time to time

the income of the presumptive" share "of each child (if more than one) or the income" of the whole "if an only child, or so much thereof respectively as the trustees for the time being might think proper to and for his and her maintenance and education, until such share or entirety, as the case might be, should become payable as aforesaid." I think I should be departing from the ordinary meaning of the words used in this will if I were to hold that by force of the maintenance clause, which is what is mainly relied upon for the Petitioner, the Petitioner is entitled to a vested interest. With regard to the payment and division being directed at the time when the youngest child attains twenty-one years, that direction may, and I think does, mean that actual division and payment shall not take place until the youngest attains that age; the testator says, in effect, that there is not to be payment or division until the youngest attains twenty-one; i. e., you are to wait for that event before you make payment and division, and when that happens you are to make payment and division; such payment and division being, however, necessarily subject to postponement or incomplete in reference to any sons who may be under twenty-five, and as to daughters, it is observable that when the youngest child attains twenty-one there might be included in the division a daughter who was not twenty-one but married. As to Fox v. Fox, Law Rep. 19 Eq. 286, it may in some other case have to be determined whether it is in conflict with the decision of the Lord Justice James in the case of In re Ashmore's Trusts, Law Rep. 9 Eq. 99, and if so, which decision is to be followed.¹⁷

¹⁷ "It is important to distinguish a gift to a contingent class and a gift to a class upon a contingency; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at twenty-one, might have the effect of vesting the bequest." See Gotch v. Foster, 5 Eq. 311.

There are several cases where no special argument could be made in favor of vesting, such as the payment of interest or income in the meantime, and where the gift was held to be to a contingent class: Bull v. Pritchard, 1 Russ. 213; Leake v. Robinson, 2 Mer. 363 (post, p. 519); Stead v. Platt, 18 Beav. 50.

CHAPTER V

GIFTS OVER UPON THE DEATH OF A PREVIOUS TAKER
SIMPLICITER, OR WITHOUT CHILDREN, OR WITH-
OUT ISSUE SURVIVING THE FIRST TAKER

O'MAHONEY v. BURDETT.

(House of Lords, 1874. L. R. 7 Eng. & Ir. App. Cas. 388.)

The LORD CHANCELLOR [LORD CAIRNS]. My Lords, Jane Brooke, by her will, dated on the 18th of September, 1840, made a bequest of a sum of £1000 in the following words: "I bequeath to my sister, Grace L'Estrange, the widow of Colonel L'Estrange, of Moystown, the sum of £1000 in the 3½ per cent. Irish stock, for her life, and after her death to her daughter, Grace L'Estrange. If my said niece should die unmarried or without children, the £1000 I here will to revert to my nephew, Colonel Henry L'Estrange, of Moystown;" and the testatrix appointed her nephew, John Burdett, her residuary legatee. Colonel Henry L'Estrange died before the testatrix, and so did Grace L'Estrange, the tenant for life of the legacy. The testatrix herself died on the 29th of March, 1848. Grace L'Estrange, the niece of the testatrix, was married in 1851 to the Appellant O'Mahoney, and died in 1871, and there was no child of the marriage.

The Appellant, under these circumstances, contends that the interest of Grace L'Estrange, the niece, otherwise O'Mahoney, became, upon her surviving both her own mother and the testatrix, the tenant for life, absolute and indefeasible. He contends, in other words, that by the expression, "if my niece should die unmarried or without children," is to be understood the death of the niece unmarried or without children, not at any time whatsoever, but only during the lifetime of the tenant for life. Of this opinion was the then Master of the Rolls in Ireland, who made an order to that effect on the 15th of July, 1859. But this order was reversed by the Judges in the Court of Appeal in Chancery in Ireland, who by an order dated the 17th of November, 1859, declared that the bequest of £1000 stock to Grace O'Mahoney was defeasible in the event of her dying unmarried or without children, at any time. Under this order the Respondent, as the representative of the residuary legatee, now claims to be entitled to the legacy.

In the absence of any authority to the contrary, I should entertain no doubt that the decision of the Court of Appeal in Chancery in Ireland was in accordance with the true interpretation of the will. A bequest to A., and if she shall die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an

absolute gift to A., defeasible by an executory gift over, in the event of A. dying, at any time, under the circumstances indicated, namely, unmarried or without children. And in like manner, a bequest to X. for life, with remainder to A., and if A. die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of A. in the event of A. dying, at any time unmarried or without children.

In this particular will any light that is to be obtained from the context is not opposed to, but supports, the natural meaning of the words. The direction that if the niece should die unmarried or without children the £1000 is "to revert to my nephew Colonel Henry L'Estrange," appears to indicate that the legacy was to come back, or come away, from the niece after she had had the possession and enjoyment of it, rather than to imply that the only state of circumstances under which Colonel Henry L'Estrange could take, would be a state of circumstances under which the niece would have had no enjoyment of the legacy at all. In other words, the benefit intended for the nephew appears to me to be introduced through the medium of an executory limitation over after enjoyment by a previous taker, and not as an alternative gift to take effect, if at all, before the period of enjoyment commences.

But it is said that there is now established an absolute rule of law, or rule of construction, that where there is a gift for life, followed by a gift over of the capital, with a proviso that if the second taker shall die under age, or unmarried, or without children, there the death of the second taker, thus described, is to be taken to refer, not to death under those circumstances at any time, but to death under those circumstances before the tenant for life; and the case of *Edwards v. Edwards* [15 Beav. 357, 21 L. J. (Ch.) 324], decided by the late Master of the Rolls, is referred to as the authority for this proposition.

It is clear that the case of *Edwards v. Edwards* [15 Beav. 357, 21 L. J. (Ch.) 324], decided in the year 1852, could not establish any new rule of construction applicable to cases of this kind; and it is equally clear, looking at the report of the case, that the Master of the Rolls did not intend to establish any new rule of construction. His Honor endeavours to collect and classify the various decisions which have taken place as to construction of gifts over in the case of death, or in the case of death under particular circumstances; and the question is, whether that part of his judgment which deals with gifts, like the one before your Lordships, is a just expression of the principles to be deduced from decisions before that time.

As regards the question actually decided in the case of *Edwards v. Edwards* [15 Beav. 357, 21 L. J. Ch. 324], with reference to the will then before the Court, there were expressions in that will which may well have warranted the conclusion at which the Court arrived. The testator devised freeholds and leaseholds to his wife for life or widowhood. Then part of the property he gave to his eldest son "for him

and his heirs to possess immediately after his mother's death or marriage." He made similar devises and bequests to another son and to a daughter; and he continued: "If my wife shall remain my widow my trustees shall assign and transfer to each of my children their shares, immediately after her death, and as soon as they arrive at twenty-one years of age. * * * Farther, if one of my children shall die leaving no children, his or her share shall be equally divided between the other two." The direction here for an assignment and transfer, coupled with immediate and absolute possession upon the death of the tenant for life, may well have justified the decision confining the contingency, of death without children, to the life of the tenant for life.¹

The Master of the Rolls, however, in his judgment, divides the cases on this subject into four classes. Upon the first three classes it is not necessary to do more than to point out that the conclusions drawn from them by His Honour do not appear to me in any way to lead up to the rule which he deduces from the fourth class of cases which he mentions. The first class of cases is that where there is a gift to A., and if he shall die to B. If in such a case the words are to be read literally, you have, in the first place, the absolute gift, and then a gift over in the event of death; an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the Court is forced to read the words "in case of death" as meaning in case of death before the interest vests.²

With regard to the second class of cases, namely, gifts to A. for 2.

¹ "If the fund is vested in trustees, who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees, who are to take upon the death of prior legatees without issue, are contemplated as taking through the medium of the same trustees, there is prima facie reason for restricting the death without issue to death without issue before the time of distribution. *Galland v. Leonard*, 1 Sw. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 B. 357; *Beckton v. Barton*, 27 B. 99; *Dean v. Handley*, 2 H. & M. 635. See *Smith v. Colman*, 25 B. 217; *In re Hayward*, *Creery v. Lingwood*, 19 Ch. D. 470; *In re Luddy*, *Peard v. Morton*, 25 Ch. D. 394; *Lewin v. Killey*, 13 App. C. 783, P. C." *Theobald on Wills* (7th Ed.) p. 662.

"When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark v. Henry*, 11 Eq. 222, 6 Ch. 588." *Theobald on Wills* (7th Ed.) p. 663.

² "If there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A.'s death before the testator. *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96; *Turner v. Moor*, 6 Ves. 556; *Cambridge v. Rous*, 8 Ves. 12; *Crigan v. Baines*, 7 Sim. 40; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Ingham v. Ingham*, 1 R. 11 Eq. 101; *In re Neary's Estate*, 7 L. R. Ir. 311; *Elliott v. Smith*, 22 Ch. D. 236; *In re Bourke's Trusts*, 27 L. R. Ir. 573. See *Watson v. Watson*, 7 P. D. 10." *Theobald on Wills* (7th Ed.) p. 658.

"But, as a rule, when there is a gift to A. indefinitely, followed by a gift at his decease, A. will take only a life interest. *Constable v. Bull*, 3 De G. & S. 411; *Waters v. Waters*, 26 L. J. Ch. 624; *Adams' Trust*, 14 W. R. 18; *Joslin v. Hammond*, 3 M. & K. 110; *Reid v. Reid*, 25 B. 469; *Bibbens v. Pot-*

life,³ and if he shall die without children, over, the Master of the Rolls expresses himself thus: "In the second of the supposed cases there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain but a contingent event. It is not in case of the death of A., but in case of his death without children; and here it would be importing a meaning and adding words to the will, if it were to be construed to import as a condition which was to entitle B. to take, that the death of A. without children must happen before some particular period. In these cases, therefore, it has always been held, that if at any time, whether before or after the death of the testator, A. should die without leaving a child the gift over takes effect, and the legacy vests in B. This is established by the case of *Farthing v. Allen* [2 Madd. 310], mentioned in *Maddocks*, but reported only in *Jarman on Wills*." [Vol. 2, p. 688.] My Lords, I agree with these observations, but I must observe in passing that I am unable to understand how it is not, to use the expression of the Master of the Rolls, "importing a meaning and adding words to the will," if you construe it to imply, as a condition which is to entitle B. to take, that the death of A. without children must happen before some particular period, any more where there is not, than where there is, a previous life estate. I may pass over the third class of cases as not bearing upon the question now before your Lordships.⁴

ter, 10 Ch. D. 733; *Re Houghton, Houghton v. Brown*, 50 L. T. 529; *Re Russell*, 52 L. T. 559." *Theobald on Wills* (7th Ed.) pp. 658, 659.

"In the case of realty, a devise to A. simply in a will before the *Wills Act*, and in case of his death over, would perhaps be construed as to A. for life, and after his death over. *Bowen v. Scoweroff*, 2 Y. & C. Ex. 640. See, however, *Wright v. Stephens*, 4 B. & Ald. 574. On the other hand, if the devise gives A. the fee, a gift over, in case of A.'s death, will be held to refer to his death before the testator. *Rogers v. Rogers*, 7 W. R. 541." *Theobald on Wills* (7th Ed.) p. 660.

³ In *Edwards v. Edwards*, 15 Beav. 357, at 361, the Master of the Rolls said: "The second case is that of a gift to A., and, if he shall die without leaving a child, then to B." This includes the case where the first taker is given an absolute interest. *Fifer v. Allen*, 228 Ill. 507, 51 N. E. 1105; *Carpenter v. Sangamon Loan & Trust Co.*, 229 Ill. 486, 82 N. E. 418; *People v. City of Peoria*, 229 Ill. 225, 82 N. E. 225; *Humane Society v. McMurtrie*, 229 Ill. 519, 82 N. E. 319.

3. ⁴ In *Edwards v. Edwards*, 15 Beav. 357, at 363, the Master of the Rolls said: "In the third class of cases, where a previous life-estate is given, the same rule which applies to the first class of cases applies equally, though the application of it fixes a different time. In the first case, the rule is, if A. die before the period of possession or payment, i. e. before the death of the testator, the legacy goes to B. In the case I am now considering, the rule is the same, namely, if A. die before the period of possession or payment, i. e. before the death of the tenant for life of the legacy, the legacy goes to B. This is the case of *Hervey v. McLaughlin* [1 Price, 264], cited with approbation by V. C. Wigram in *Salisbury v. Petty* [3 Hare, 92]. And it may further be observed, that the propriety of giving effect to the testator's words, making death a contingent event, by referring that event to the period when the legacy is vested in possession, rather than to the death of the testator, where these periods are not identical, was the ground on which the House of Lords reversed the decision of Lord Cowper, in *Lord Bindon v. The Earl of Suffolk* [1 P. Wms. 96], although the principle of that decision was then recognized, and has always been since maintained."

The fourth class of cases mentioned by the Master of the Rolls consists of those where a life estate is given, and the property is then given to A. with a direction that if he shall die leaving no child (or unmarried or under twenty-one), over. As to these cases the Master of the Rolls observes, that the words referring to death without leaving a child, &c., may be applied to death at any time whenever it may occur; "nor," he continues, "if it were *res integra* would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine what construction ought to prevail." The Master of the Rolls, however, proceeds to say that he considers it "settled, both by principle and authority, that, in the absence of any words indicating a contrary intention, the rule is, that the words indicating death without leaving a child," must be construed to refer to the occurring of that event before the period of distribution, which he takes as synonymous with the death of the tenant for life.

The principle to which the Master of the Rolls refers, he states to be, the desire of the Court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the gift during the whole lifetime of the legatee, a principle which, he says, influenced Lord Brougham in his decision of the case of *Home v. Pillans* [2 My. & K. 15]. With regard to the case of *Home v. Pillans*, it will be found, when I examine it, to have no application whatever to bequests of the kind which we are now considering, and I am not aware of any principle such as the Master of the Rolls refers to, being applied to control the natural meaning of the terms of a bequest. In the second class of cases referred to by the Master of the Rolls, the gift continues defeasible during the whole life of the legatee; and in cases like that before your Lordships it would, even according to the construction of the Appellant, continue defeasible during the whole of the life of the legatee, supposing the legatee to be outlived by the tenant for life.

The Master of the Rolls, however, refers to decided authorities. These authorities are *Da Costa v. Keir* [3 Russ. 360], *Galland v. Leonard* [1 Sw. 161], and *Home v. Pillans* [2 My. & K. 15]. In *Da Costa v. Keir* [3 Russ. 360] the testator gave the residue of his estate to his widow for her life, and after her decease to a person whom I shall denote as C., to and for her own use and benefit, to be at her own disposal, but if C. should happen to die, leaving any children living at her decease, then to such children; but if C. should happen to die without any child or children living at her decease, then to D. and E. equally; but if either should die before they became entitled to receive the residue of his estate, then the whole to the survivors; but if both should happen to die in the lifetime of the widow, then to his widow absolutely. There were, in this will, various circumstances pointing out the death of the widow as the period at which all the interests were to become indefeasible. In the first place the principal of the residue was given to C. "from and after the death of the widow, to and for her own use and benefit, to be at her own disposal;" a pro-

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vision which appeared to negative any continuing defeasibility. In the next place, the gift over from C. was framed, either in case she should die leaving children, or in case she should die not leaving children. And inasmuch as she must of necessity die either leaving or not leaving children, the case was the same as those where the gift over is in the event of death simpliciter. Farther, the ultimate gift was, in case D. and E. should both happen to die in the lifetime of the widow, a provision which seemed to imply that the previous gifts over were meant to be in case of death in the lifetime of the widow. It was upon these particular expressions, peculiar to this particular will, and not upon any general rule of construction, that the Master of the Rolls arrived at a decision, which, as it appears to me, was in that case entirely justified by the words of the will.

With regard to the case of *Galland v. Leonard* [1 Sw. 161] it is unnecessary to delay your Lordships by going through a narrative of the will. It is singular that there also, as in *Da Costa v. Keir* [3 Russ. 360], there was a gift over in the double event of either leaving or not leaving children, and there was a provision that the children of a daughter should be entitled to the same share as their mother would have been entitled to "if then living," and it was upon these expressions, and on the general construction of the particular will, that the Master of the Rolls held that the daughters surviving the tenant for life took indefeasible interests.

The case of *Home v. Pillans* [2 My. & K. 15] was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one; and, in case of the death of either niece leaving children, or a child, the testator gave the share of the niece so dying to her children or child. This was not the case of an absolute gift, with a gift over in a certain event. There was no gift over, and there was no gift at all until a niece attained twenty-one, and the child of a niece marrying and dying before twenty-one would have been wholly unprovided for if the Court had not held that the words "in case of the death of my said nieces or either of them, leaving children or a child," pointed to a death under twenty-one.

I am unable, therefore, to find in the authorities referred to by the Master of the Rolls the general rule of construction which he deduces from them.

I may add that there is a well-known class of cases referred to by Mr. Fearne in his book on *Contingent Remainders* [9th Ed. p. 471], and by other writers, where, with respect to executory devises of terms for years or other personal estates the Court of Chancery has been accustomed to lay hold of any words in the will to tie up the generality of the expression "dying without issue," and confine it to dying without issue living at the time of the person's decease. In several of these cases there has been a prior life estate, as in the case of *Atkinson v. Hutchinson* [3 P. Wms. 258], but in none of them was it ever suggested that the words "dying without issue" or without leav-

ing issue, could be construed as pointing to a death before the tenant for life.

My Lords, I need not refer in detail to cases decided since the case of *Edwards v. Edwards* [15 Beav. 357, 21 L. J. Ch. 324], some of them have professed simply to follow *Edwards v. Edwards* [15 Beav. 357, 21 L. J. Ch. 324], and among them is the case of *In re Heathcote's Trust* [Law Rep. 9 Ch. Ap. 45; see the case *Ingram v. Soutten*, post] now under appeal before, and about to be decided by, your Lordships. Another is the case of *Smith v. Spencer* [6 Deg., M. & G. 631], before Lord Cranworth, a case in which, if it is analogous to the present, the decision of *Edwards v. Edwards* [15 Beav. 357, 21 L. J. Ch. 324] was certainly not followed.

I am unable to find, in any case prior to *Edwards v. Edwards* [15 Beav. 357, 21 L. J. Ch. 324], any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children occurring at any time, or that this ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

I ought to observe, lest it should appear to have been overlooked, that at one period of the argument doubts were expressed whether under the present will the nephew, Colonel L'Estrange, having died in the life of the testatrix, the gift over from Grace L'Estrange could take effect. This point was not raised in the Court below, and I am satisfied that the gift to Colonel L'Estrange having failed by lapse, the residuary legatee is entitled to take all that Colonel L'Estrange, if living at the death of the testatrix, could have taken.

On the whole, I am of opinion that the present appeal should be dismissed with costs. My Lords, I say with costs, more particularly, because I observe that out of this legacy, not a large one at the best, the costs of litigation which came on two occasions before the Court below have already been paid; and if farther costs were to be paid out of the legacy, it would in effect be making the owner of the legacy pay the costs of both sides throughout the litigation.⁵ * * *

LORD SELBORNE. [After dealing with the principal point of the case and agreeing in the conclusions expressed by the Lord Chancellor, continued as follows:] This disposes of the appeal now before us, un-

⁵ Opinion of Lord Hatherley omitted.

NOTE ON THE MEANING OF "WITHOUT CHILDREN."—"Without any child" means primarily without children surviving at the death of the first taker. *Jeffreys v. Conner*, 28 Beav. 328; *In re Booth*; *Pickard v. Booth*, L. R. [1900] 1 Ch. 768.

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. See *Theobald on Wills* (7th Ed.) pp. 706, 707; *Smith v. Kimbell*, 153 Ill. 368, 377, 38 N. E. 1029.

less it can be held that the gift to Grace L'Estrange, the niece, being absolute in form, never became subject to the divesting clause, because the contingent gift by the clause was to a person who died in the testatrix's lifetime. When the appeal was first opened, I doubted whether, under these circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee. But the result of the preliminary argument on that point, and of the authority cited by the Respondent, has been to satisfy me that the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testatrix, operates (when the contingency has happened on which the gift to the person was made to depend) for the benefit of the residuary legatee, or next of kin, in the same way as if the gift had been originally made to the same person, free from any contingency.

Order appealed from affirmed; and appeal dismissed, with costs.

TREHARNE v. LAYTON.

(In the Exchequer Chamber, 1875. L. R. 10 Q. B. 459.)⁶

Appeal from the decision of the Court of Queen's Bench discharging a rule to enter a verdict for the defendants.

The action was in ejectment to recover possession of tenements situate at Clay Hill, in the county of Hertford.

The defendants as landlords defended for the whole.

The cause was tried before Kelly, C. B., at Hertford spring assizes, 1874.

Jane Clifford, formerly of Clay Hill, made and executed her will on the 19th of June, 1863, as follows:

"I, Jane Clifford, of Cedar Cottage, Clay Hill, * * * do make and declare this to be my will and testament in the manner following: I order that all my just debts, funeral expenses, and charges of proving this my will, be in the first place fully paid and satisfied, and after payment thereof all the rest, residue, and remainder of my goods, chattels, debts, ready money, effects, and other my estate whatsoever and wheresoever both real and personal, I give and bequeath the same, and every part and parcel thereof, unto my granddaughter Martha Hudson, for her sole use during her lifetime, and after her death to her children in equal parts. And I do hereby order my granddaughter Martha Hudson to allow my brother Robert Robbins everything necessary during his lifetime in her own house, or my granddaughter Martha Hudson to allow my said brother fifteen shillings per week so long as he shall live. In case my granddaughter Martha dies leaving no issue,

⁶ Only the opinion of Cleasby, B., is given. The concurring opinions of Grove and Denman, JJ., and Pollock and Amphlett, BB., are omitted.

the whole of the property goes to the next of kin, with the understanding that they the next of kin do allow my brother Robert Robbins fifteen shillings per week during his life."

Martha Hudson married the plaintiff on the 27th of July, 1864.

The testatrix died on the 29th of January, 1867.

In April, 1868, a male child was born to the plaintiff and Martha Treharne (formerly Hudson), and lived for a few hours only. No other child of the marriage was born alive.

Martha Treharne died on the 6th of June, 1872.

The property sought to be recovered was freehold property of Jane Clifford and passed by her will.

The verdict was entered for the plaintiff. Kelly, C. B. reserved leave to enter a verdict for the defendants, on the ground that there was no evidence of sufficient title in the plaintiff to enable him to maintain the action.

A rule was afterwards obtained pursuant to leave reserved.

The rule was argued on the 21st and 23rd of November, 1874, and the Court (Blackburn, Mellor, and Lush, JJ.) discharged the rule on the ground that the phrase "leaving no issue" must be construed as "having had no issue."

CLEASBY, B. We think that the authorities applicable to this case are so clear and so strong that we should not be justified in saying that they are wrong. The position they lay down is, that where an estate is vested in children after a gift to a parent, then the gift over in case of the parent dying "without leaving issue" must be read "having had no issue" in order to carry into effect the intention of the testator: and this rests upon the highest authority and goes back further than the case of *Maitland v. Chalie*, 6 Madd. 243, at p. 250, which was a decision of Leech, V. C. He says: "In this case a clear vested interest is in the first place given to the children of a daughter attaining twenty-one; if in the clause which gives the property over on failure of children of the daughter the word 'having' be read for 'leaving' the whole will express a consistent intention to that effect." Then he says: "I feel myself bound by the authorities," and he refers to *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; 3 V. & B. 82, (c), which was no doubt a case of settlement, but we cannot disregard it. That case was in the time of Lord Thurlow. Then we have the distinct authority of Parker, V. C., in *Re Thompson's Trusts*, 5 De G. & Sm. 667; 22 L. J. (Ch.) 273, who, in dealing with the case expresses himself thus: "I think that this case comes within the authorities cited in support of the petition. The will gives a life estate and then clearly a vested interest in the children; and if any child dies under twenty-one leaving issue, to the issue of that child. Thus far everything is vested; and then occurs the clause, 'in case the said Martha Oliver shall leave no child or children, or leaving such, all of them shall happen to die under age and without issue,' in which case he gives the fund over. It is said that if the word 'leave' be understood in its ordi-

nary sense, the gift over takes effect, for Martha Oliver had no children who survived her. It appears to me that the testator's intention was to give this fund over only in case the previous limitation should fail." And then he adds this remark, which is so just and applicable to all cases of this description: "But I may observe an observation that may always be made in cases where there is this kind of question, that the testator never contemplated the event which has happened of a child attaining twenty-one and dying in the lifetime of the tenant for life. He assumed the child would have lived." And then he says, "I consider the construction is clear according to the authorities." And he refers to *Maitland v. Chalie*, 6 Madd. 243, the case decided by Leach, V. C., which he says is clearly in point. In addition to these decisions we have that of *Kindersley*, V. C., in *Ex parte Hooper*, 1 Drew. 264, and *Wood*, V. C., in *White v. Hill*, Law Rep. 4 Eq. 265, which bring the authorities down from the time of Lord Thurlow (1792) to the present time without dispute. At all events, I speak for my learned Brothers as well as for myself, we do not feel justified in overruling the decision of the Court of Queen's Bench, based on a long series of authorities; the judgment therefore must be affirmed.⁷

⁷ "This construction cannot be adopted where the gift over is on the death of the tenant for life without leaving any children at his death, or without leaving any children him surviving. *Young v. Turner*, 1 B. & S. 550; *In re Hamlet*, *Stephen v. Cunningham*, 38 Ch. D. 183, 39 Ch. D. 426." Theobald on Wills (7th Ed.) p. 706.

CHAPTER VI
GIFTS ON FAILURE OF ISSUE

PELLS v. BROWN.

(Court of King's Bench, 1620. Cro. Jac. 590.)

See ante, p. 38, for a report of the case.¹

CHADOCK v. COWLEY.

(Court of King's Bench, 1624. Cro. Jac. 695.)

Ejectment of lands in Bradmere, of a lease of William Hydes. Upon not guilty pleaded, a special verdict was found, that William Hydes, the lessor's grandfather, was seised in fee of this land in Bradmere and East-Leak, holden in socage of that manor; and having two sons, Thomas and Francis, devised them by his will in this manner, viz. to his wife for life, and after her death all his lands in Bradmere to Thomas his son and his heirs forever; and his lands in East-Leak to Francis his son and his heirs forever. "Item, I will that the survivor of them shall be heir to the other, if either of them die without issue." The wife enters, and dies, Thomas enters into the lands in Bradmere, and devises them to Richard his second son in fee, under whom the defendant claims; and William the eldest son of Thomas enters, and lets it to the plaintiff. Et si super, &c.

The sole question was, Whether this devise be an estate tail immediate by the devise, or only a contingent estate, if he died without issue in the life of his brother?

And it was holden by ALL THE COURT (absente LEA), that it was an estate tail, so the devise of Thomas was void: for although it were objected, that the words, "the survivor shall be heir to the other if he die without issue," are idle, for it doth not appear that he had any other children; and then when the one dies without issue, the other is his heir by the law, and so he wills no more than the law appoints; sed non allocatur; for non constat but that he might have other children, and that by several venters; and by the devise he intended to give it to the others by way of devise, if he died without issue. Secondly, for the words, "that the survivor shall be heir to the other if he dies without issue," they seem to be an estate tail. But if the devise had been,

¹ So a gift over, on the first taker in fee dying "without leaving issue surviving," is an executory devise on a definite failure of issue. *Nicholson v. Bettle*, 57 Pa. 384.

that "if he died without issue in the life of the other," or "before such an age," that then it shall remain to the other; then peradventure it should be a contingent devise in tail, if it should happen, and not otherwise: but being, "that the survivor shall be heir to the other if he die without issue;" that in his intent is an absolute estate tail immediately, and the remainder limited over, as 7 Edw. 6, "Devise" 38, is; and resembled it to the case 9 Edw. 3, "Tail" 21, and 35 Ass. pl. 14, and 9 Co. 128 and 16 El. Dyer, 330. And that here although the first part of the will gives a fee, the second part corrects it, and makes it but an estate tail. Wherefore it was adjudged for the plaintiff. Vide Dyer, 354 and 122, 124. And this judgment was given upon the first argument.²

NICHOLS v. HOOPER.

(Court of Chancery, 1712. 1 P. Wms. 198.)

John Jackson seised in fee devised lands to his wife Mary for life, remainder to his son Thomas Jackson and his heirs; provided, that if the said Thomas Jackson should die without issue of his body, then he gave £100 apiece to his two nieces A. and B. to be paid within six months after the death of the survivor of the said mother and son, by the person who should inherit the premises; and in default of payment, as aforesaid, then the testator devised the lands to the legatees for payment, and died.

The testator's wife Mary died, and the son Thomas Jackson died, leaving a daughter, which daughter, within the said six months after the death of her father Thomas Jackson died also without issue; the bill was to have the £200 and for the plaintiffs.

It was urged, that though Thomas Jackson left issue living at the time of his death, yet when that issue died without issue, then did Thomas Jackson die without issue; that if a man should devise lands to A. in tail, and if A. died without issue, then to B. if A. should leave issue, and that issue should afterwards die without issue, B.'s estate would plainly commence. So if a rent were limited to commence upon tenant in tail's dying without issue, if tenant in tail left issue, that

² Accord: *Burrough v. Foster*, 6 R. I. 534 (devise to grandchildren and "to their heirs and assigns forever," with a gift over "if any of my grandchildren should die leaving no surviving issue," then to "the survivor or survivors of such as shall die as aforesaid," and "to their heirs and assigns forever"; the grandchildren took an estate tail); *Hall v. Priest*, 6 Gray (Mass.) 18 (devise to the testator's children and to their "heirs and assigns forever," with a gift over "in case of the decease of either of my said children without issue, the share of such deceased child or children shall be equally divided to and among his or her surviving brothers and sisters").

Contra: *Anderson v. Jackson*, 16 Johns. (N. Y.) 382, 8 Am. Dec. 330; *St. John v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Abbott v. Essex Co.*, 18 How. 202, 15 L. Ed. 352 (semble); *Lewis v. Claiborne*, 5 Yerg. (Tenn.) 369, 26 Am. Dec. 270; *Summers v. Smith*, 127 Ill. 645, 650, 21 N. E. 191; *Greenwood v. Verdon*, 1 K. & J. 74 (semble); *Den v. Allaire*, 20 N. J. Law, 6, 27.

afterwards died without issue, the rent must commence; and it was said to be the stronger, in regard, in this case, here was a death without issue within six months after the death of the survivor; (scil.) the issue of Thomas died without issue within six months after the death of Thomas her father.

Vernon & Cur' [LORD KEEPER HARCOURT] cont': Thomas Jackson is not by this will made tenant in tail, but continues tenant in fee-simple; so that this is not like the limitation of an estate; for it is agreed, that in case of limitation of estates, in construction of law, whenever there is a failure of issue of J. S. though J. S. died leaving issue at his death, yet from that time J. S. is dead without issue.

But where a legacy is given by a will, to commence upon this contingency, (scil.) if J. S. shall die without issue, this shall be taken according to common parlance, viz. issue living at his death; for, in common parlance, if J. S. leaves issue, he does not die without issue; and it cannot be intended that the testator designed, whenever there should be a failure of issue of Thomas, (which might be 100 years hence,) that then these legacies, which were meant only as personal provisions, should take effect.

However, in this case, with respect to the legatees, if the legacies take any effect, the words of the devise pass a legal interest, and the court does not hinder the plaintiffs from proceeding at law, in an ejectment, but dismisses the bill.

Note. This differed from the case of *Goodwin v. Clark*, 1 Lev. 35, where a settlement was on husband and wife for their lives, remainder to the first, &c., son in tail male, and if the husband should die without issue male, remainder to the daughters for a term of years, for the raising of £1500 for their portions; and the husband died leaving issue a son and a daughter, after which the son died without issue:

Whereupon it was adjudged, that the daughter should have the £1500, for that whenever the issue male of the husband failed, he might properly be said to be dead without issue male. 8 Co. 86, *Buckmere's Case*. And this very expectation, remote and precarious as it was (for there being an estate-tail, a recovery suffered by the tenant in tail would have barred the portions expectant thereupon) was, notwithstanding, of advantage to the daughters with respect to their advancement in marriage; whereas in the principal case, the estate being a fee, no recovery could be suffered thereof, and consequently there was danger of a perpetuity.

HUGHES v. SAYER.

(Court of Chancery, 1718. 1 P. Wms. 534.)

John Hughes, after several legacies, by his will directed that the surplus of his personal estate should be divided by his executors into ten shares, three shares whereof should be paid to his nephew and niece, Paul and Anne Hughes, children of a deceased brother, and upon either of their dying without children, then to the survivor, and if both should die without children, then to the children of the testator's other brothers and sisters.

The question was, whether this devise over of a personal estate upon the devisee's dying without children, was good or not?

And his Honor [SIR JOSEPH JEKYLL, M. R.], having taken time to consider it, gave judgment that the word (children) when unborn, had been in case of a will construed to be synonymous with issue, and therefore would in a will, create an estate tail; and if the word (children) was understood to be the same with issue in the present case, then the devise over of the personal estate upon a death without issue would be void; but that here the words (dying without children) must be taken to be children living at the death of the party. For that it could not be taken in the other sense (that is) whenever there should be a failure of issue, because the immediate limitation over was to the surviving devisee, and it was not probable, that if either of the devisees should die leaving issue, the survivor should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure forever.

And therefore, by reason of the limitation over in case of either of the devisees dying without children, then to the survivor, the testator must be intended to mean a dying without children, living at the death of the parent, consequently the devise over good.³

FORTH v. CHAPMAN.

(Court of Chancery, 1720. 1 P. Wms. 663.)

This cause was reserved for the judgment of the Master of the Rolls [Sir Joseph Jekyll], who after time taken to consider thereof, gave his opinion. The case was,

One Walter Gore by will devises thus: all the residue of his estate real and personal he gave to John Chapman in trust, only the lease of the ground he held of the school of Bangor, for the use of his nephews William Gore and Walter Gore during the term of the lease as hereinafter limited, and having given several legacies, declared his will as to the remainder of the said estate, as well as his freehold house in Shaw's

³Accord: Clapp v. Fogleman, 21 N. C. 466.

Court, with all the rest of his goods and chattels whatsoever and where-soever, he gave to his nephew William Gore; and if either of his nephews William or Walter should depart this life and leave no issue for their respective bodies, then he gave the said [leasehold] premises to the daughter of his brother William Gore, and the children of his sister Sibley Price; upon which the question arose, whether the limitation over of the leasehold premises to the children of the devisor's brother and sister, was void as too remote?

The court was of opinion that the devise over was void, and said that had the words been, if A. or B. should die without issue, the remainder over; this plainly would have been void, and exactly the case of *Love and Wyndham*, 1 Sid. 450, 1 Vent. 79, 1 Mod. 50.

Now there is no diversity betwixt a devise of a term to one for life, and if he die without issue, remainder over, and a devise thereof to one for life, with such remainder, if he die leaving no issue; for both these devises seem equally relative to the failure of issue at any time after the testator's death; and for this the court cited and much relied upon 1 Leon. 285, *Lee's Case*, where one devised lands to his second son William, and if William should depart this life not having issue, then the testator willed that his sons-in-law should sell his lands, and died: William had issue a son at the time of his death, who afterwards died without issue; upon which it was clearly resolved by the whole court, that though literally William had issue a son at his death, yet when such issue died without issue, there should be a sale; for at what time soever there was a failure of issue of William, he upon the matter died without issue. And in a formedon in reverter or remainder, whenever there is a failure of issue, then is the first donee, in supposition of law, dead without issue.

His Honor mentioned the case of *Hughes and Sayer*, which he himself upon consideration had determined; and said there was a diversity betwixt issue and children, issue being nomen collectivum; and also between things merely personal and chattels real; more particularly in the case of *Hughes and Sayer*, by the devise over of the money to the survivor, if either of the donees should die without children, the testator of necessity must be intended to mean a death of the donee without children living at his death; for to wait until a failure of issue, might be to wait forever.

It being also debated by counsel, where the residue of the term vested, in regard the devise was to William and Walter Gore: the court declared that the subsequent words increased their interest, and gave the whole term to them, it being plainly intended to dispose of and devise away the whole term from the testator's executors; that a devise of a term to one for a day or an hour, is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors.

Afterwards in Trin. Term, 1720, this case coming before LORD PARKER upon an appeal, his Lordship reversed the decree; and said,

that if I devise a term to A. and if A. die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended if A. die without leaving issue at his death, and then the devise over is good; that the word [die] being the last antecedent, the words [without leaving issue] must refer to that. Besides, the testator who is inops concilii, will, under such circumstances, be supposed to speak in the vulgar, common and natural, not in the legal sense.

His Lordship likewise took notice that in a formedon in remainder, where tenant in tail leaves issue, which issue afterwards dies without issue, whereupon such writ is brought, the formedon says, that the tenant in tail did die leaving issue J. S. which J. S. died afterwards without issue, and so the first donee in tail died without issue, thus the pleading says, that the donee in tail died leaving issue at his death; consequently the words [leaving issue] refer to the time of the death of the tenant in tail, and if the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say a court should take the will in the most uncommon meaning; to do what? to destroy the will.

2dly, he said that the reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate-tail, is in favor of the issue, that such may have it, and the intent take place; but that there is the plainest difference betwixt a devise of a freehold, and a devise of a term for years; for in the devise of the latter to one, and if he die without issue, then to another, the words [if he die without issue] cannot be supposed to have been inserted in favor of such issue, since they cannot by any construction have it.

3dly, his Lordship observed what seemed very material, (and yet had been omitted in the pleadings, and also by the counsel at the bar) that by this will the devise carried a freehold as well as leasehold estate to William Gore, and if he or Walter died leaving no issue, then to the children of his brother and sister, in which case it was more difficult to conceive how the same words in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction should be, if William or Walter died without issue generally, by which there might be at any time a failure of issue; ⁴

⁴Accord: As to real estate: *Hulburt v. Emerson*, 16 Mass. 241; *Morehouse v. Cotheal*, 21 N. J. Law, 480; *Id.*, 22 N. J. Law (2 Lab.) 430; *Chetwood v. Winston*, 40 N. J. Law, 337; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447.

Contra, as to real estate: *Harris v. Smith*, 16 Ga. 545 (1855); *Flinn v. Davis*, 18 Ala. 132; *Daniel v. Thomson*, 14 B. Mon. (Ky.) 662; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Metzen v. Schopp*, 202 Ill. 275, 67 N. E. 36.

In *Parish's Heirs v. Ferris*, 6 Ohio St. 563, the gift over was in case the first taker "shall die without children." There was some ground for contending that children meant heirs of the body or issue. The court held that even if it had that meaning the gift over was on a definite failure of issue. *J. R. Swan, J.*, said:

"It is a singular fact that, with the repeated decisions of the English courts upon this subject, testators, from generation to generation, persisted in using

and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue at their death: however, LORD CHANCELLOR said, it might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated by two several clauses, viz. I devise to A. my freehold land, and if A. die without leaving issue, then to B., and I devise my leasehold to A. and if A. die without leaving issue, then to B., in

these natural words, and which were held to be inoperative and void, until, in the first year of the reign of the present Queen, a statute was passed declaring that the words 'die without issue,' or other words which may import a want or failure of issue, should be construed to mean dying without issue living at the death of the person, and not an indefinite failure of issue, unless a contrary intention appear by the will. The English rule, adopted in Virginia, and in a modified form in New York, has met the same fate by legislative interposition. In Ohio, as in Kentucky, the English rule of interpretation has never been sanctioned; and in the latter State, the subject was very fully considered in the case of *Daniel v. Thomson*, 14 B. Mon. (Ky.) 662, and the English rule was rejected as one unknown to the community, contrary to the natural sense and common use of words, founded upon laws and estates inapplicable to titles in Kentucky, where, as here, estates tail are abrogated, and so evaded by courts as to be made to depend upon the discretion and variable opinions of judges. If there be any rule of interpretation of words which defeats the intention of the testator, and to which the following language of Justice Hitchcock is applicable, it is the English rule now under consideration: 'I must be permitted to say that these rules, in most cases, are applied not for the purpose of ascertaining, but of defeating the intention of the deviser. In this State, however, we are required, by statute, to carry out this intention; and I presume no such statute would have been passed, had it not been supposed that these antiquated rules of construction were too much regarded by our courts.'

"We are all of the opinion, for the reasons which have been indicated, that the words, 'if he die without issue,' or 'without leaving issue,' or 'heirs of his body,' or 'children,' or other words of similar import, are to be interpreted according to their plain, popular and natural meaning, as referring to the time of the person's death, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes. We could, without impeaching the old English rule of interpretation, find in the words of the will before us, and in the fact that the brothers and sisters of the testator were living at the time he made his will, sufficient to restrict the contingency and the devise over, to the time of the decease of his daughter. But we are unwilling to make an exception by which we sanction the English construction of the words under consideration, as referring in general to an indefinite failure of issue, and at the same time make the case before us an exception to that rule; thus leaving open a wide field of uncertain interpretation of words and circumstances, so that no man would know the nature of an estate which depended upon the interpretation of these or the like words, until there had been a decision on the particular will on which the question might arise.

"If the English rule of interpretation had been recognized by our courts as a rule of property we would not disturb it. It would then be a fit subject of legislation. But it never has been recognized; and the uniform course of the decisions of the courts of this State has been to so construe wills as to carry into effect the intention of testators. To adopt the English rule, is clearly to defeat what every person must acknowledge is the real and the lawful intention of testators; it is to presume that a testator intended to create an estate forbidden by our statute relating to entailments; and a rule too which, wherever recognized by courts, has been changed by legislation.

"Indeed the only certain and stable principle is to hold that these words in a will, as in other cases, must be taken in their natural sense, unless a contrary intention is plainly expressed."

which case the different clauses would (as he conceived) have the different constructions above-mentioned to make both the devises good; and it was reasonable it should be so, *ut res magis valeat quam pereat*.

TROTTER v. OSWALD.

(Court of Chancery, 1787. 1 Cox, 317.)

The Bishop of Raphoe in Ireland, by his will in July, 1776, gave all the residue of his property whatsoever, both real and personal, in trust to the plaintiff Trotter, and to another trustee, "for the use of John Bogle during his life, and to the lawful heirs of his body after his demise, but in case of his dying without issue of his body, after his decease I give all such residue to John Oswald."

The question was, whether the limitation to John Oswald was or was not too remote.

Pinbury v. Elhin, 1 P. W. 563, and *Theebridge v. Kilburne*, 2 Ves. 233, were cited.

MASTER OF THE ROLLS [SIR LLOYD KENYON]. In general, words which give an estate tail in land, give the absolute property in personal estate, and a limitation over of personalty, after an indefinite failure of issue, is clearly void; but if the failure of issue is limited within a certain bound prescribed by law, then such limitation is allowed. The questions therefore on this subject, are questions of construction, viz., whether, according to the fair construction of the words, such limits are transgressed. In this case I think a doubt can scarcely be framed. The residue is first given to Bogle and the lawful heirs of his body; if the will had stopped here, it would most clearly have given him the absolute property; so, if it had rested on the words, "if he die without issue;" but the important words follow, viz. "after his decease I give," &c. These make it a contingency with a double aspect; if he had a child at his death, then the limitation over would be at an end; but if not, the limitation over is within legal limits. This was therefore a good limitation in its creation. The event which may give it effect, or destroy it, is still in the womb of time; and therefore at present no direction can be given.⁵

⁵ See *Ex parte Davies*, 2 Sim. N. S. 114 (real estate devised to the testator's eldest son and his heirs, with a gift over in case said son should die without leaving any lawful issue of his body, the freehold estate should at his death be divided into equal parts, one of which the testator devised to his second son and his heirs, and the other to his daughter and her heirs; the gift over was on a definite failure of issue); *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132 (devise to the testator's daughter, and if she die without leaving issue "then it is my will that after her decease I give and devise the remainder and residue of my estate, both real and personal, whatever it may be at the decease of my said daughter," to another in fee; the gift over was on a definite failure of issue, but the daughter was not impliedly given any power to sell or dispose of the subject-matter of the devise); *Ide v. Ide*, 5 Mass. 500 (the gift over was if the first taker "leave no lawful heirs, what estate he

ROE *ex dem.* SHEERS *v.* JEFFERY.

(Court of King's Bench, 1798. 7 Term R. 589.)

The following case was reserved on the trial of this ejectment at the last summer Warwick assizes for the opinion of this court.

J. Goodacre, being seised in fee of the premises in question, by will dated 20th May, 1754, devised to his wife A. Goodacre for life, after her decease to his daughter Mary Friswell, wife of W. Friswell for life, and after her death to his grandson T. Friswell, son of W. and M. Friswell and to his heirs forever; "but in case his said grandson T. Friswell should depart this life and leave no issue, then (his will was) that the said dwelling-house, &c., should be and return unto Elizabeth, Mary, and Sarah, the three daughters of W. and M. Friswell or the survivor or survivors of them to be equally divided betwixt them share and share alike;" nevertheless his will was that the said premises should go to his son W. Goodacre for life immediately after the decease of his wife A. Goodacre, "and after his decease the said premises and every part thereof to go as above mentioned to his daughter M. Friswell and her issue as aforesaid." On the devisor's death in 1757, his wife A. Goodacre entered, and continued in possession until her death in April 1762, when W. Goodacre the son entered. In Trinity term 1764 the said Mary Friswell the daughter (her husband being then dead), Thomas Friswell the grandson and W. Goodacre levied a fine of the premises in question, the uses of which were declared to be to E. Inge to make him tenant to the præcipe in order that a common recovery might be suffered; in the Trinity term following a recovery was suffered, and the uses were declared to be to T. Goodacre and T. Cater his trustee, who afterwards conveyed the premises to W. Jeffery one of the defendants. T. Friswell, the devisor's grandson, died in September 1766 unmarried and without issue, never having been in the possession of the premises. Mary Friswell, the daughter, died in February 1779. And W. Goodacre, the last tenant for life, died in March 1795. Sarah Friswell, one of the daughters of W. and M. Friswell, died in August 1782; Elizabeth another of the daughters and one of the lessors of the plaintiff married Sheers and survived him; and Mary the third daughter married J. Mawson, and they are the other two lessors of the plaintiff. The above defendants are tenants in possession of the whole of the premises. An actual entry was made by the lessors of the plaintiff after the death of W. Goodacre and before the day of the demises laid in the declaration.

This case was argued in last Michaelmas term by,

Reader, for the plaintiff.

Romilly, contra.

shall leave, to be equally divided" between J. & N.; held, the gift over was on a definite failure of issue only because of the words "what estate he shall leave").

The court said they would consider of the case; but

LORD KENYON, C. J., then said that the distinction taken in *Forth v. Chapman*, that the very same words in the same clause in a will should receive one construction as applied to one species of property and another construction as applied to another, was not reconcileable with reason: but that if it had become a settled rule of property it might be dangerous to overturn it. That it had been quarrelled with by different judges, and that small circumstances had been relied on to take particular cases out of the rule. His Lordship added that he had then formed no decisive opinion of this case, but that it appeared to him that there were circumstances in the case to show an intention in the testator that by leaving no issue he meant a failure of issue of T. Friswell at the time of his death, the remainders over being life estates only. That he was not then prepared to unsay what he had said in *Porter v. Bradley*, 3 T. R. 146, in which he had not given any judicial opinion respecting the distinction taken in *Forth v. Chapman*, but had merely said that it required a good deal of argument to convince him of the propriety of that distinction.

The case accordingly stood over, and now

LORD KENYON, C. J., delivered the opinion of the court, after stating the case.

When we read this case at first, it appeared to us that there was no difficulty in it: but the defendant's counsel, in arguing it, seemed to think that if we decided against his client the established law of the land would be overturned, and he pressed the case of *Forth v. Chapman* on us with peculiar force. But it did not strike me in the same light, and on the best consideration that I have since been able to give to it at different times I think that this is a clear case and may be decided on principles that have not been disputed for a century. We had occasion a few days ago to advert to this doctrine, when we said that this is a question of construction depending on the intention of the party; and nothing can be clearer in point of law than that if an estate be given to A. in fee, and by way of executory devise an estate be given over which may take place within a life or lives in being and 21 years and the fraction of a year afterwards, the latter is good by way of an executory devise. The question therefore in this and similar cases is, whether from the whole context of the will we can collect that, when an estate is given to A. and his heirs forever but if he die without issue then over, the testator meant dying without issue living at the death of the first taker. The rule was settled so long ago as in the reign of James the First, in the case of *Pells v. Brown, Cro. Jac. 590*, where the devise being to Thomas the second son of the deviser and his heirs forever, and if he died without issue living William his brother then William should have those lands to him and his heirs forever, the limitation over was a good executory devise. That case has never been questioned or shaken, but it has been adverted to as an authority in every subsequent case respecting executory devises;

it is considered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the established law of the land as (it was supposed by the defendant's counsel) we should do if we decided this case against him. On looking through the whole of this will we have no doubt but that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, and life estates are only given to them. Now taking all this into consideration together, it is impossible not to see that the failure of issue intended by the testator was to be a failure of issue at the death of the first taker; and if so, the rule of law is not to be controverted. It is merely a question of intention, and we are all clearly of opinion that there is no doubt about the testator's intention. The consequence of this is that there must be judgment for the plaintiff.

Postea to the plaintiff.⁶

PROPOSED LEGISLATION ⁷

In any gift, grant or devise hereinafter taking effect, a limitation of an executory interest contingent upon the event of a prior taker "having no issue" or "dying without issue" or "dying without leaving issue" (or using words of similar import), shall not be held to refer to an indefinite failure of issue, but shall be deemed to refer to the want or failure of issue at the time of the death of the person named as ancestor.

⁶ Where, however, the testatrix bequeathed personal estate to her daughter and her heirs, and in case she dies without issue to be divided between four nephews and nieces named, one of them to take only for life and her part to be divided between the survivors, the gift over was upon an indefinite failure of issue and void for remoteness: *Barlow v. Salter*, 17 Ves. 479.

⁷ Prepared by Professor Ernst Freund and embodied in the draft of a bill presented to the Illinois Legislature at its sessions in 1907 and 1909. See, also, 1 Ill. Law Rev. 314, 315.

CHAPTER VII

IMPLICATION OF CROSS-LIMITATIONS¹

SCOTT v. BARGEMAN.

(Court of Chancery, 1722. 2 P. Wms. 68.)

One has a wife and three daughters, A., B., and C., and being possessed of a personal estate, devises all to his wife, upon condition, that she would immediately after his death pay £900 into the hands of J. S. in trust to lay out the same at interest, and pay the interest thereof to his wife for her life, if she shall so long continue a widow; and after her death or marriage, in trust that J. S. shall divide the £900 equally among the three daughters, at their respective ages of twenty-one, or marriage, provided that if all his three daughters should die before their legacies should become payable, then the mother, whom the testator also made executrix, should have the whole £900 paid to her.

The wife pays the £900 to J. S. and marries a second husband, viz., the defendant Bargeman; the two eldest daughters die under age and unmarried; the youngest daughter attains twenty-one; and the question being, whether she was entitled to all, or what part of the £900.

LORD CHANCELLOR [MACCLESFIELD]. The youngest daughter is entitled to the whole £900, by virtue of the clause in the will, which says, "if all the three daughters shall die before their age of twenty-one or marriage, then the wife shall have the whole £900;" for this plainly excludes the mother from having the £900 or any part of it, unless these contingencies shall have happened, and the share of £300 apiece did not vest absolutely in any of the three daughters under age, so as to go, according to the Statute of Distributions, to their representatives, in regard it was possible all the three daughters might die before their ages of twenty-one or marriage, in which case the whole £900 is devised over to the mother; consequently the whole £900 does now belong to the surviving daughter the plaintiff.²

¹ Cross-remainders will not be raised by implication in a deed: *Doe d. Tanner v. Dorvell*, 4 T. R. 518 (1794).

² "If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe d. Gorges v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R. 3 Q. B. 655; *Hannaford v. Hannaford*, L. R. 7 Q. B.

CHAPTER VIII
DETERMINATION OF CLASSES

WELD v. BRADBURY.

(Court of Chancery, 1715. 2 Vern. 705.)

Wickstead Weld, the plaintiff's father, devised his stock without doors to be sold by his executors, and after debts and legacies paid, the surplus arising by sale to be put out at interest; and one moiety to be paid to the younger children of the plaintiff, living at his death, and the other moiety to the children of J. S. and J. N.

Neither J. S. nor J. N. had any child living at the making of the will, or at the death of the testator.

PER CUR. [LORD COWPER, L. C.] It must be intended [an executory devise, and to be to such children, as they, or either of them should at any time after have, and the children to take per capita, and not per stirpes, they claiming in their own right, and not as representing their parents.¹

116; see Askew v. Askew, 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620." Theobald on Wills (7th Ed.) 739.

"The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents." Maden v. Taylor, 45 L. J. Ch. 569. Theobald on Wills (7th Ed.) 739.

"It has been said that, if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. Clache's Case (Dyer, 330), however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks by Turner, L. J., in Atkinson v. Barton, 3 D. F. & J. 339. And the decision in Rabbeth v. Squire, 19 B. 77; 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L. J.: 'Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it.' Atkinson v. Barton, 3 D. F. & J. 339 (reversed on appeal, but on different grounds, 10 H. L. 313). See, too, Vanderplank v. King, 3 Ha. 1; Re Ridge's Trusts, 7 Ch. 665; In re Hudson. Hudson v. Hudson, 20 Ch. D. 406 (where the rules deducible from the cases are stated); In re Rabbins; Gill v. Worrall, 79 L. T. 313." Theobald on Wills (7th Ed.) 740.

"Cross-remainders will be implied in a devise to the children of A., which carries to them only a life estate, with a gift over for want of such issue of A. Ashley v. Ashley, 6 Sim. 358." Theobald on Wills (7th Ed.) 740.

¹ Same as to realty, Shepherd v. Ingram, ante, page 97.

• HILL v. CHAPMAN.

(Court of Chancery, 1791. 3 Brown, Ch. Cas. 391.)

The testator, John Spackman, made his will, dated 15th January, 1785, and thereby ² gave the residue to his trustees, the defendants, in "trust for the benefit of all his grandchildren, by his daughter Sarah, equally to be divided between them, and laid out for their respective benefit" ["as aforesaid."] The testator made two codicils to his will, and by the latter, dated 19th November, 1785, he gave annuities to his servants to the amount of £30 a year, and directed £1000 Three per cent Bank Annuities to be set apart to pay these annuities.

The plaintiffs were the children of the testator's daughter, Sarah Hill, born before the death of the testator.

The defendants were the trustees, and a child born after the death of the testator (but during the life of the annuitants), who was brought before the court, by a supplemental bill.

And the question was, whether the after-born child should take a share of this £1000.

LORD CHANCELLOR [THURLOW]. Where a supplemental bill brings a new person or a new interest before the court, it is open to the parties to make any objection to the decree that might have been made at the first hearing.

It is intelligible, that by "the children of A." the testator means children then born; if you go further, it must extend to all possible children. To tie it up to the death of the testator, is rather a forced construction.

Where it is to one for life, and then to the children, it shows the intention to be children born then. If it was a specific legacy to one for life, and then to be divided, there could be no doubt.

If it were of a part to one for life, then to fall into the residue, and then the residue was ordered to be divided among children, the same principle would apply; which must extend to all the children: therefore, if the £1000 was to be divided at the death of the surviving annuitants, it must be divided among all then born; but the difficulty here is, that the general estate must be divided at the death of the testator. The circumstance of taking out a part for the special purpose does not seem very material. If he says nothing upon the subject, upon the death of the surviving annuitant it must sink into the residue, which is divisible at the testator's death; and it is repugnant to say, one part of the residue shall be divisible at one time, and the other part at another.

I think it must fall into the residue.

² After having given distinct legacies to the children of his daughter, Sarah Hill, nominatim, directing the mode of investment, and the time when each legatee should have the possession; see the report in 1 Ves. Jun. 405, and the MS. reports of the judgment.—Belt's Note.

I have always thought that the case of *Ellison v. Airey*, 1 Vesey, 111, went on a refinement, and was beside the intention of the testator.³

DEVISME v. MELLO.

(Court of Chancery, 1782. 1 Brown Ch. Cas. 537.)

Stephen Devisme,⁴ having made his will in 1763, added a codicil March 20, 1770, which contained this provision: "I give and bequeath a further sum of £5000 sterling, to purchase stock, and the interest to be paid to my mother Marianne Devisme; at her death the interest to be paid to my brother William Devisme; and at his decease, to my godson Stephen; at his decease, if before he is of age, to be divided among his brothers equally."

Stephen Devisme, the testator's godson, had died, aged four years, February 26, 1770, before the making of the codicil. The testator died in November, 1770. Stephen Devisme, the godson, was the son of the testator's brother William Devisme. Besides Stephen, William Devisme had two sons who were living both at the date of the codicil and at the time of the testator's death, and another son Andrew, who was born in 1778.

Marianne, the testator's mother, died in 1779, and William Devisme in 1781.

The sum of £5000 had been invested in stock. The two sons of William Devisme, who were living at the testator's death, and had attained twenty-one, brought this bill, that their shares might be transferred to them. The question was, whether Andrew Devisme was entitled to share.

LORD CHANCELLOR [THURLOW] was of opinion, that he was obliged to say the words in the bequest of £5000 to brothers of Stephen, were not confined to those who were his brothers at the time of making the codicil; that the testator must have had in contemplation other sons coming into being; that the intention of the testator appeared to be to make an aggregate description of a part of the family of William, by the name of brothers of Stephen, as if he had used the words male children of William, that he made use of the word brothers merely by relation to the antecedent, the name of Stephen used in the former part of the bequest, and that he could not otherwise have

³ In *Hagger v. Payne*, 23 Beav. 474 (1857), it was held that where the gift was of a residue to a class, and part of the residue consisted of a reversion, yet the class was ascertained and determined for the whole residue when the time came for the distribution of the residue generally, and not from time to time as the reversion fell into possession and became distributable.

⁴ The following statement is abbreviated from the report, and one of the points is omitted.

described the sons of William but by a circumlocution; he therefore declared that Andrew, being born before the time of distribution of the fund, was entitled to a share of the £5000.⁵

AYTON v. AYTON.

(Court of Chancery, 1787. 1 Cox, 327.)

George Lee, by his will of the 10th of October, 1762, "gave unto his wife Mary Lee, the whole rest, residue, and remainder of all his stock, government securities, money, and estates real and personal, for her life and no longer. Upon her decease he gave and bequeathed them to the children of Mr. John Ayton and his wife Jane, to be equally divided amongst them the said Jane Ayton's children, and not to any children by another marriage of either party."

At the time of the death of the testator and his widow Mary, the petitioners John and Susannah Ayton, were the only children of John and Jane Ayton, but after the death of the widow they had three more children, Hannah, Jane, and Elizabeth.

By the decree made in this cause by the Master of the Rolls on the 5th of December, 1765, his Honor declared, that according to the words of the will, the testator meant to comprise not only such of the children of John and Jane Ayton as were living at the time of the making the will, and at the testator's death, but also all the children there should be of such marriage, and gave directions for applying the fund for benefit of the petitioners, "and any other child or children of the said John and Jane Ayton, as shall be living at the time of the death of Ayton and his wife, or either of them."

The petitioners now applied to have the cause reheard, complaining of the decree being erroneous in extending the construction of the words to children born after the death of the widow Mary Lee.

MASTER OF THE ROLLS [SIR LLOYD KENYON]. This certainly is a question of construction, viz. whether by the words the testator has made use of, he meant to comprise one class of children or another; but in this, as in many other cases, there are technical rules of construction, which are as binding on the court as rules of law in other cases. The rule of construction applicable to the present case is settled, and settled most conveniently for the parties, by the case of *Elison v. Airey*, 1 Ves. 111. So many children as come in esse before

⁵ It makes no difference that the life interest is not created by the testator. *Walker v. Shore*, 15 Ves. 122.

In accord with the principal case: *Stiles v. Cummings*, 122 Ga. 635, 50 S. E. 484; *Hubbird v. Goin*, 137 Fed. 822, 70 C. C. A. 320 (real estate).

Per Buller, J., in *Doe d. Comberbach v. Perryn*, 3 T. R. 484, 495 (1789): "Where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period." See Gray, *Perpetuities*, § 110.

the time when the fund is distributable shall be comprehended, and no more; the vesting is not to be suspended till other children are born, to take away from the shares of the former. There are many other cases to this point. *Roberts v. Higham*, 12th July, 1779; *Congrave v. Congrave*, March, 1781; *Bartlett v. Lynch*, 26 May, 1757; *Baldwin v. Karver*, January, 1774, Cowp. 309, Doug. 503; *Isaacs v. Isaacs*, December, 1768; *Devisme v. Mello*, July, 1782. The general words will extend beyond children in being; for it will take in any child born before the remainder takes effect, and therefore so far I shall certainly go in this case; but the decree in 1765 goes further, and extends it to all the children of the marriage, which is a construction that would be attended with very great inconveniences; and I cannot see sufficient in the words confining the bequest to the children of the present marriage to break in upon the rule. I must therefore reverse the decree, and declare my opinion, that in the events which have happened the absolute interest in the residue vested in the children born before the death of Mary Lee, and not in the children born afterwards.⁶

MIDDLETON v. MESSENGER.

(Court of Chancery, 1799. 5 Ves. Jr. 136.)

John Messenger by his will, dated the 17th of March, 1785, after directing his debts to be discharged, proceeded thus:

"Item, I give and bequeath unto my well-beloved wife Lydia Messenger all the interests of my money arising from the 3 per cent. Consolidated funds, and also the profits arising from all my estates whatsoever, and the use of all my household furniture, during the term of her natural life; and at her decease I give to my daughter-in-law Ann Little the interest arising from £1500 for her sole use during her natural life; but to stand in my name deceased; and if any misfortune by sickness or lameness should attend the said Ann Little, that she may at any time hereafter be rendered incapable of going to receive her interest money, my will is, that she appoint by letter of attorney a person to receive the same: Item, I give and bequeath unto my sister O'Brien and to my sister Charlewood ten guineas annually each, being the interest of £700., to stand in my name deceased: The remainder of money in the funds and all my estates of every kind or nature whatsoever to be sold by a fair auction, and the sums of money arising therefrom to be equally divided among brothers' and sisters' children (Susan Charlewood excepted) to whom I bequeath one shilling."

⁶ Theobald on Wills (7th Ed.) p. 307: "If no children are born before the death of the tenant for life all afterborn children are admitted. *Chapman v. Blissett*, Ca. t. Talb. 145; *Wyndham v. Wyndham*. 3 B. C. C. 58. But this rule does not apply, if there is a clear intention, that distribution is to be made once for all when the fund falls into possession. *Godfrey v. Davis*, 6 Ves. 43, explained in *Conduitt v. Soane*, 4 Jur. N. S. 502."

He then gave some mourning rings, and to John Middleton and George Odel ten guineas each; and he appointed them executors.

The testator afterwards made the following codicil: "As the legacies die the benefit of the interest moneys to go into the family of my brothers' and sisters' children then surviving equal share and share alike."

The testator died upon the 3d of June, 1786. Besides stock and household furniture he was possessed of leasehold estates. His widow received the interest and dividends of his 3 per cent. Annuities and the profits arising from all his estates, and had the use of all his household furniture, during her life. She died upon the 12th of May, 1795. The annuitants named in the will survived her.

The bill was filed by the executors to have the accounts taken, and the claims of the parties ascertained; and by a decree made at the Rolls upon the 12th of December, 1786, the accounts were directed; and an inquiry, who were the brothers and sisters of the testator; whether they had any and what children living at the time of his death; if any were dead, who were their personal representatives; and whether any of them (except Susan Charlewood), were living at the death of the testator's widow.

The Master's report specified the brothers and three sisters of the testator; and stated, that several of their children were living at the testator's death; and some of them died before the death of his widow. None were born after the testator's death.

By another decree, pronounced upon the 16th of February, 1798, it was directed, that £1500. 3 per cent. Consolidated Bank Annuities, part of £3350. standing in the name of the testator, should be carried to the account of the Defendant Ann Little, and the interest to be paid to her for her life; and it was declared that upon her death the said £1500. would belong to such of the children of the testator's brothers and sisters (except Susan Charlewood) as should be living at the death of Ann Little. The decree farther directed, that £700., other part thereof, should be carried over in manner following: viz. £350. to the account of the testator's sister, the Defendant Sarah Clempson (formerly O'Brien); and the interest thereof should be paid to her for life; and £350., the other moiety, to the account of his sister Ann Charlewood; and the interest thereof be paid to her for life: and it was declared, that the said two sums would belong to such of the children of the testator's brothers and sisters (except Susan Charlewood) as should be living at the respective deaths of Sarah Clempson and Anne Charlewood. Some inquiries were directed as to James Messenger, a brother of the testator; who went to sea in 1785; and has not since been heard of. Advertisements were published for his children: but none came in.

The cause coming on for farther directions, the question was, whether the general residue belonged exclusively to the children of the testator's brothers and sisters (except Susan Charlewood), who were liv-

ing at the death of the widow; or whether children, who died between the death of the testator and the death of his widow, were entitled with the others. The Counsel for the Plaintiffs were directed by the Court to support the point in favor of all the children living at the death of the testator.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. I have looked over this will with much attention; and I do not say, I have not some doubt upon it; and that I have not in some degree changed my opinion in the consideration of the question. But upon the whole will taken together with the codicil I am of opinion, the codicil upon the true construction is not explanatory, but restrictive; a distribution only of so much as had by the will been appropriated; the interest of which he had given in different proportions to Ann Little, Sarah Clempson, and Anne Charlewood. By the will making no farther disposition of the £1500. and £700. so appropriated, which are still to stand in his name, he proceeds to dispose of the remainder of his money in the funds and all his other property after those appropriations. I understand, he had several leasehold estates. It appears to me upon the face of the will, and according to the construction put upon words of division at the deaths of tenants for life and the authority of *De Visme v. Mello* (1 Bro. C. C. 537 [Am. Ed. 1844, 537–542, and notes]; see the cases upon this subject collected and classed by Mr. Fonblanq. *Treat. Eq.* vol. ii, 346, and by Mr. Sanders, 1 Atk, 122, in a note upon *Heathe v. Heathe*; see also *Spencer v. Bullock*, *Taylor v. Langford*, *Malim v. Barker*, ante, vol. ii, 687; iii, 119, 151, and the note ante, i. 408), that the remainder of his money in the funds and the produce of all his other estates, when sold, were divisible among all the children of his brothers and sisters, except Susan Charlewood, living at his own death, and such, if any, as might be born before the death of his wife, and the representatives of such as should be dead in the life of his wife. That is fully established in that case; in which every circumstance contained in this occurs. It is clear upon that case, to which I perfectly subscribe, that under such a disposition the fund is divisible among such of the objects, as are living at the testator's death, and such as shall be born, before the fund is distributable; and that they are vested interests. If that is the true construction of this will, and it is clearly so, if *De Visme v. Mello* is right, the question is, to what the codicil relates; and it was contended, that it related, not only to the sums appropriated to the annuitants, but that it was explanatory of the words the testator used, when speaking of the remainder of his money in the funds, after that appropriation, and all his other estates; to restrain the disposition, as it does, as far as it relates to the subject of it, to children then surviving. But upon the true construction of this codicil I am of opinion, it was not to relate to any thing but the interest undisposed of by the will; and that the testator did not mean to disturb what was given by the will, but to

dispose of what had been left undisposed of, the sums of £1500. and £700. after the deaths of the annuitants.

Declare, that the residue of the testator's personal estate, after the appropriation of £1500. and £700. 3 per cent., &c. for satisfaction of the annuities given by the will to Ann Little, Sarah Clempson, and Ann Charlewood, is distributable among the children of the testator's brother and sisters (except Susan Charlewood) living at his decease, and the representatives of such as died in the life of his wife.⁷

GILMORE v. SEVERN.

(Court of Chancery, 1785. 1 Brown, Ch. Cas. 582.)

Testator gave to the children of his sister Jane Gilmore, wife of Thomas Gilmore, £350 with interest for the same, to be paid them respectively, their equal shares and proportions as they should respectively attain twenty-one; and in case any of them should die under twenty-one, then their shares should go to the survivors and survivor.

At the death of the testator, Jane Gilmore had two children, the plaintiffs; afterwards she had another child: the plaintiffs were both infants; and the COURT [SIR LLOYD KENYON] was of opinion, that

⁷ Accord: *Holland v. Wood* (1870) L. R. 11 Eq. 91 (devise of real estate).

But see *Drury v. Drury*, 271 Ill. 336, 111 N. E. 140 (1916); *Satterfield v. Mayes*, 11 Humph. (Tenn.) 58 (personalty); *Cole v. Creyon*, 1 Hill Eq. (S. C.) 311, 322, 26 Am. Dec. 208 (personalty); *Conner v. Johnson*, 2 Hill Eq. (S. C.) 41 (real estate); *Robertson v. Garrett*, 72 Tex. 372, 10 S. W. 96 (real estate); *Teed v. Morton*, 60 N. Y. 502, 506 (personalty); the court suggests difference between realty and personalty); *Matter of Allen*, 151 N. Y. 243, 247, 45 N. E. 554 (semble; personalty); *Hadcox v. Cody*, 75 Misc. Rep. 569, 135 N. Y. Supp. 861 (personalty).

In *Cole v. Creyon*, supra, the court, by Harper, J., said: "I think it, however, the more natural import of the words, when the bequest is to children at the death of the tenant for life, that those who then answer the description of children, should be meant. The intention too, will, I think, in general be best complied with by this construction. When property is thus given to children, and one dies before the period of distribution, it will commonly happen that his brothers and sisters will be his next of kin, and then it will be immaterial whether they take as legatees or as next of kin of the deceased. But it may happen that there will be a father or mother to take along with them; and when the testator has passed over the parent and given the whole to the children, it would seem to defeat his intention that the parent should at the period of distribution, take any portion as next of kin. When the devise is of real estate in England, one brother would take the whole of the deceased's portion as heir-at-law; and this would seem to defeat the intention that all the children should take equally. There would be reason for making a different construction, and probably a different one ought to be made, when the child dying has left children; and this also to effectuate the intention; for it cannot be supposed that the testator intended the object of his bounty not to be capable of transmitting to his children so as to provide for them."

Compare, however, with the result reached in *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127.

the youngest child, being born during the infancy of the other two, though after the death of the testator, might be entitled to a share.

As none were entitled to a vested interest, the court ordered the money to be paid into the bank.⁸

ANDREWS v. PARTINGTON.

(Court of Chancery, 1791. 3 Brown, Ch. Cas. 401.)

Robert Andrews, grandfather of the plaintiff, made his will bearing date 19th August, 1763, and thereby gave to the defendants, Partington and Andrews (the father of the plaintiffs), all his real and personal estates (subject to debts): in the first place, to pay taxes, repairs, and for the renewal of leases; and out of the rents, &c., to pay his wife, Margaret, £800 a year, until his daughters, Diana and Catherine, should marry; and after their marriages, £600 a year for life; and subject and without prejudice thereto, out of the rents and profits, to raise £3000, as soon as might conveniently be, after his decease, to be paid in manner following: i. e., £2000 to his daughter Diana, and £1000 to his daughter Catherine, accumulating the surplus rents and profits during the life of his wife; and, after the decease of his wife, in the further sum of £7000 to be paid to his daughters, at such times, and in such proportions, as therein mentioned; i. e. £3000 to Diana, on the day of her marriage, and £4000 to Catherine, on the day of her marriage, provided such marriages should happen after the decease of his wife; and in case either of his daughters should marry in the lifetime of the wife, then her share to be paid her within six months after the death of the wife; the shares of the daughters, after decease of the wife, to bear interest at four per cent; and in case his said daughters, or either of them, should die unmarried, then, upon trust, to pay the share or shares of her or them so dying in the manner following: i. e., £2000, part of the £3000 share of Diana, to all and every the child and children of his son Robert Andrews, equally to be divided between and among them; if more than one, share and share alike; and if but one, then to such only child; the parts or shares of such child or children to be paid in manner following: i. e., the daughter's shares at her or their age or ages of twenty-one, or day or days of marriage, which should first happen; and the son's share or shares, at his or

⁸ See, also, *In re Emmet's Estate*, 13 Ch. D. 484 (1880). Theobald on Wills (7th Ed.) p. 309: "Maintenance out of the shares or presumptive shares of children will not extend the class. *Gimblett v. Purton*, 12 Eq. 427. But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 B. 485; *Bateman v. Gray*, 6 Eq. 215; *In re Courtenay*; *Pearce v. Foxwell*, 74 L. J. Ch. 654."

their age or ages of twenty-one; or to be sooner advanced, for his or their preferment in the world, or benefit, if the trustees, or the survivors of them, &c., should think fit, with survivorship among the children, the dividends and interest thereof to be paid by the trustees, toward the maintenance and education of such child and children, till their shares become payable, in proportion to their respective shares and interests therein; and in case all the children should die before their shares became payable, then the £2000 to be paid to his son Robert Andrews. The testator also declared the uses as to the remaining £1000 given to his said daughter Diana, for the benefit of the children of his daughter Margaret Ashcroft; and with respect to £2000 of the £4000, his daughter Catherine's share, he also gave it in the same manner with the first £2000 given to his daughter Diana; and the other £2000, part thereof, he gave among the children of his daughter Margaret Ashcroft, in the manner therein mentioned; and he gave the residue of his estate, after the death of his wife, after payment of £1000, to his son Robert Andrews, and three annuities, to persons since dead, to the children of defendant, Robert Andrews, in the same manner with the £2000 given in the first place to Diana.

The testator died 27th August, 1753, and his wife and defendant Partington, proved his will.

The widow died 23d May, 1774, leaving defendant Partington the surviving executor.

Catherine Andrews, one of the testator's daughters, intermarried with John Neale Pleydell Nott, Esq., and £4000 part of the £7000 were, after decease of the mother, paid to the trustees named in the settlement upon the marriage, together with £1100 arising from savings, and from another fund.

The remaining £3000 was never raised; Diana, the other daughter, never having married; but interest for the same has been paid to her from the death of the widow.

Sarah Andrews, wife of the defendant, Robert Andrews, son to the testator, died in April, 1781, and the plaintiffs are the children of that marriage, six of whom had attained their ages of twenty-one, previous to the filing of the bill, and the six others were minors.

The bill prayed (among other things) that the freehold and leasehold estates might be sold, and six twelfth parts of the produce, and also of the residue, and accumulation, might be paid to the six plaintiffs, who had attained twenty-one, and the remaining six twelfth parts be placed out at interest for the benefit of such of the plaintiffs as are infants, &c.

The cause came on to be heard 1st March, 1790, when the only question decided was, relative to the maintenance (vide 3 Bro. C. C. 60), and it was referred to the master, to inquire (inter alia) what children the defendant Andrews then had, and had had, and at what times they were respectively born, and in case any of them were dead, then when they respectively died.

July 11, 1791, the master made his report, and thereby stated, that the defendant, Robert Andrews, had issue by his late wife, the following children, and no more; plaintiff Elizabeth, born 1761, Robert, 1762, Catherine, 1764, George, 1765, Charlotte, 1766, Sarah, 1767, Cæsar, 1770, Hugh, 1772, Henry, 1773, Frederick, 1775, Marianne, 1777, Augustus, 1779; and that, besides the above-mentioned children, the defendant, Andrews, had an issue by his said wife, the following children, who were dead; Sarah, born 1760, died 1763; John, born 1769, died 1783; and Charles, born 1776, and died in the same year.

And now the cause coming on for further directions upon the master's report, the question was, what children should take under the bequest of the residue? 1st. Whether all such children as the defendant Robert should have at the time of his death? 2d. Whether it should be confined to such as were living at the death of Margaret, the testator's widow? Or, 3d. To such children as were living at the time the eldest child attained the age of twenty-one?

LORD CHANCELLOR [THURLOW] said where a time of payment was pointed out, as where a legacy is given to all the children of A., when they shall attain twenty-one, it was too late to say, that the time so pointed out shall [not] regulate among what children the distribution shall be made. It must be among the children in esse at the time the eldest attains such age. He said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children.

DAVIDSON v. DALLAS.

(Court of Chancery, 1808. 14 Ves. 576.)

Alexander Davidson by his will bequeathed to the children of his brother Robert Davidson £3000 to be equally divided among them; and if either of them should die before the age of twenty-one years their share to go to the survivors.

The testator died in 1792. The master's report stated, that at the death of the testator there were six children of his brother, the eldest of whom was at the date of the report of the age of fourteen, and two more children were born since the report. A decree had been taken, without argument, declaring that the two children of Robert Davidson, born after the death of the testator, and all the other children to be born, until the eldest child should attain the age of twenty-one, were equally entitled with the children who were born before the testator's death. The cause came on upon an appeal from the decree.

THE LORD CHANCELLOR [LORD ELDON]. This legacy is a vested interest, subject to be divested by the death of any of the children under the age of twenty-one, leaving another child surviving. It is an

immediate legacy to the children, living at the testator's death; in whom it vested at that time; equally to be divided among them; with a limitation over, if either of them should die before the age of twenty-one, to the survivors. That period of division and vesting is the death of the testator; and that, which is to be divided and vested at that time, may in certain events go over to some of those, among whom it was to be divided, and in whom it vested, at the testator's death. The difficulty that has always been felt to apply the term "survivors" to those, who may not be alive at the time of the distribution taking place, has been met by presuming, that the testator intended persons, not then living, but who might come into existence before the distribution; construing the word "survivors" as "others;" to take in all who should come into existence before that period. There is nothing in this will, indicating a general intention, upon which the forced construction of the term "survivors" has been adopted. These words must therefore have their natural meaning.

The decree declared, that those children only of the testator's brother, who were living at the death of the testator, were entitled.

OPPENHEIM v. HENRY.

(Court of Chancery, 1853. 10 Hare, 441.)

The principal question arose on the effect of the following bequest of the residuary estate of the testator:

"I desire and will the remaining residue to be appropriated in manner following,—say as soon as conveniently can be after my decease, to be turned into cash, and brought into the funds, stock £3 per cent. Consols, in the names of my executors hereinafter named, and to be held by them in trust for all my grandchildren, to be divided equally among them at the end or expiration of twenty years after my decease, and the interest by the purchase of £3 per cent. Consols stock, to accumulate till that time."

THE VICE-CHANCELLOR [SIR W. PAGE WOOD], with reference to the argument for confining the gift to grandchildren living at the expiration of the twenty years, said, that the cases which were referred to in support of the argument for postponing the gift until that time, were cases in which the gift was connected with the period of division. The strongest cases in this form were, perhaps, those in which the gift was "to children on attaining a certain age." There, no doubt, the gift was coupled with the period of distribution. In some of those cases it might possibly have been contended, that the existence of the life interest was the only reason for postponing the division. He had no difficulty in holding, that a gift of stock in trust for all the grandchildren of the testator, to be divided equally amongst them at the period of twenty years from the time of his decease, was a vested interest in the

grandchildren of the testator. The only question, then, was, in what grandchildren the gift vested; and upon this he was clearly of opinion, that the grandchildren who were living at the death of the testator, and those who were born afterwards before the period of distribution, were entitled.⁹

RINGROSE v. BRAMHAM.

(Court of Chancery, 1794. 2 Cox, 384.)

The question in this cause depended upon the following clauses in the testator's will:

"I also give to Joseph Ringrose's children £50 to every child he hath by his wife Elizabeth, to be paid to them by my executors as they shall come of age, and the interest to be paid yearly till they come of age to their father or mother. I also give to Christopher Rhodes's children, that he hath by his wife Peggy, £50 to every child when they come of age, and the interest to be paid yearly till they come of age to their father or mother. And my will is, that my two executors do lodge in Mr. W. Foxhall's hands £600, and £100 in Joseph Ringrose's hands till the children aforesaid come of age, and to receive the interest yearly, and to pay the same to the above-named children or their father or mother. And if any of the children should die before they are of age, then the legacies shall go to my executors."

There were eleven children of Joseph Ringrose and Christopher Rhodes living at the time of the making the will; thirteen at the death of the testator; and three born since.

This bill was filed by the sixteen children of Joseph Ringrose and Christopher Rhodes, claiming to be entitled to £50 apiece under the above bequest.

And it was insisted on the part of the plaintiffs, that there was nothing to confine these legacies of £50 to the children living at the time of making the will, or to those living at the death of the testator; that although the testator has made use of the word "hath," which is properly of the present tense, yet it is evident that he meant thereby "shall have," in the same manner as he afterwards uses the word "come" for "shall come;" that the sum which he has set apart for the payment of these legacies does not tally with the number of the children living at any one of these periods, and therefore nothing can be inferred from thence, except that he did not mean to confine the legacies to the children living at the date of the will; that as the legacies are not to be paid to the respective legatees until they attain twenty-one, this will at least let in all the children born before any of them arrives at that age. *Gilmore v. Severn*, 1 Bro. Cha. Rep. 582.

⁹ But see *Kevern v. Williams*, 5 Sim. 171 (1832); *Elliott v. Elliott*, 12 Sim. 276 (1841).

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The case of *Gilmore v. Severn* is very distinguishable from this. In *Gilmore v. Severn*, a gross sum of £350 was given to the children of Jane Gilmore, to be paid to them in equal shares at twenty-one, and there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the mean time, because there was nothing to do but to set apart the sum of £350, and the residue of the testator's personal estate might be immediately divided; for whether more or fewer children divided the £350, still they could have but £350 amongst them. But here there are distinct legacies of £50 to each of the children, and therefore if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of Joseph Ringrose and Christopher Rhodes, or their wives, for I can never divide the residue until I know how many legacies of £50 are payable. Therefore, though I perfectly assent to *Gilmore v. Severn*, it is not applicable to this case. At the same time I think I may fairly construe the word "hath," so as to make it speak at the time the will takes effect, and let in the children born between the making of the will and the death of the testator. His Honor therefore declared the thirteen plaintiffs only who were living at the death of the testator, entitled to legacies of £50 each.¹⁰

STORRS v. BENBOW.

(Court of Chancery, 1833. 2 Mylne & K. 46.)

A codicil to the will of William Townsend contained a bequest in the following words: "Item, I direct my executors to pay, by and out of my personal estate exclusively, the sum of £500 apiece to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship."

The question was, whether the plaintiff, William Townsend Storrs, who was a grandchild of one of the testator's brothers, and who was born after the testator's death, was entitled to a legacy of £500, under this bequest.

THE MASTER OF THE ROLLS [SIR JOHN LEACH]. This is an immediate gift at the death of the testator, and is confined to the children then living. The words "may be born," provided for the birth of children between the making of the will and the death. The cases of *Sprackling v. Ranier*, 1 Dick. 344, and *Ringrose v. Bramham*, 2 Cox, 384, are direct authorities to this point. To give a different

¹⁰ If there are no children in existence at the testator's death, does the provision fail? See *Mann v. Thompson*, Kay, 638 (1854); *Rogers v. Mutch*, 10 Ch. D. 25 (1878).

meaning to the words "may be born," would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until after the deaths of all the children of either of his brothers.

MAINWARING v. BEEVOR.

(Court of Chancery, 1849. 8 Hare, 44.)

William Carver by his will, dated in 1835, after bequeathing to his trustees all his shares and moneys standing in his name in divers stocks, funds, and securities, and after declaring trusts of three several sums of £30,000 consols, for the benefit of his widow and sons, William James Carver and James Carver, for their respective lives, with remainder to the children of his said two sons, or their issue,—declared that, as to the residue of his consols, his £3 per cent reduced stock, his New £3½ per cent, and his bank stock, and all other the stocks and funds or securities which might be standing in his name at his decease (except the said three sums of £30,000 consols), his trustees should stand possessed of such residue, upon trust (after paying an annuity of £20 to Mary Scott for her life), to pay and apply such part and proportion of the dividends, interest, and annual produce of the residue, as the said trustees or the survivors or survivor of them might in their or his discretion deem necessary, for or towards the maintenance and education of all and every of his grandchildren, the children of his said two sons, William James Carver and James Carver, until they should severally attain the age of twenty-one years. And the testator directed, that the surplus of such dividends, interest, and annual produce, which should not be wanted and applied for the purpose last aforesaid, should be invested by his trustees in government securities (with power to vary and transpose the same), and proceeded: "And when and as each of my said grandchildren shall attain the age of twenty-one years, upon trust that they my said trustees, &c., do and shall, by the sale of such part of the stocks, funds, and securities then standing in their names or name, as may be necessary for the purpose raise and pay to each of my said grandchildren so attaining the age of twenty-one years as aforesaid, the sum of £2000 for their own benefit. And I do hereby declare, that when and so soon as all and every my said grandchildren shall have attained their age of twenty-one years, they my said trustees, &c., do and shall stand possessed of the whole of the stocks, funds, and securities then standing in their names, upon any of the trusts of this my will (over and above the three several sums of £30,000 £3 per cent consols, hereinbefore by me disposed of), upon trust to pay, transfer, divide, and make over the same respectively, and the dividends, interest, and annual produce thereof, unto, between, and amongst all and every my said grandchildren, to and for their own absolute use and benefit as ten-

ants in common, and not as joint tenants. Provided always and I do hereby declare, that if I shall have only one grandchild who shall live to attain the age of twenty-one years, then such one grandchild, upon his attaining that age, shall have and be entitled to the whole of the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, to which my grandchildren, if more than one should have attained the age of twenty-one years would have become entitled. And I do hereby further declare, that each of my grandchildren, upon their severally attaining the age of twenty-one years, shall take vested interests under this my will. Provided also, and I do hereby further declare, that in case any or either of my grandchildren shall at any time during his, her, or their minority, go or be taken beyond the seas, for the purpose of being or to be educated in any foreign country, or for any purpose whatever, and shall remain beyond the seas or in any foreign country, for any purpose whatever, more than three calendar months in any one year, then and in every such case, and from thenceforth, the claim, right, and title of each and every such grandchildren so going or being taken beyond the seas to maintenance and education out of or in respect of any moneys or property to which they, he, or she may be entitled under this my will, shall cease and determine and become forfeited; but so, nevertheless, that such forfeiture shall not in any respect affect the right of such grandchild or grandchildren to the principal of such moneys and property, upon his, her, or their attaining the age or ages hereinbefore mentioned for payment of the same."

The testator died in 1837, leaving his two sons surviving. William James, one of the sons, had five children living at the testator's death. James, the other son, was unmarried. The youngest of the five grandchildren attained twenty-one years of age in 1848, and no others had been born. The grandchildren then filed their bill for the execution of the trusts of the residue of the stocks, funds, and securities, and for a declaration that they were entitled to an immediate transfer of their respective shares. Mary Scott the annuitant was dead, but the sons, William James and James, were still living.

VICE-CHANCELLOR [SIR JAMES WIGRAM]. In the case of a gift to children when they attain twenty-one, the reason of the rule of the court is, that the eldest child, on attaining twenty-one, has a right to demand his share, and that this right is inconsistent with a gift to "all the children," including those who may afterwards be born of the parent named. In this case there is no such inconsistency. Here there is no express direction, conferring upon the grandchildren the right now to receive their shares, and no inconsistency would arise from holding all the grandchildren born in the lifetime of either of the parents named in the will, entitled to participate. If the class is to be confined to the grandchildren in esse at the death of the testator, the argument is intelligible. In the case of Elliott v. Elliott [12 Sim. 276], the Vice-Chancellor seems to have adopted that construction, on the ground

that it brought the bequest within the rules of law as to remoteness, proceeding, I suppose, on the principle, that where a will admits of two constructions, that is to be preferred which will render it valid. The rules of construction cannot, however, be strained to bring a devise or bequest within the rules of law. If the class cannot be so restricted in this case, and grandchildren born after the death of the testator are to be admitted, there does not appear to be any reason for excluding a grandchild, born or to be born in the lifetime of either of the testator's sons.

VICE-CHANCELLOR. Where a testator has given two inconsistent directions, and has said, that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attains twenty-one, in that case you must do one of two things,—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The court has in such cases decided in favor of the eldest child taking at twenty-one, as the will directs, and sacrificed the intention that all the children shall take. In this case, the testator has given the residue to all the children of his two sons, when the youngest attains the age of twenty-one years. There are a certain number of children, and the elder children attain twenty-one. The inconvenience pointed out by Mr. Prior then arises: the provision for the maintenance of those children ceases, though, as it cannot be certainly said that the youngest child has attained twenty-one, they cannot claim a distributive share of the fund. The question is, how long is the eldest child or the other children to wait. If the objects of the testator's bounty can be confined to children of his sons living at his death,—which, independently of the fact that there is one son who had no children at that time, I am clear cannot be done in this case,—it might be possible to get at the conclusion which I have already mentioned, that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it be once admitted that a child born after the death of the testator may take, all the inconvenience is let in, and the eldest child may have to wait for an indefinite time, so long as children may continue to be born. How in that case is it possible to limit the class entitled in the way suggested, which is, that the moment the youngest child in esse attains twenty-one, there is to be a division, although there may be an unlimited number of children born afterwards? I do not see how the inconvenience pointed out can be avoided. The words of the will do not require an immediate distribution.

With respect to the case of *Hughes v. Hughes* [3 Bro. C. C. 434], it appeared to me at first, that though the language of the court in giving judgment was in favor of the view I take of the case, the decree as drawn up was different. It is not, however, different, for it lets in all the children,—whether it means children in esse or children at any

time born of the daughter, I do not know. It is not now the practice of the court to make a prospective decree; but the decree is open to the construction, that every child of the daughter shall take a distributive share. I see no principle upon which a distribution can be demanded in the case before me, merely because the youngest grandchild in esse has attained twenty-one.

In re WENMOTH'S ESTATE.

(Chancery Division, 1887. 37 Ch. Div. 266.)

William Wenmoth, who died in February, 1871, by his will, dated the 19th of April, 1870, after certain pecuniary and specific bequests gave all the residue of his property upon trust to pay to his daughter Eliza (Mrs. M'Kever) an annuity, and directed his trustees during the life of his said daughter to pay and apply the surplus of the rents, dividends, interest, and annual proceeds, and after her death to apply the whole of such income "unto and equally between my grandchildren (being the children of my son Joseph and my said daughter Eliza) on their respectively attaining the age of twenty-one years, during their respective lives, share and share alike." On the death of any grandchild (except the last survivor) who should die leaving issue the share of such income and annual proceeds of such grandchild so dying to be paid unto and equally between his or her children who being sons should attain twenty-one or being daughters should attain that age or marry. After the death of the last surviving grandchild the residuary estate to be converted, and the proceeds of the conversion to be divided equally amongst testator's great grandchildren living at the death of his last surviving grandchild and attaining twenty-one. The share of any grandchild in the said rents and annual proceeds to be invested by the trustees during the minority of any such grandchild and form part of the trust. The trustees were also empowered to apply all or any of the share of the income or capital of any minor for his or her maintenance, education, or advancement.

Mrs. M'Kever had two children, both of whom died in the testator's lifetime.

Joseph Wenmoth had eleven children, of whom eight were now living.

Of these eight grandchildren of the testator five were born in the testator's lifetime, and the eldest attained twenty-one on the 25th of March, 1883. Two were born after the testator's death and before the eldest grandchild attained twenty-one; one was born in February, 1887.

The question, raised by originating summons, was whether the trusts of the will for the benefit of grandchildren were confined to such grandchildren as were living at the testator's death, or extended (a)

to grandchildren born after his death, before the eldest grandchild attained twenty-one, or (b) to all grandchildren whenever born. A further question was whether the grandchildren who for the time being had attained twenty-one were entitled to the whole of the net income, subject to Mrs. M'Kever's annuity; and if not, to what part of such income they were entitled, and whether the plaintiff (the surviving executor) could apply any and what part of such income for the maintenance, &c., of such of the grandchildren as for the time being were under twenty-one.

CHITTY, J. An immediate gift of personal estate to the children of A. is free from doubt, and those children only take who are living at the testator's death. A gift to the children of A, who shall attain the age of twenty-one, is also one on which no question can arise. The class of children in either case remains open until the period of distribution and then closes, and all those children who may be born before the death of the testator, or before the eldest of them has attained twenty-one, are admissible, while those born after the period of distribution are excluded. This rule, excluding as it does from the class to be benefited any child born after the period of distribution, may be explained by the attempt of the court to reconcile two inconsistent directions, viz., that the whole class should take and also that the fund should be distributed among them at a period when the whole class could not possibly be ascertained. The rule, which was intended as a solution of the difficulty, may be said to be a cutting of the knot rather than an untying, and, though it has been called a rule of convenience, must be very inconvenient to those children who may be born after the period of distribution. In Gillman v. Daunt, 3 K. & J. 48, Lord Hatherley, when Vice-Chancellor, said that a child "who has attained twenty-one cannot be kept waiting for his share; and if you have once paid it to him, you cannot get it back." Where, however, as in this will, the distribution is of income and not of corpus there is nothing which requires the application of the rule, and the difficulty does not arise.

In the case of the distribution of corpus, the trustees cannot ascertain what is the aliquot share of a member of the class until the class is closed, but in the case of a distribution of income the distribution is periodical. Each member of the class, as soon as he becomes entitled, takes his share of the income, and there is no reason why the rule should be applied beyond each periodical payment. I have no difficulty, therefore, upon principle in holding that in the case of a bequest of income among a class of children to be paid on their attaining twenty-one years, the date of the first attaining twenty-one years was not the date of the ascertainment of the class, and that any child at any time attaining twenty-one years will be entitled to a share of the income. *Mogg v. Mogg*, 1 Mer. 654, appears to me to be an authority for my decision as to the distinction between a gift of corpus and a gift of income. In the two cases cited in support of the contention

that the grandchildren living at the testator's death were the only objects to take under the bequest (*Elliott v. Elliott*, 12 Sim. 276; *In re Coppard's Estate*, 35 Ch. D. 350), there was a question in each as to the rule against perpetuities, and although in neither case was remoteness made the actual ratio decidendi such a construction was adopted as avoided an intestacy by the operation of the law of remoteness, and the decision in each case saved the will. The general law on this point is stated by Lord Selborne in *Pearks v. Moseley*, 5 App. Cas. 719: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect." If I thought those two cases in point I should have to consider them very carefully, but I do not. I decline to decide the question as to the interests of the great-grandchildren as being premature.¹¹

In re POWELL.

(Chancery Division, 1897. L. R. [1898] 1 Ch. Div. 227.)

Adjourned Summons.

Alvara Powell, by his will dated October 17, 1877, gave all the residue of his personal estate to trustees upon trust to divide the interest, dividends, and annual profits thereof into three equal portions, and upon trust to pay one-third part of the interest, dividends, and annual profits of his personal estate unto the children of his sister Elizabeth Holmes, and to divide the same equally among them during their lives, and after their deaths to divide one-third part of his personal estate equally between their children; but if they should all die without leaving any children, then he directed his trustees to divide the said third part of his personal estate equally among the children of his nephew Edward Crosland, share and share alike.

The testator died on July 17, 1879.

The testator's sister Elizabeth Holmes, who was upwards of eighty years of age at the date of the testator's death, died on November 9,

¹¹ If the gift is to members of the class who attain twenty-one, a member of the class who has attained twenty-one, there being other members of the class in existence under twenty-one, is only entitled to the income of his share, having regard to the number of members of the class for the time being in existence, but without regard to the possibility of other members of the class being subsequently born. *In re Holford*, L. R. [1894] 3 Ch. 30.

On the other hand, where there is a gift to the members of a class who attain twenty-one, of a fund or of real estate, which does not carry the intermediate income, the members of the class who have, for the time being, attained twenty-one are entitled to the whole income, though there may be other members of the class who have not attained twenty-one. *In re Averill*, L. R. [1898] 1 Ch. 523; *Theobald on Wills* (7th Ed.) p. 184.

1888. She had several children, one of whom had died leaving children.

This summons was taken out by the trustees of the will for the determination (inter alia) of the question whether the trust by the will declared of one-third of the testator's residuary personal estate in favor of the children of the children of the testator's sister Elizabeth Holmes was valid, or void as transgressing the rule against perpetuities.

KEKEWICH, J. The first question is whether, according to the language of the will, the gift to the children of the testator's sister Elizabeth Holmes must be confined to those living at the date of the death of the testator, or be construed so as to admit any children who may be born after that date. The argument in favor of the more extensive construction, admitting the after-born children, is, I think, founded entirely on an application, which I venture to call a misapplication, of the decision of Chitty, J., in *In re Wenmoth's Estate*, 37 Ch. D. 266. It is said that the learned judge was there dealing with the same rule of convenience as that which applies to the present case, and that the exception to the application of the rule which was adopted by him is applicable to this case also. The answer, to my mind, is clear. Whether the rule which I am asked to apply can or cannot be properly described as a rule of convenience, it is not the rule of convenience with which Chitty, J., was dealing. There is some foundation for the argument, and for calling the rule a rule of convenience. Mr. Theobald, a well-known and careful author, in his book on Wills has described both the rule which I have to apply here and the rule with which Chitty, J., was dealing as rules of convenience. With great respect to Mr. Theobald's accuracy, I venture to think that the law is better stated in Mr. Vaughan Hawkins' treatise. He devotes Chapter VII. to "Children, &c., when ascertained," and on page 68 he says this: "It might be supposed that a gift to the children of a person simpliciter, would include all the children he might have, whenever coming into existence; but the testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible; and it may be laid down as a general rule (qualified by the other rules which follow in this chapter) that"—and then he thus states the rule: "A devise or bequest to the children of A. or of the testator, means, *primâ facie*, the children in existence at the testator's death: provided there are such children then in existence." He cites *Viner v. Francis* (1789), 2 Cox, 190, a case which is also cited by Mr. Theobald, 4th ed., p. 255. It is over a hundred years old, and there can be no question about the authority of it. Mr. Hawkins on a somewhat later page also deals in a similar way with the rule with which Chitty, J., dealt in *In re Wenmoth's Estate*. At page 75 he says: "In the cases considered under the preceding rule, the shares of all the objects became payable at the same time, and the period of distribution was the same for them all: where the shares become payable at different times, as in the ordinary case of a

gift to children at twenty-one or marriage, the last rule requires to be supplemented by another, namely, that where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded." This rule, which accelerates the period of distribution by fixing it at the time when the first child becomes entitled to receive his share, is undoubtedly a rule of convenience. The two rules, however, seem to me to depend on different considerations. The latter is purely a rule of convenience, which, as is admitted by all who have commented on it, contradicts the words of the will. The other rule does not necessarily contradict the words of the will, because, in legal phraseology, "all the children" is intended to mean "all the children living at the testator's death." No lawyer could doubt that a gift of a sum of money to the "members of a club" would extend only to those who fulfilled that description at the time of the testator's death. There does, therefore, seem to me to be a distinction of substance between the first rule, which may to some extent be a rule of convenience, and the second rule, which is purely and simply a rule of convenience, although, no doubt, they must both be treated as instances of rules fixing the period of distribution in the case of gifts to a class of persons. Chitty, J., in *In re Wenmoth's Estate*, was dealing solely with the second rule, i. e., the rule which fixes the period of distribution among children at the time when the first child becomes entitled. It is that rule which he declines to extend to a case where income only is given; and I do not think it occurred to him to consider in any way whether it would be right to depart from the rule as to children being ascertained at the testator's death because they were only interested in income, or for any other reason. His judgment does not appear to me to apply to such a case as the present one, and this gift must be construed according to the ordinary rule. I therefore hold that, under the gift of income, only the children of Elizabeth Holmes living at the testator's death take, and that the gift over to the children of such children is not void for remoteness, and there must be a declaration to that effect.

CHAPTER IX

DIVESTING CONTINGENCIES AND CONDITIONS PRECEDENT TO THE TAKING EFFECT OF EXECUTORY DEVICES AND BEQUESTS

SECTION 1.—FAILURE OF EXECUTORY DEVISE OR BEQUEST

HARRISON v. FOREMAN.

(Court of Chancery, 1800. 5 Ves. 207.)

John Stallard, being possessed among other personal estate of £566 annuities of 1778, by his will dated the 13th of August, 1779, gave to Joseph Jennings and John Harrison £40 per annum, part of the said annuities, in trust to pay the dividends and produce thereof, which should from time to time arise and become payable, to his cousin Mrs. Sarah Barnes during her life, exclusive of her marriage or any future husband, and not to be subject to his or their debts or control; and from and after her decease upon trust to transfer the said sum of £40 per annum, or the stock or fund, wherein the produce thereof might be invested, to Peter Stallard and Susannah Snell Stallard, children of his (the testator's) cousin William Stallard, in equal moieties; and in case of the decease of either of them in the lifetime of the said Sarah Barnes, then he gave the whole thereof to the survivor of them living at her decease. He gave all the residue of his estate and effects of every kind to Elizabeth Stallard and Sarah Stallard, the children of his cousin Abraham Stallard, to be equally divided between them, share and share alike; and he appointed Jennings and Harrison his executors.

By a codicil, dated the 2d of February, 1781, among other things the testator revoked the disposition of the residue, and gave it in the same terms to the said Elizabeth Stallard and Sarah Stallard, and Mary Main, sen., and Mary Main, jun., equally.

By another codicil, dated 9th of February, 1782, the testator, taking notice of the death of Jennings, appointed another joint-executor with Harrison.

The testator died in March, 1782. Susannah Snell Stallard and Peter Stallard died, the former in January, 1784, the latter in December in the same year; both intestate. Sarah Barnes died in January, 1797. The bill was filed by the executors of the testator; praying

that it may be declared, who are entitled to the said £40 per annum, annuities, &c. The question was between the defendant Foreman, administratrix of Susannah Snell Stallard and Peter Stallard, and the residuary legatees, claiming it as having fallen into the residue.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The only question upon this will is, whether by the event, that has happened, the deaths of Susannah Snell Stallard and Peter Stallard in the life of Sarah Barnes, this sum of £40 per annum annuities given after her death in their favor is undisposed of; or in other words whether the bequest is by these means put an end to and become absolutely void. Upon the first part of the will, if it stood without the condition annexed in case of the death of either of them in the lifetime of Sarah Barnes, there could be no doubt, I suppose, that it would have been a vested interest in those two persons; for it is a bequest of these annuities to a person during her life; and after her decease to two given persons in equal moieties. If it rested upon those words, there could be no doubt it would upon the death of that person have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person entitled for life, or died before her. Then comes the condition annexed; making a disposition in a given event different from that which would have been the effect of the first words. The contingency described in that part of the will never took place; there being no survivor of those two persons at that time. The question is, then, whether this makes the whole void; as if it never vested at all.

It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared, that interest shall not arise. The case of *Mackell v. Winter* [3 Ves. Jr. 236, 536], is most analogous to this. I held the interest absolutely vested in the surviving grandson. My decree was reversed: the Lord Chancellor holding two things; in both of which I had given an opinion; first, that it never did vest in the two grandsons or the survivor of them: secondly, If it did vest, yet it sufficiently appeared upon the will, that the testator intended a survivorship to take place between all three, the grandsons and the granddaughter, though it was not expressed. As to the first point, it does not bear upon this case. The Lord Chancellor was of opinion, the words were not sufficient to give a vested interest to the two grandsons for this reason; that nothing was given to them till their ages of twenty-one: but the capital and the accumulation are directed to be paid to them at that time and no other. His Lordship's opinion is expressly founded upon that. My opinion rested entirely upon the first point. I admit the absurdity of the intention; but that is no reason why it should not prevail. I am very glad the decree took the turn it did; for unquestionably it effected the real intention of the testatrix.

But without entering into that question, or commenting farther upon that case, to which it is my duty to submit, it is sufficient to say, that it is impossible any doubt can be entertained upon the words of this will. Upon the principle of the Lord Chancellor's opinion, that the words in that will were not sufficient to give any vested interest till the attainment of majority, my decree undoubtedly was wrong. But upon the doctrine held both by his Lordship and by me it must be determined, that upon the words of this will there was a vested interest, that was to be divested only upon a given contingency, and the question only is, whether that contingency has happened. No words can be more clear for a vested interest. Then the rule that I applied in *Mackell v. Winter*, and that was admitted by the Lord Chancellor, takes place; that if there is a clear vested interest, the court is only to see, what there is to take it away; and the only contingency is, that in case of the decease of either of them in the life of Mrs. Barnes the whole is to go to the survivor. Neither of them was living at her death. That rule, therefore, that I applied in *Mackell v. Winter*, and that I still think binding upon a court of equity, applies. There is a vested interest; and the contingency, upon which it is to be divested, never happened: the vested interest therefore remains; as if that contingency had never been annexed to it. Upon the principles laid down by the Lord Chancellor in *Mackell v. Winter* I am perfectly clear, his Lordship would have agreed with me in this case. I could illustrate the principle by putting the case of a real estate, instead of these annuities, given after the death of the tenant for life to these two persons and their heirs, as tenants in common; but, if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it so, there is no possibility of doubt, it would have been a vested interest in them, to be divested upon a contingency, which did not take place.

It is unnecessary for me to take notice of that case of *Allen v. Barnes*, as I have elsewhere [*Perry v. Woods*, 3 Ves. Jr. 204, 208] observed, that it is not correctly reported.

Declare, that these annuities of £40 per annum were a vested interest in Susannah Snell Stallard and Peter Stallard, and now belong to the defendants Foreman and his wife in right of the latter as their administratrix.

JACKSON v. NOBLE.

(Court of Chancery, 1838. 2 Keen, 590.)

This was a bill filed by Mary Anne Jackson and others, against Mary Ann Noble and Edward Leslie, praying that the wills of David Russen, George William Russen, and Jane Russen, might be established, and that the rights of the parties to certain property given by the will of David Russen to the defendant, Mary Ann Noble, might be declared, and that consequential relief might be given.¹

On the 29th October, 1813, David Russen made his will, and thereby, after giving to his son, George William Russen, certain leasehold estates and his money in the funds, with certain exceptions, gave and bequeathed as follows: "And I do hereby give, devise, and bequeath, all those my freehold estates, situate and being in Upton Lane, Westham, in the county of Essex, in the possession of Mr. Clark: also my freehold estate situate in Golden Lane, in the city of London, in the possession of Mrs. Snell and Mr. Sandover: also my moiety or half part of my copyhold messuage or tenement, garden and premises, situate at Westham, in the county of Essex, in the possession of Mr. Stuart, and which said estate I have surrendered to the use of this my will: also my leasehold estate, situate and being in Philip Lane, in the city of London, in the possession of Mr. Thomson; and £1,000 3 per cent stock unto my daughter Mary Ann Russen, and Matthew Peter Davies, of Saint Martin's Le Grand, and George William Russen, of Aldersgate Street, gentlemen, their heirs, executors, administrators, and assigns, to have and to hold the said last-mentioned freehold and leasehold messuages, tenements, estates, and premises, with their several and respective appurtenances, and the aforesaid £1,000 stock, unto my said daughter Mary Ann Russen, the said Matthew Peter Davies, and George William Russen, their heirs, executors, administrators, and assigns, for and according to my several estates, right, interest, and term of years therein respectively. In trust to permit and suffer my said daughter, M. A. Russen, and her assigns, to receive and take the interest and dividends of the said £1,000 stock, and the rents, issues, and profits of the said several last-mentioned estates, for and during the term of her natural life, to and for her own separate, personal, and peculiar use and benefit, independent of any husband, with whom my said daughter shall or may at any time or times hereafter intermarry; and not be subject to his or their debts, powers, control, engagement, or intermeddling; and for which her receipts alone shall from time to time, and at all times hereafter, be full, good, and sufficient discharges, notwithstanding any such coverture, in such and the like manner as if she had continued a feme sole and unmarried, and that to all intents and purposes

¹ Only that part of the case which relates to the effect of the executory gift is here given.

whatsoever. And from and after the decease of my said daughter, in trust to convey and assign the said several last-mentioned freehold and leasehold estates, and the said £1,000 stock, unto the heirs, executors, and assigns of my said daughter, for and according to all my estate and right therein respectively. Nevertheless, in case my said daughter shall intermarry and have no child or children, then the said estates and money in the funds shall belong to my son George William Russen; or (in case of his decease before my said daughter, then to such child or children as he may happen to have);" and after enabling his daughter to grant leases of the freehold and leasehold estates so given to her, and giving certain other legacies, he gave all the residue of his estate to his son George William Russen.

By a codicil, the testator gave to his daughter, Mary Ann Russen, a further sum of £1,000 3 per cent reduced annuities, subject to the like terms and conditions as before mentioned and described in his will.

The testator died on the 6th of February, 1819. He left his son George William Russen his heir-at-law and customary heir, and his daughter Mary Ann Russen surviving. The son George William Russen proved the will, and became legal personal representative.

He died without issue, having made a will, dated the 28th February, 1833, by the recital of which he showed, that he considered himself interested in the property given to his sister by his father's will; and he made a general gift of his own property to his wife, under whom the plaintiffs claim to be entitled.

Mary Ann Russen married, and was now the defendant, Mary Ann Noble; but she had no child.

THE MASTER OF THE ROLLS [LORD LANGDALE]. The first question is, what estate is given to Mrs. Noble? Is she entitled to an estate for life only, or to an absolute estate, subject to be defeated by a contingent executory gift over? If the former, the plaintiffs are entitled to the claim, which they have made in this respect. If the latter, it is to be considered, whether the event on which the executory gift over was to take effect, can now happen.

It is admitted on both sides, that Mrs. Noble has an equitable estate for life. During her life it is the office of the trustees, to preserve for her, the separate and independent use of the income; after her decease, it is the office of the trustees, to convey and assign all the testator's interest to her heirs, executors, administrators, or assigns. It is not the case of an equitable or trust estate for life, with a use executed in the heir, upon the death of the tenant for life; but a case, in which the trustees have a duty to perform, after, as well as before, the death of the tenant for life; and in which the duty after the death of the tenant for life, is clear and defined, neither requiring nor admitting of any modification. There would, on the death of the tenant for life, be nothing for this court to do, but to direct the conveyance or assignment to the heirs, executors, administrators or as-

signs; and I think that upon the construction of this part of the will, independently of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators, and assigns; and that Mrs. Noble has an absolute estate, subject to be defeated by the executory gift over.

And if this be so, the question is, whether the particular event on which the vested estate was to be divested, can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion, that the gift over was to take effect, only in the event of Mrs. Noble's marrying and dying without issue, in the lifetime of her brother, or of such child or children as he might happen to leave; and as he died in her lifetime, and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in Mrs. Noble cannot now be divested.²

DOE d. BLOMFIELD v. EYRE.

(Exchequer Chamber, 1848. 5 C. B. 713.)

PARKE, B.,³ now delivered the judgment of the court.⁴

This case comes before us on a writ of error on a judgment of the Court of Common Pleas on a special verdict. The facts of the case are fully stated in the special verdict. It is unnecessary to advert to them in detail; a very short statement is sufficient to explain the questions which we have to decide.

On the marriage settlement of Mary Sida, a copyhold estate of which she was seised in fee, was settled to the use of her husband

² Bequest to the testator's wife for life; and after her death the capital to be divided between the testator's brothers and sisters in equal shares; but in case of the death of any of them in the lifetime of the wife, his or her shares to be divided between all his or her children. Held, that the representative of a brother who had died in the wife's lifetime without issue was entitled. *Smither v. Willock*, 9 Ves. 233 (1804).

Bequest of interest and dividends of personal property to A. for life, and on her death the same to be equally divided among her children, or such of them as should be living at her death. A's children all died before her. Held, that they all took vested interests which had not been divested. *Sturges v. Pearson*, 4 Mad. 411 (1819).

See also *Norman v. Kynaston*, 3 De G., F. & J. 29 (1861); *Crozier v. Crozier*, L. R. 15 Eq. 282 (1873); *In re Piekworth*, [1899] 1 Ch. 642.

Bequest of income to two grandchildren until they became of age, when they were to be paid the principal, and if one died before majority the other was to receive the whole; if both died before majority, it was to be paid to their father. Both children died under age, but the gift over did not take effect, because, as the court construed the limitations, the father only took if he survived the death of both children under twenty-one. This he did not do. It was held that the survivorship of the father was a part of the divesting contingency, and hence, when one child died, the other took the whole, and that interest had never been divested. *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103.

³ Only the opinion is here given.

⁴ Parke, B., Alderson, B., Coleridge, J., Platt, B., Erle, J., Rolfe, B., and Wightman, J.

for life, and, after his death, to the use of Mary Sida, for life, and, from and after her decease, to the use of such child or children of the body of Mary Sida, by her intended husband, and for such estates or other interest, and in such parts, shares, or proportions, as Mary Sida, by any deed or writing, sealed in the presence of, and attested by, two witnesses, or her last will, duly executed, might direct and appoint; and, for want of such appointment, to the use of all the children of the marriage, as tenants in common in tail; and, in default, to Mary Sida in fee.

Mary Sida, in the lifetime of her husband, and then having two sons, made a will, duly executed according to the power, and appointed the estate to her eldest son, John Blomfield, and his heirs and assigns forever, upon condition that he should pay to her other son £200, within a year and a day after her husband's death, in case he should be living, and twenty-one years of age, &c.; but, if neither of her sons should be living at the decease of her husband, she appointed the estate to her father-in-law, his heirs and assigns, upon certain trusts.

The testatrix died in 1782. John Blomfield, the devisee, died in 1820, in his father's lifetime, leaving the lessor of the plaintiff, his youngest son and customary heir: and the father died afterwards, in 1820. William Blomfield, the second son, had previously died, in 1767.

This action was brought in 1841. The defendant defended for six seventh parts of the property; and the question is, whether the lessor of the plaintiff is entitled to recover those six sevenths.

The Court of Common Pleas decided that he was not; and we are of opinion that their decision was correct.

Two objections were made to the title of the lessor of the plaintiff. The first objection was, that there was no dispensation of coverture in the power given to Mary Sida; and that her execution of the power during coverture, was therefore void. The second was, that John Blomfield, the son, had no estate which descended to the lessor of the plaintiff.

We intimated our opinion, in the course of the argument, that it was clear that there was in this case, an implied dispensation of coverture, and that there could be no doubt that the meaning of the settlement was, that the power should be executed by Mary Sida whether she were sole or covert.

The second was the principal question. It was contended, on behalf of the defendant in error, that the appointment to the son was altogether void, by being so connected with the appointment to the father-in-law that it could not be separated. If this was so, the plaintiff could not be entitled to recover. But the learned counsel for the plaintiff in error, argued, that the appointment was not altogether void, but gave a vested defeasible estate in fee to the eldest son; and that the appointment over alone was void.

Admitting that argument to be correct,—as we think it was,—we are of opinion, that, in the event which has happened, this estate was put an end to, and, consequently, that the lessor of the plaintiff is not entitled.

The learned counsel contended, that, where there is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became, impossible to be performed, the defeasible estate was made absolute; and he cited *Co. Lit.* 206 a. Of this there is no doubt; the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testatrix meant the estate to be defeated? Was it—if the two sons should die in the father's lifetime? or was it—if they so died, and the estate should, by law, vest in the father-in-law? In the former case, the plaintiff would fail; in the latter, he would succeed.

This question is not peculiar to cases of appointments under powers: it might arise upon an ordinary will. If a testator were to devise to A. B. in fee, and to direct, that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear, that, if A. B. died in the lifetime of J. S., he, A. B., or, rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case, by his will says: "If A. B. dies in the lifetime of J. S., I do not mean that A. B. or his heirs should any longer have the estate." The estate of A. B. is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over.⁵ So, in the case before us: the testatrix (for, for this purpose, she may be treated as an ordinary testatrix), says, in substance: "If my son John

⁵ In the case of a devise by A. to B. in fee, upon a contingent event, without more, the land descends to the heir of A., subject to the contingent executory devise, and the fee is in the heir of A., until that devise takes effect. Any declaration that, until the event contemplated, A.'s heirs shall not have the land, would be nugatory, as the heir necessarily takes in the absence of an immediate effectual disposition thereof. So, in the case of a devise by A. to B. in fee on a contingent event, and subject to the contingent devise, to C. in fee, C. is substituted for the heir of A., and the fee vested in C. remains undivested until the devise to B. takes effect. In each case the intention is, in the event contemplated, not simply that the primary taker shall not retain the land, but that the land shall go preferably to B., and if, from any cause whatever, B. is incapable of taking, the divesting intention fails. (*Acc. per Rolfe, B.*, 5 C. B. 744.) The effect is, in substance, the same where A. devises to B. in fee, with a contingent executory devise over to C. If, by any means, the devise to C. is removed out of the way, or if the devise to C. is of a less estate than the fee, the estate of B. is not defeated, or is only partially defeated. The estate was not intended to be taken from B., for any other purpose than that of giving it to C., and that purpose failing, A.'s original bounty remains in full operation. It appears to be immaterial from what cause the executory devise to C. fails of effect, whether by reason of the contingency itself not arising, or of its being too remote, or of the death of C. in the lifetime of A., or of C.'s incapacity to take. The late case of *Jackson v. Noble*, 2 Keen, 590, appears to be in substance this: A. devises to B. in fee,

and his brother William die in their father's lifetime, I do not mean him (John) to have the property; but I give it over to strangers." That which defeats the estate of John, is the death of himself and brother in his father's lifetime,—not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event

but in case B. shall leave no child, then to C. or his children surviving B. C. dies in the lifetime of B. without leaving any child. It was held, that the estate already vested in B. could not be divested, although B. (who was living) should die without issue,—that B. had "an absolute estate, subject to be defeated by the contingent executory gift over," of which gift the object had failed. It was not attempted to be argued that the contingency on which the estate was limited over, could be incorporated, as a qualifying ingredient, in the primary gift to B. The principle seems to be,—that the intention in favor of the primary devisee is qualified for the benefit of another object of bounty, and is for that reason only, not absolute, and that whenever, and by whatever means, that object is removed, the inducement to disturb the primary gift has ceased. The same principle appears to apply equally to a conveyance *inter vivos*, and to a posthumous conveyance by devise, although, in the latter case, the manifestation of the intention of the disposing party, may be less fettered by technical rules of construction.

Before the 1 Vict. c. 26, § 25, if A. had devised Blackacre to B. in fee, on a contingency, which happened,—so that the intention in favor of B. took effect absolutely—the devise, by the death of B. in A.'s lifetime, lapsed, for the benefit of the heir of A., notwithstanding the existence of an operative residuary devise to C.; for, every devise of land being at that time really specific, the devise of the residue was nothing more than a devise of the lands of which A. was then seised, other than Blackacre, which A. supposed himself to have already disposed of in all events. But, now Blackacre would pass under the residuary devise: such a devise embracing all the realty from any cause whatever not effectually disposed of; and thereby constituting a universal *heres factus*. So, under the old law, A. might have expressly devised Blackacre to B. in every event in which it was not effectually devised to C. and might have thereby constituted B. a special *heres factus*; and the question is, whether A., by devising to B., with a contingent executory devise to C., would not have sufficiently declared that intention. (And see Sweet, *Convey.*, 2d ed. 424-427.)

Where there is a devise by A. to B. in fee, defeasible on an event which happens, in favor of C. in fee, and C. dies in the lifetime of A., the only mode, it is conceived, by which the heir of A. could be let in, would be, to treat the devise to B. as revoked by the devise to C. becoming absolute, and to consider the heir of A. as in by the lapse of the devise to C., instead of treating the devise to B. as ceasing to be defeasible on the failure of the devise to C. But A., it is submitted, declares, not that if the contingency happens, B. shall lose the estate, but, simply, that if the contingency happens, C. shall have the estate.—*Rep.*

Sugden on Powers (8th Ed.) 513, 514:

"The case [*Doe v. Eyre*] has been before the Exchequer Chamber, and the judgment has been affirmed (5 Com. Bench, 713), upon clear and satisfactory grounds. The judges held that the eldest son took a vested defeasible estate in fee, and that the appointment over alone was void. This estate in the son in the event which had happened was put an end to, for the condition by which the estate was to be defeated was, if the two sons should die in their father's lifetime, and not if they so died and the estate should by law vest in the father-in-law. It would be so upon an ordinary devise to one in fee, and if he died in the lifetime of A. over to a charity, when if the event happen the devise ceases, although the charity cannot take.

"The reporters have added a note to the above-mentioned case, with a view to impeach the decision upon the ground that as the gift over to the father-in-law could not take effect, the gift to the son was not defeated. After showing that where there is a devise in fee upon a contingency, the land in the

which happened, he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain, is that she has not expressed any intention, that in the events which have happened, John should take: and, as he could only be entitled by virtue of an expressed intention in his favor, we think that he fails to establish any right.

Judgment affirmed.

mean time descends to the testator's heir-at-law, the note proceeds to say that in the case of a devise by A. to B. in fee on a contingent event, and subject to the contingent devise to C. in fee, C. is substituted for the heir of A., and the fee vested in C. remains undevested until the devise to B. takes effect. In each case the intention is, in the event contemplated, not simply that the primary taker shall not retain the land, but that the land shall go preferably to B., and if from any cause whatever B. is incapable of taking, the divesting intention fails, and an observation which fell from Mr. Baron Rolfe during the argument is referred to in support of this position. Now in the first place there can be no vested devise over after a contingent devise in fee; but, to come to the main point, the opinion of Rolfe, Baron, does not support the position for which it is quoted. If it did, yet as he concurred in the judgment, any obiter dictum of his before judgment was pronounced, adverse to the view of the court, could not be relied upon. In the course of the argument, Parke, B., asked for a reference to any case of a limitation to one and a conditional limitation over to a person who could not take, as a corporation, &c., to which it was answered from the bar that no doubt there were some such cases—of that class were the cases of perpetuity; whereupon, Rolfe, B., said, that can hardly apply: the first taker is clearly intended to take, and takes forever unless the estate can go over to another. His observation therefore is confined to a case where the fee is first given and then there is a gift over void for perpetuity, in which case the fee remains in the first devisee, and the gift over is simply void. But this has no bearing upon the principal question, for here the testatrix could by law declare her intention, that upon the happening of the contingency, the devise to her son should cease, whereas in the case put at the bar and answered by the learned baron, the testator could not by law defeat the first devise in the event which he provided for: the law forbade the devise over, and therefore the first devise remained unaffected by it. The reporters state that in these and similar cases it appears to be immaterial from what cause the executory devise over fails of effect, whether by reason of the contingency itself not arising, or of its being too remote, or of the death of the executory devisee in the lifetime of the testator, or of the incapacity of the executory devisee to take; and in support of this view the case of *Jackson v. Noble*, 2 Kee, 590, is relied upon. Mr. Jarman (1 Wills, 2 ed. 783) had previously referred to the same case as an authority, that where a devise in fee is followed by an executory limitation in fee in favor of an object or class of objects not in esse, and who in event never came into existence, the first devise remains absolute. And so he adds, if the executory devise were void on account of its remoteness or from any other cause, the prior devise would be absolute. This we have seen was ruled otherwise by the Exchequer Chamber. The case of *Jackson v. Noble* was decided not on any general rule, but on the ground that looking at all the devises the estate was not intended to go over in the event which happened. It would be out of place to enter here into an examination of the case of *Jackson v. Noble*; but if it cannot be supported upon the intention as collected by the court, it must be considered as opposed to the later decision in the Exchequer Chamber, which affirmed the judgment of the Common Pleas. The point upon the devise over appears to have been there decided on solid legal grounds. The point ruled is that an absolute appointment to an object of the power with an executory gift over in a given event to a stranger will cease upon the happening of the event although the appointee over is incapable of taking the estate."

ROBINSON v. WOOD.

(Court of Chancery, 1858. 27 Law J. Ch. 726.)

John Dales Allison, by his will, dated the 3d of September, 1840, devised all his freehold, customary and copyhold estates, whatsoever and wheresoever, whereof or wherein he or any person in trust for him was seised or possessed, or to which he was entitled for any estate of inheritance, or over which he had or might have any power of appointment or disposition, or in which he had any devisable interest, whether in possession, reversion, remainder or expectancy, to hold the same to them, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell such part of his real estate as his trustees should think fit or needful, and pay such of his debts as his personalty was insufficient to discharge, and subject thereto to receive the rents of the remaining part of the real estate, and pay and apply the same for the maintenance, education and bringing up of his daughter, Ann Dales Allison, otherwise Ann Dales, born to him by his wife, Harriet Allison, until she attained the age of twenty-one years; and when his said daughter should attain the age of twenty-one years, upon further trust to convey, assign, transfer and assure the said residuary freehold and other real estate and property, subject as aforesaid, unto and to the use of his said daughter, her heirs and assigns forever. And in case his said daughter should happen to depart this life under the age of twenty-one years, leaving lawful issue her surviving, then he directed that his said trustees or trustee for the time being should stand possessed of the said residuary real estate, upon trust for the absolute use and benefit of such issue, his, her or their heirs and assigns, as tenants in common; but (in case his said daughter should happen to depart this life under the age of twenty-one years without leaving lawful issue her surviving, then upon trust to receive the rents, income and profits of his said estates and property, and equally divide the same between his said wife, if she should be then his widow and unmarried, and Mary Allison, share and share alike, with benefit of survivorship between them during their joint lives, and after the decease of the survivor upon trust to sell the said residuary freehold and other real estate and property, and pay the money to arise from such sale to the treasurer of the Primitive Methodist Society.

The testator died in September, 1840, leaving Ann Dales Allison, his only child, him surviving. The testator's widow and Mary Allison both died in the lifetime of the daughter, Ann Dales Allison, who died in March, 1856, under twenty-one years of age, without having been married.

The plaintiff, who was the heir-at-law of Ann Dales Allison, filed the bill in this cause claiming to be entitled to the estates devised by the testator, alleging that the devise to the testator's daughter was a

vested estate in fee simple, and that as the charitable gift to the Primitive Methodist Society was void under the Statute of Mortmain, he was entitled as her heir-at-law.

The defendants were the trustees of the testator's will, who claimed the real estates as undisposed of.

KINDERSLEY, V. C. This is a case of considerable importance. There are two questions of construction raised and they are questions of common law without any ingredient of equity except that there is a devise to trustees, and therefore the interests are equitable, and whatever construction a court of law would put upon this instrument, a court of equity would put the same. The question then is, first, whether there is by the prior part of these limitations an absolute vested estate in fee simple given to the testator's daughter. It is not necessary for the determination of this case to decide that question; but my impression is, that it is a vested estate in fee simple in the daughter, Ann Dales Allison, liable of course to be divested. It is sufficient however to say, that I will assume in favor of the plaintiff that the testator's daughter took such absolute vested estate in fee simple in the first instance, although she did not live to attain the age of twenty-one years. Then the next question is, whether the estate was divested by virtue of the subsequent clauses. Those clauses provide for the divesting of the estate in certain events: first, in the event of her dying under twenty-one, leaving issue; and the other, of her dying under twenty-one without leaving issue, which is the event that has happened. Now, of course, as this was a devise to a charity, it was void under the Statute of Mortmain, 9 Geo. 2, c. 36, §§ 1 and 2. The Statute directs, that no lands shall be given in trust, or for the benefit of any charitable uses whatever, except in a particular manner. And then follows the third clause directing that all gifts of any lands, tenements or hereditaments to or in trust for any charitable uses whatever, which shall be made otherwise than in that particular manner, shall be absolutely and to all intents and purposes null and void. It has been argued, that the entire gift over being void, there is nothing to divest the estate from the original taker, and I confess that I have much difficulty in getting over that reasoning; but I find that the precise question has been brought before the Court of Common Pleas and the Court of Exchequer, and it has been held that, where there is a gift over purporting to divest a prior estate in fee simple, if the devise over fails for any reason, the intention of the testator must be taken to have been that the devise should nevertheless operate to carry the estate over. Now, whatever opinions I may entertain upon the point, it is not for me, in the exercise of my functions, to overturn that decision. It appears to me, that not only is every particular the same in the case of *Doe v. Eyre*, 5 Com. B. Rep. 713, but the arguments there used are entirely adverse to the claim of the plaintiff, and I must presume that the observations used are to be taken as the expression of opinion of the whole Court of Exchequer Chamber. If that were the case, it

must follow as a matter of course, that if the case now before the court were decided by the same judges, their decision would be adverse to the case of the plaintiff. How, therefore, can I take upon myself to say that the decision was wrong? If there had been a series of decisions the other way, one would have to be weighed against the other; but what are the cases cited, and suggested as being adverse? First, there is the case of a gift by will of property, or a share of property, to a child, importing an absolute gift, and directing subsequently that the share should be settled; that does not bear upon the present case, because that was not a case which turned on divesting upon a contingency. There was no contingency at all; the testator stated that he meant to give an absolute interest, which however he wished to be modified, in order that the children might have it; but if there were no children, the original gift was to prevail. Those are not cases raising the same question. The only other case is that of *Jackson v. Noble*, which it is extremely difficult to reconcile with *Doe v. Eyre*, by reason of the language there used; but when it is looked into, it will be found that the ground of the decision was, that the contingency there contemplated, on which the gift over was to take effect, had never happened. Of course, if that was the ground upon which the decision was founded, it does not touch the present question; and whether that decision was right or wrong is of no moment, because, at all events, it is not a decision adverse, and therefore upon the state of the pronounced opinions, it is impossible to say that the gift over is entirely inoperative; and whatever my opinion might have been but for the case of *Doe v. Eyre*, and I confess it is extremely doubtful whether I should have been of the opinion there expressed, I feel myself under the necessity of coming to the same conclusion. If I had not been precluded by law, I should probably have submitted this question to the very court who decided *Doe v. Eyre*, for their opinion; and if I had done so, I cannot doubt but that they would have decided in conformity with their previous decision. I must therefore dismiss this bill; but having regard to the nature of the case, I shall dismiss it without costs.⁶

O'MAHONEY v. BURDETT.

(House of Lords, 1874. L. R. 7 Eng. & Ir. App. Cas. 388.)

See ante, page 235, for a report of the case.⁷

⁶ See *Hurst v. Hurst*, 21 Ch. Div. 278, 284-286, 290, 293, 294 (1882).

⁷ Gray, *Rule against Perpetuities* (2d and 3d Eds.) §§ 783-788; *Drummond's Ex'r v. Drummond*, 26 N. J. Eq. (11 C. E. Green) 234 (1875).

ON THE EFFECT OF THE FAILURE OF SUBSEQUENT INTERESTS FOR REMOTENESS.
—See Gray, *Rule against Perpetuities*, §§ 247, 248; *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625 (1912).

SECTION 2.—FAILURE OF PRECEDING INTEREST

JONES v. WESTCOMB.

(Court of Chancery, 1711. 1 Eq. Cas. Abr. 245, pl. 10.)

A., possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then enseint with; and if such child died before it came to twenty-one, then he devised one third part of the same term to his wife, her executors and administrators, and the other two thirds to other persons, and made his wife executrix of his will, and died; and the bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate not devised by the will; and two questions were made: 1st, whether the devise to the wife of one third part of the term was good, because it happened she was not then enseint at all; and so the contingency, upon which the devise to her was to take place, never happened; the other question was, whether this term, being part of the personal estate, and expressly devised to her for life, with such other contingent interest on the death of the supposed enseint child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix, and so the surplus go in a course of administration, to be distributed amongst the plaintiffs, as next of kin. As to the first point, Lord Keeper [LORD HARCOURT] delivered his opinion, that though the wife was not enseint at the time of the will, yet the devise to her of such third part of the term was good; and as to the other point dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part, as aforesaid.⁸

⁸ See *Murray v. Jones*, 2 V. & B. 313 (1813); *Mackinnon v. Sewell*, 2 M. & K. 202 (1833); *Gulliver v. Wickett*, 1 Wils. 105; *Meadows v. Parry*, 1 V. & B. 124.

"*Frogmorton v. Holyday* [3 Burr. 1618] was a case similar in character to that of *Jones v. Westcomb*, and what Lord Mansfield says is this: 'A question applicable to this part of the argument was pleaded in the days of ancient Rome by Scævola and Crassus, in the famous cause between Curius and Coponius, and was much agitated in modern times in the courts of Westminster Hall, in the case of *Jones v. Westcomb*. A man, taking for granted that his wife was with child, devised his estate to the child his wife was enceinte of, and if such child died under age then he devised it over. The woman was not with child. The question was, 'whether the devisee over should take?' Lord Mansfield (with a little sarcasm perhaps) says, 'the Roman tribunals at once and the English at last, finally determined that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it; consequently, no posthumous child having ever existed, the substitute was entitled.'"

WILLING v. BAINE.

(Court of Chancery, 1731. 3 P. Wms. 113.)

A. by his will devised £200 apiece to his children, payable at their respective ages of twenty-one; and if any of them died before their age of twenty-one, then the legacy given to the person so dying, to go to the surviving children. He devised the residue of his personal estate to A., B. and C. (being three of his children), and having made them executors, died.

One of the children died in the testator's lifetime, and after the testator's death one of the executors and residuary legatees died. Upon this two questions arose, first, whether the legacy of the child that died in the life of the testator should go to the surviving children, or should be a lapsed legacy, and sink into the surplus? 2dly, whether when one of the executors and residuary legatees died, his share of the residuum belonged to his executor, or to the surviving residuary legatees? ⁹

As to the first, it was objected to be the constant rule, that if the legatee dies in the life of the testator, this legacy lapses, which took in the present case; for here the child, the legatee, died in the lifetime of the testator; that it was true, there was a devise over of the legacy, in case any of the children should die before their age of twenty-one; but such clause could not take place in the present case, because there can be no legacy, unless the legatee survives the testator, the will not speaking till then; wherefore this must only be intended, where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one.

On the other side it was said and resolved by the court [LORD KING, C.] that the rule is true, that where the legatee dies in the life of the testator, his legacy lapses (i. e.), it lapses as to the legatee so dying; but that in this case the legacy was well given over to the surviving children; for which 2 Vern. 207, *Miller v. Warren*, was cited, where there was a devise of a legacy of £1,500 to A. payable at his age of twenty-one, and if A. died before, then to B. On A.'s dying in the lifetime of the testator, though this was never a legacy with respect to A., but lapsed as to him, by his dying in the life of the testator, still it was held to be well devised over. So in the case in 2 Vern. 611, of *Ledsome v. Hickman*. In like manner, if land were devised to A. and if A. should die before twenty-one, then to B. on A.'s dying in the life of the testator, and before twenty-one, this would be a good devise over of the land to B.

⁹ That part of the case which concerns this second point is omitted.

TARBUCK v. TARBUCK.

(Court of Chancery, 1835. 4 L. J. [N. S.] Ch. 129.)¹⁰

The testator by his will devised certain hereditaments unto his son James for the term of his natural life, without impeachment of waste, and, immediately after his decease, then unto and equally amongst all the children of his said son James, share and share alike, and to their respective heirs and assigns forever as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns forever, chargeable as therein mentioned. And the said testator also gave and devised all his other messuages and dwelling-houses, buildings, lands, and hereditaments, whatsoever and wheresoever, unto his son Jonathan, for and during the term of his natural life, without impeachment of waste; and from and after his decease, then unto and equally amongst all the children of his said son Jonathan, lawfully to be begotten, share and share alike, or to their respective heirs and assigns forever, and for and during all his, the said testator's term and interest therein respectively, as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns forever, and for and during all his term and interest therein respectively, chargeable as therein mentioned; and in case his said son James should happen to die without leaving lawful issue, then he gave and devised the said hereditaments, so devised to him for his life as aforesaid, unto his, the said testator's, son Jonathan, his heirs and assigns forever; and in case his said son Jonathan should happen to die without leaving lawful issue, then the said testator gave and devised the said hereditaments so devised to him for his life as aforesaid, unto his, the said testator's, son James, his heirs and assigns forever, or for and during all his, the said testator's, term and interests therein respectively; but if both his, the said testator's, said sons, James and Jonathan, should happen to die without leaving lawful issue, then the said testator gave and devised the whole of the said messuages, hereditaments, &c., equally, unto and amongst all his, the said testator's, nephews and nieces, share and share alike, and to their respective heirs and assigns forever, or for and during all his, the said testator's, estate, term, and interest therein respectively, as tenants in common.

At the date of the will, neither of the testator's sons had any children, and they both died in the lifetime of the testator. James, one of the testator's sons, left one child, a son, who survived his father James and his uncle Jonathan, but who subsequently died in the lifetime of the testator, and Jonathan died without children. The testator died, seised of freehold estates, and possessed of leasehold for lives and years, all of which were included in the above devise; and

¹⁰ Part only of the case is here given.

the question was, whether, under the circumstances, the devise over to the nephews and nieces took effect.

THE MASTER OF THE ROLLS [SIR C. C. PEPYS]. It appears that the testator's son James died in 1814, leaving a son, James; the testator's son Jonathan died in 1824 without issue. James, the son of the testator's son James, died in 1824, and the testator himself died in 1831; so that the devises in favor of the testator's sons, James and Jonathan, and their children, lapsed and failed. On the part of the nephews and nieces it was contended, that, in the events which have happened, they are entitled under the devise to them. On the part of the heir-at-law of the testator, it was contended, that as the events have not happened upon which alone the nephews and nieces were to be entitled, the devise to them cannot take effect, and that therefore there is an intestacy.

The first question to be considered is, What estates would James and Jonathan have taken, had they survived the testator? [The discussion of this first question is omitted.] I am therefore of opinion, that if James and Jonathan had survived the testator, they would have taken estates for life, with remainder to their children in fee, but with executory devises over, in the event of their leaving no children at the times of the death of the respective tenants for life; and if this be the true construction of the devise, it is clear the gift to the nephews and nieces could never have taken effect, for that gift is only to take effect in the event of James and Jonathan dying without lawful issue, that is, children to the above construction, and James, at the time of his death, had a son, namely, James, who survived both his father and his uncle Jonathan.

The only remaining question is, whether the circumstance of James, and his son, and Jonathan, having died in the testator's lifetime, makes any difference. The distinction is very nice between those cases, in which executory limitations have been held not to be defeated by the failure of a prior estate, as in *Avelyn v. Ward*, 1 Ves. Sen. 420; *Jones v. Westcomb*, Prec. Chanc. 316; *Murray v. Jones*, 2 Ves. & Bea. 313; and the opposite class of cases, in which it has been held, that subsequent limitations do not arise, although the preceding estates fail, because the event in which the estate was to go over had not arisen. The principle, however, is well established, although there has sometimes been some confusion in the application of it. It is, as I conceive, clear, that if James and Jonathan had survived the testator, the devise to the nephews and nieces could not have taken effect under the circumstances which happened; and it is, I think, established by authority, that the situation of the parties is not altered by their having died before the testator. *Williams v. Chitty*, 3 Ves. 545; *Calthorpe v. Gough*, 3 Bro. C. C. 394, n.; *Doo v. Brabant*, 3 Bro. C. C. 392; s. c. 4 T. R. 706; and *Humberstone v. Stanton*, 1 Ves. & Bea. 385, are decided cases on this point. I am therefore of opinion that the event, on which

the nephews and nieces were to take, did not happen; and that consequently there is an intestacy. The same declaration with regard to the leaseholds follows of course.¹¹

HUGHES v. ELLIS.

(Court of Chancery, 1855. 20 Beav. 193.)

The testator, by his will, dated in 1823, expressed himself as follows: "I direct that all my just debts, funeral expenses, the expenses of proving this my will, and all other expenses attendant thereon be first paid by my executrix, hereinafter named, out of my personal estate, and from and after the payment of the same, I give and bequeath the remainder of all my personal estate and effects, of what nature or kind the same may be, in manner following: videlicet—I give and bequeath to my mother, Anne Davies, the sum of one shilling. Also, I give and bequeath to my brother Hugh, and my sisters, Margaret, Anne, Elizabeth, Sarah, and Mary each the sum of one shilling; I give and bequeath to my dear wife Mary the rest, residue, and remainder of all my estate, whether leasehold, real or personal, of what nature, kind, or quality soever the same may be, and to her executors, administrators and assigns. But if my said wife should die intestate, then my will is, that the said remainder of my estate shall be bequeathed to my nephew David Hughes (son of my brother William), and to Margaret Evans (niece of my wife's first husband), share and share alike, their heirs and executors." He appointed his wife sole executrix.

Mary Hughes, the wife of the said testator, died intestate, on the 16th of September, 1854, in the lifetime of the said testator, and who died on the 23d of October, 1854.

The plaintiff Margaret Hughes (formerly Margaret Evans) by this bill claimed a moiety of the testator's residuary estate, under the bequest over to her and David Hughes.

To this bill the defendants Mrs. Ellis and Mrs. Parry demurred.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. My opinion of this will is, that the testator intended to give his wife an absolute interest in this property, with the power of absolutely disposing of it either in her lifetime or by will. If she did not dispose of it in her life or by will, he then intended these gifts over to take effect. No doubt the result is, that the gifts over could not take effect, for the wife took an absolute interest, and if she died without a will, the residue would go to her next of kin. She died, however, in the life of the testator, and I am of opinion that a lapse took place; the testator might have said "intestate in my life," but the simple word "intestate" excludes the construction that the gift over was intended by the testator

¹¹ Accord: *Brookman v. Smith*, L. R. 6 Ex. 291; L. R. 7 Ex. 271 (1872).

to provide against a lapse, because if she had died in his lifetime, being a feme covert, she had no power to do any testamentary act, by making a will, and she therefore must necessarily have died intestate.

I am of opinion that he intended to give her an absolute interest in the property, and if she did not dispose of it by will, the gift over was to take effect, and both upon principle and on the authorities which have been cited, such a gift over could not take effect.

The difficulty has been created by the testator; his estate ought, if possible, to bear the costs.¹²

¹² In *Greated v. Greated*, 26 Beav. 621 (1859), there was a devise to the testator's children (naming them) in fee, but if any of them died before having heirs of their body or (which the court construed "and") making a particular disposition of his share, then to the survivors. Two children died in the lifetime of the testator, but the gift over to the survivors did not take effect. See, also, *In re Jenkins' Trusts*, 23 L. R. (Ir.) 162; *Stretton v. Fitzgerald*, 23 L. R. (Ir.) 310. But cf. *Eaton v. Straw*, 18 N. H. 320, 333.

In *In re Stringer's Estate*, 6 Ch. D. 1, 14, 15 (1877) James, L. J., said: "It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir-at-law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested de facto in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator. But that, I should have thought, did not apply to a case where the original gift never did take effect at all, because then there is no repugnance. There may be repugnance between the gift over and the gift intended to be made, but I am not quite sure that that ought to have applied to a case, supposing the point arose, where there was simply the death of the person creating a lapse. True, there are two authorities cited of the late Master of the Rolls, *Hughes v. Ellis*, 20 Beav. 192, and *Greated v. Greated*, 26 Beav. 621, one of which seems to me very similar to this case. I think, if it were necessary for us to deal with these cases, I should be slow to express my assent to them."

Where personal property is bequeathed to A. and the heirs of his body (which, as is well settled, is an absolute gift to A.) and in case of failure of issue of A., then to B., if A. survive the testator, the gift over to B. is void for remoteness, because on an indefinite failure of issue. But if A. die in the life of the testator without issue, then the gift over is not void for remoteness, and will take effect. In *re Lowman*, L. R. [1895] 2 Ch. 348 (overruling dicta to the contrary in *Harris v. Davis*, 1 Coll. 416, and *Hughes v. Ellis*, supra, and *Greated v. Greated*, supra).

Theobald on Wills (7th Ed.) 648: "It would seem that a gift of consumable articles to A. for life, remainder to B., would not lapse by A.'s death in the testator's lifetime, notwithstanding *Andrew v. Andrew*, 1 Coll. 686, 690."

ON THE EFFECT OF THE FAILURE OF A PRECEDING INTEREST FOR REMOTENESS UPON THE SUBSEQUENT LIMITATIONS.—See *Beard v. Westcott*, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25 (1813); *Monypenny v. Dering*, 2 De G., M. & G. 145 (1852); *Gray*, Rule against Perpetuities, §§ 251–257.

SECTION 3.—ACCELERATION

EAVESTAFF v. AUSTIN.

(Court of Chancery, 1854. 19 Beav. 591.)

The testatrix devised and bequeathed all her real and personal estate to trustees, in trust to invest £4,500, and pay the interest thereof to her brother, William Johnson, during his life, and in case of his wife, Harriet Johnson surviving him, she directed her trustees, immediately thereupon, to set apart a sufficient sum out of the £4,500 to pay Harriet Johnson, during her life, out of the dividends, &c., an annuity of £100; and that the remainder of the sum of £4,500 should, immediately upon her brother's decease, be equally divided between her nieces, Elizabeth Austin and Mary Austin. She then proceeded thus:

“And I also direct, that in case my said brother shall survive his said wife [which happened], in that event, the same proportion of the £4,500 as I have directed to be divided between my said nieces, Elizabeth Austin and Mary Austin, shall, in that event, immediately after the decease of my brother, in the same way, be equally divided between them. And I further direct, that such proportions of the £4,500 as shall be set apart, in case my said brother shall die before his said wife, for securing to his wife for her life the sum of £100 per annum, or in case of his surviving his wife, so much of the £4,500 as would be equal to the production of £100 per annum, from the dividends, &c., thereof, shall, by my said trustees, immediately upon my said brother's decease, be set apart, and that my said trustees shall pay the said sum of £100 per annum to my granddaughter, Adelaide Dalton, for life; and I direct that after her death, the same shall be equally divided between the children of my nephew, John Austin.”

By a codicil the testatrix revoked the £100 annuity given by her will to her granddaughter, Adelaide Dalton, “she being otherwise provided for.”

The testatrix died in 1847; William Johnson survived his wife Harriet, and died in 1852 and Adelaide Dalton was still living.

The first question was, whether the bequest to the children of John Austin, of so much of the £4,500 as would produce £100 a year, was accelerated by the revocation of the bequest of the annuity of £100 to Adelaide Dalton for life, or whether its enjoyment by such children was postponed till the decease of Adelaide Dalton.

On the question of acceleration, the case of *Lainson v. Lainson* was cited.

The Master of the Rolls reserved judgment.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. Though I think that the same rules which relate to real estate do not apply to personalty, and that therefore this case is distinguishable from *Lainson v. Lainson*,¹³ still I think that the decision here, on the construction of this will, must be the same, and that it must be held that the interest of the children of John is accelerated. Without that, I do not see how I can avoid holding that it fell into the residue, which is given in another way. The interest of the children takes effect at once, without waiting for the death of Adelaide Dalton.¹⁴ [The balance of the case, relating to another point, is omitted.]

¹³ 18 Beav. 1. A devise of land to A. for life and from and immediately after his death to B. in tail. A codicil revoked the devise to A. Held, that B.'s estate was accelerated.—*Ed.*

¹⁴ See also *Jull v. Jacobs*, 3 Ch. D. 703 (1876); *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. 332; *Cook's Estate*, 10 Pa. Co. Ct. Rep. 465.

In *Craven v. Brady*, L. R. 4 Eq. 209, L. R. 4 Ch. App. 296, where there was both an appointment and a devise to A. for life, subject to a condition subsequent of forfeiture on alienation, with a remainder to B., B.'s remainder was accelerated upon the forfeiture of the life estate.

But where an appointment was made to a wife for life, "upon condition that she should thereout maintain and educate his children, in such manner as his executors should think proper," with remainder to the eldest son, and the appointment to the wife was void because in excess of the power, but the gift in default of appointment was to the children equally, the remainder was not accelerated, but the rents and profits went to the children equally during the life of the wife. *Crozier v. Crozier*, 3 D., R. & W. 373.

Suppose, after a devise of real estate to the wife for life, the testator directs that at the wife's death the executor shall sell and divide the proceeds between A. and B. If the wife renounces, may the executor sell at once and divide? See *Dale, Adm'r, v. Bartley*, 58 Ind. 101.

Now, suppose the executors are directed to sell at the wife's death and divide the proceeds into two shares, one to go to A. or his issue, the other to B. or his issue, with a gift over, if either dies without leaving issue before the legacy becomes payable, to C. Suppose the widow renounces. Are A. and B. entitled to have the property sold and divided at once? See *Coover's Appeal*, 74 Pa. 143. If so, do A. and B. take indefeasible shares?

Suppose real estate be devised to the widow for life, or until her remarriage, with a gift "after her death to be equally divided between lawfully begotten children of my brothers, John, David, Jacob and James," or such of them as may be living at the time of her death. After the widow's remarriage, were the remaindermen who then survived entitled? See *Augustus v. Seabolt*, 3 Metc. 153 (Ky. 1860).

Suppose a devise to trustees upon trust to make certain payments of income to the wife during her life; the remainder of the net income to be divided between two daughters for life, with a gift over to their children, and a further gift over upon the death of the children without leaving issue [which happened], "then, immediately after the decease of my wife, if she survive my said daughters, but if not, then immediately after the decease of the last surviving one of my daughters, my said trustees shall divide my estate into two equal shares, * * * and shall at once proceed to distribute one of such shares among the lawful surviving descendants of my own brothers and sisters, such descendants taking per stirpes and not per capita." The widow renounced. Both daughters died without issue. Then brothers and sisters of the testator died, and their descendants during the life of the widow seek a distribution. Are they entitled? See *Blatchford v. Newberry*, 99 Ill. 11.

Gray, *Rule against Perpetuities* (3d Ed.) § 251: "In former editions it was said: 'Thus if an estate is given (1) to A. for life, (2) to A.'s unborn child for life, (3) to the child of such unborn child for life, (4) to B. in fee, B.'s estate

is good, although the remainder to the child of A.'s unborn child is too remote. So although the later interest is not vested at its creation, yet if it must become vested within the limits fixed by the Rule against Perpetuities, it will be good.' But this is incorrect. A vested estate is an estate which is subject to no condition precedent except the termination of the precedent estates. [See §§ 8, 101, ante.] In the case put the estate to B. is subject to the condition precedents of (1) the death of A., (2) the death of A.'s unborn child, (3) the death of the child of A.'s unborn child. A. and A.'s unborn child have estates for life, but the gift to the child of A.'s unborn child being remote, said child has no estate; and therefore as B.'s estate is subject not only to the termination of the life estates of A. and of A.'s unborn child, but also to the contingency of the death of an unborn person who has no estate, the estate given to B. is too remote, and so it was held in *In re Mortimer* [1905, 2 Ch. (C. A.) 502. A note by the author, 23 Law Quart. Rev. 127, is wrong. See 1 Jarm. Wills (6th Ed.) 352-354]."

PART III

POWERS

CHAPTER I

OPERATION, CLASSIFICATION, RELEASE AND DISCHARGE

SIR EDWARD CLERE'S CASE.

(Court of Queen's Bench, 1599. 6 Coke, 17b.)

See ante, p. 36, for a report of the case.¹

RELEASE AND DISCHARGE OF POWERS, by John Chipman Gray, 24 H. L. R. 511: The first distinction in powers rests on the nature of the instrument by which the power is exercisable. It may be exercisable by either deed or will, or by will alone. A power may be made exercisable by deed and not by will, but the law as to releases is the same in the case of powers of this description as it is in that of powers exercisable by either deed or will. For the essential difference is whether the power can be exercised at once, or only on the death of the donee.

¹ In *Roach v. Wadham*, 6 East, 289 (1805), the donor of the power conveyed in fee to the donee reserving rent and the donee agreeing to pay rent. The donee then appointed the fee and the appointee covenanted to pay the rent to the donor. Held, the donor could not sue the appointee for the rent.

Sugden on Powers (8th Ed.) 144: "*Moreton v. Lees*, C. P. Lancaster, March Ass. 1819. Case reserved and argued before Lord Chief Baron Richards and Mr. Baron Wood, at Serjeants' Inn. The conveyance was by feoffment to the purchaser and his heirs, habendum to him, his heirs and assigns, to such uses as he should appoint by deed or will, and in default of and until appointment, to the use of the purchaser, his heirs and assigns. He exercised the power by an appointment in fee, and his wife brought an action to recover her dower. The objection was taken that the husband was in at the common law, and the power was void; but the contrary was decided, and the wife was held to be barred of dower. This decision, therefore, sets the point at rest. It has recently been followed by a case in Ireland, *Gorman v. Byrne*, 8 Ir. C. L. 394."

In *Commonwealth v. Duffield*, 12 Pa. 277 (1849), the donor, residing in Maryland, created by will a general testamentary power to appoint personally in Maryland. The donee resided in Pennsylvania and appointed by will probated in that state. Held, the appointee was not liable for any collateral inheritance tax under the laws of Pennsylvania.

Again, powers are either general or special. Under a general power an appointment can be made to any one, including the appointing donee. Under a special power an appointment can be made only to certain persons or objects, or to certain classes of persons or objects other than the donee. Special powers are sometimes called limited powers.

Finally, the relation between the donee and the property over which he has the power of appointment may be one of four kinds: First. The donee may have an interest in the property from which the exercise of the power will derogate, as when the donee of the power owns the property in fee. This is called a power appendant.² Second. The donee may have an interest in the property, but the exercise of the power will not derogate from such interest, as when A. has a life estate, with power to appoint by will. This is called a power in gross or collateral. Third. The donee has no interest in the property, but has himself created the power, as when a man conveying land in fee reserves to himself a power of appointment. This is also called a power in gross or collateral, to distinguish it from the power of the second kind, it will be called here a reserved power in gross. Fourth. The donee has no interest in the property and did not create the power. The power in this case is said to be simply collateral.

This somewhat clumsy nomenclature is derived from an opinion of Hale, C. B., in *Edwards v. Sleater* [Harde. 410, 415, 416].

DOE ex dem. WIGAN v. JONES.

(Court of King's Bench, 1830. 10 Barn. & C. 459.)

LORD TENTERDEN, C. J.³ This was a special case, argued during the last term. It appeared by the case that in Michaelmas term 1822 a judgment was entered up against T. Baker at the suit of the defendant, who, on the 13th of December, 1827, sued out an elegit, under which the lands in question were delivered to him by the sheriff. In the mean time, between the entering up of the judgment and the execution of the elegit, viz. in November, 1826, the then defendant, Baker, had acquired these lands by a conveyance to such uses as he might appoint, and in the mean time to the use of himself for life, and so forth. In March, 1827, Baker mortgaged the estate for £4000 to the lessor of the plaintiff, and appointed the use to him for 500 years; and the question for the court was, Whether this conveyance, under the power of appointment, defeated the judgment-creditor? It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest which he may

² See Maundrell, 10 Ves. 246, 254.

³ The opinion only is given.

do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding in invitum, and therefore falls within the rule. We are, therefore, of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

Postea to the plaintiff.⁴

JONES v. WINWOOD.

(Court of Exchequer, 1838. 3 Mees. & W. 653.)

ALDERSON, B.⁵ In this case we propose to give the reasons which have induced us to send our certificate to the Lord Chancellor in favor of the plaintiffs.

By the original conveyance, dated the 27th and 28th of December, 1819, certain lands were settled to such uses as William T. Davies, and Frances his wife, should at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing duly executed, direct and appoint, and in default of and until such appointment, to the use of William T. Davies for life, with remainder to trustees to preserve contingent remainders, then to the use of his wife for life, then in like manner to the use of his sons in succession in tail general, and then to the use of the daughters in tail general, with cross remainders, and with remainder in fee to William T. Davies himself.

In 1824 William T. Davies took the benefit of the Insolvent Act, and conveyed to the provisional assignee, on the 6th of August, 1824, all his interest in the premises, which was subsequently transferred by the provisional assignee to Isaac Jones, the assignee of the estate in the usual way.

Under these circumstances William T. Davies and his wife in execution of their joint power of appointment conveyed on the 16th and 17th of September, 1828, by lease and release, the premises to Patrick Brown and Jenkyn Beynon in fee, upon trust for the creditors of W. T. Davies. And the point to be considered is, whether by this appointment any estate passed, and what estate, to the trustees.

The first question is, whether the power was revoked by the conveyance to the provisional assignee; and we are of opinion that it was not. Indeed, on this part of the case there seems to be little difficulty.

No authority was cited for the proposition contended for by the defendant's counsel, that where by previous conveyance a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end; nor can any such proposition be maintained. Even upon the authority of the decision of

⁴ A power is not extinguished by a judgment against the donee. *Leggett v. Doremus*, 25 N. J. Eq. 122.

⁵ The opinion only is given.

Badham v. Mee [7 Bing. 695; 1 Myl. & K. 32], as explained by Sir John Leach, this question may be answered in the negative. For he considered the power as not well executed in that case, because the particular limitations made by the appointment under it could not have been valid, if introduced into the original deed creating the power. But if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

Now it is obvious, as was indeed pointed out by the court in the course of the argument, that limitations might have been made subsequently to the conveyance in 1824, which would apply to the life estate of the wife, and the estates tail of the children, and which might legally have been introduced into the original deed, and consequently, upon the principles stated in *Badham v. Mee*, such an execution of the power would have been valid; and if any valid execution of the power could have been made, the first of the Lord Chancellor's questions must be answered in the negative.

But in truth, the whole case turns upon the answer to be given to the second question. For if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it, and the original limitations contained in the deed of 1819 remain still in force.

We think, after full consideration, that this power was well executed, so as to convey the estate for life of the wife, and the estates tail of the children, to the trustees under the deed of 1828.

We cannot adopt the principle laid down by Sir John Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that court made their certificate, the reasons for which were not given by them.

We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a court of equity would compel them to perform, it may be questionable whether even this ought to be done), would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the court looks at the other circumstances; and finding

that the insolvent had previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes therefore that the deed does not operate on the estates previously assigned.

The result therefore is, that by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion we shall send our certificate to the Lord Chancellor.⁶

In re RADCLIFFE.

(Court of Appeal, 1891. L. R. [1892] 1 Ch. 227.)⁷

LINDLEY, L. J. This is an appeal from a decision of Mr. Justice North. In order to understand the application, it will be necessary that I should state the circumstances under which it is made. It appears that in 1852 a marriage settlement was made which gave the intended husband a life interest in certain property both real and personal. It also gave a life interest to his wife in the same property. She is dead. There was a power to appoint amongst the children of the marriage, and subject to the life interests and to the power of appointment the property was vested in trustees in trust for the children of the marriage, vesting in them on attaining twenty-one. One of them died intestate without attaining a vested interest; two others lived to obtain vested interests. One died intestate having a vested interest, and his father, the Appellant, is his legal personal representative. The wife being dead, the father is equitable tenant for life of the whole property, and he is entitled as legal personal representative of his son to one half of the personal estate subject to the trusts of the settlement. Under those circumstances, the father executed a deed by which he has extinguished his power of appointment; and having extinguished his power of appointment the result is this: that as regards the personal estate, with which alone we have to deal now, he is equitable tenant for life in his own right, and he is entitled as administrator of his son to one half of the reversion in the same property. That being the case, he has taken out a summons asking the Court to authorize or to direct the surviving trustee to pay him over half the personal estate to

⁶ See *Reid v. Gordon*, 35 Md. 174.

Where the holder of a fee with a power appendant conveys the fee, the power is extinguished. *McFall v. Kirkpatrick*, 236 Ill. 281, 296, 86 N. E. 139; *Brown and Wife v. Renshaw*, 57 Md. 67, 78.

⁷ Only the opinion of Lindley, L. J., is given. The concurring opinions of Bowen and Fry, L. JJ., are omitted.

which he is entitled in the way and to the extent I have mentioned. The trustee very naturally declines to do it without the direction of the Court, and Mr. Justice North has also declined to interfere, and this is an appeal from his decision.

Now, before I refer to the authorities, I will say one or two words about the principle applicable to the case. The exact position of affairs being that which I have stated, it is obvious that at the present moment, the life estate being vested in the father in one right and the reversion in another right, the two have not merged. In order that there may be a merger, the two estates which are supposed to coalesce must be vested in the same person at the same time and in the same right. Therefore, there is no merger as matters at present stand. The power of appointment is effectually got rid of. There was a time when it was doubtful whether such a power could be released; but all doubt on that point was removed more than fifty years ago and no doubt can be thrown or ought to be thrown on the doctrine that was then established, even independently of the 52d section of the Conveyancing Act, 1881. The power, therefore, having been got rid of, the only difficulty in principle in assenting to the application of the father is that there is as yet no merger. The difficulty could be got rid of at once by a surrender by the father of his life interest so as to extinguish it, the effect of which would be that the two interests would coalesce, and if there are any creditors the two estates would coalesce for the benefit of the creditors. The father, as the legal personal representative of his son, would then have an estate in possession which could be distributable amongst the son's creditors if there were any, and subject to their payment he would take the property as sole next of kin under the statute. Now, although there has been no surrender, I apprehend there will be no difficulty in the Appellant undertaking to surrender his estate now by counsel at the Bar. If that were done, I cannot see any principle whatever on which we should decline to act upon the state of things which would then exist. It is said that mergers are odious to the Court. I do not understand that. The saying only means that mergers are odious if misapplied so as to do injustice; but there is nothing odious in a merger if there is no injustice done. Therefore, I confess, upon principle I cannot see why the Court should decline to accede to the application of the tenant for life provided he removes the technical difficulties which I have suggested by surrendering his life estate.

Then, it is said that there are cases against this view, and that there is an authority of *Cunynghame v. Thurlow* [1 Russ. & My. 436, n.], which is inconsistent with it. Now, I am not sure that *Cunynghame v. Thurlow* was inconsistent with it, because in *Cunynghame v. Thurlow* itself there was no equitable merger by reason of there having been in that case what there is here—an estate for life in one right, and remainder in another right, and there was no suggestion in *Cunynghame v. Thurlow* that the difficulty could be got rid of by a surrender. But

be that as it may, *Cunynghame v. Thurlow* has been recognized and acted upon for a great number of years with one very striking exception. The exception to which I refer is the case before the late Master of the Rolls (Sir John Romilly) of *Smith v. Houblon* [26 Beav. 482]. Some little ambiguity is thrown upon *Smith v. Houblon* by reason of Mr. Beavan not having set out the order which was actually made; but Mr. Lawrence has been kind enough to supply us with a copy of that order, and it shews that Lord Romilly's order went much further than Mr. Beavan understood it to go, and did declare that the plaintiff there was entitled to receive from the trustees that which he sought to receive. Those two cases are, to my mind, directly in conflict; and we are at liberty to act upon principle, and to say that notwithstanding *Cunynghame v. Thurlow* the Plaintiff is entitled to an order such as he asks, I should hesitate long before I did that if I thought there was the slightest danger of our present decision shaking any title. But, having considered the matter as best I can, and having consulted with my learned Brethren, I am unable to see how any title can be affected or prejudiced in any way whatever.

It appears to me, therefore, that the right order to make is this: to discharge the order made by Mr. Justice North, who, I am bound to say, had not his attention called to the mode of getting rid of the difficulty by surrendering the life estate; and, of course, until that surrender is made there is a difficulty and the Plaintiff will not be entitled to the money. But if the Plaintiff has no objection—I do not suppose he has—the order may be drawn up in this form: The Plaintiff by his counsel at the Bar undertaking to surrender his life interest in one moiety of the personal estate, subject to the trusts of the settlement of July, 1852, to the end that the said life interest may merge in the interest in remainder vested in the Plaintiff as the legal personal representative of his son declare that the Plaintiff is entitled as legal personal representative of his son to receive from the Defendant, the surviving trustee, the said moiety of the said personal estate subject to the payment thereof of the costs by the order of the 14th of April, 1891, ordered to be retained, and the costs of all parties to this appeal.

The net result, therefore, of our decision I take to be this: that in a case of this kind the trustees cannot safely pay the money to the tenant for life who simply extinguishes his power: He must do something more—he must surrender his life estate as well. I do not think that was done in *Cunynghame v. Thurlow* [1 Russ. & My. 436, n.]. I can find no trace of it. But if the power is extinguished, and the life estate is surrendered, then the tenant for life's two interests do coalesce, and are vested in the same person at the same time in the same right; and trustees may safely act upon this view in future; and this Court will act upon it now.⁸

⁸ See *Atkinson v. Dowling*, 33 S. C. 414, 12 S. E. 93; *Thorington v. Thorington*, 82 Ala. 489, 1 South. 716; *Grosvenor v. Bowen*, 15 R. I. 549, 551, 10 Atl. 589.

WEST v. BERNEY.

(Court of Chancery, 1819. 1 Russ. & M. 431.)

In this case the master had reported that a good title was shown; and exceptions were taken to the report. The question arose on the following instruments:

Sir John Berney, being seised in fee under a settlement made in 1789, conveyed the estate to the use of himself for life; remainder to such one or more of his sons as he should appoint; remainder, in default of appointment, to his first and other sons in tail; remainder to himself in fee.

In 1811, on the occasion of the marriage of his eldest son, Sir John Berney was a party to a deed of settlement, to which the intended wife was also a party, and to a fine and recovery levied and suffered in pursuance thereof, whereby the estate was limited to the use of Sir John Berney for life; remainder to the use of Hanson Berney, his eldest son, for life; remainder to the first and other sons of Hanson Berney in tail, with divers remainders over. And in this deed a power was given to the trustees, authorizing them, at the request of Sir John Berney during his life, and, after his death, at the request of Hanson Berney, to sell the estate; and, after paying the encumbrances to which it was at this time subject, to invest the produce in the purchase of other estates to be settled to the same uses.

Sir John Berney had not previously executed any appointment in favor of his eldest son; and a doubt occurring whether he might not still execute his appointment in favor of any other son, and so defeat the settlement, he, in 1815, executed a deed of appointment in favor of the eldest son in fee, reciting, that it was for the purpose of confirming the marriage settlement of 1811.

Against the title, it was urged by Mr. Preston, that the power of appointment in the deed of 1789 was merely collateral, and, being for the benefit of particular objects, was an interest in them, and in the nature of a trust in Sir John Berney, and, therefore, could neither be released nor extinguished by him; that the power of appointment remained in him, therefore, notwithstanding the settlement of 1811; and that it was not well executed by the deed of 1815, because the eldest son was not capable of receiving an interest in the estate inconsistent with the settlement of 1811. He cited Co. Lit. 237 a, 265 b, Albany's Case, 1 Rep. 111, and Digges's Case, 1 Rep. 175.

Mr. Sugden, who was also against the title, differed altogether in his argument from Mr. Preston. He admitted that the power was extinguished by the settlement of 1811; but insisted upon the form of the pleadings, that a good title could be made only for a certain term of 500 years, under which the plaintiffs claimed. He relied upon Albany's Case and Digges's Case; and cited also Leigh v. Winter, Sir W. Jones, 411; Bird v. Christopher, Stiles, 389; Edwards v. Sleater,

Hardres, 410; King v. Melling, 1 Vent. 225; Tomlinson v. Dighton, 1 P. Wms. 149; Saville v. Blacket, 1 P. Wms. 777; Morse v. Faulkner, 1 Anstr. 11, 3 Swanst. 429, n.

THE VICE-CHANCELLOR [SIR JOHN LEACH]. In Albany's Case it was held, that the reserved power of the grantor may be extinguished by his release. He took in the settlement an estate for life.

In Digges's Case it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and enrolled, was extinguished by his fine levied after a revocation, but before enrolment.

In Leigh v. Winter it was held that the grantor could release his reserved power of revocation. He took by the settlement an estate for life.

In Bird v. Christopher it was held that, if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished.

Edwards v. Sleater was cited for the able reasoning of Lord Hale upon the distinctions of powers; whose opinion seems to be, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, it may be destroyed by release, fine, or feoffment.

In King v. Melling, it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery.

In Tomlinson v. Dighton it seems to be admitted, that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine.

In Saville v. Blacket it was held that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money by joining in a recovery and re-settlement of the estate, because he would otherwise defeat his own grant.

In Morse v. Faulkner, A. sold a copyhold estate to which he had no title. It afterwards descended upon him, and he died. On a bill by the purchaser against his heir, the court was of opinion that the purchaser would have had a personal equity, but doubted whether it could reach his heir.

Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land clear of the charge, would be a release.

I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an

interest in him, which may be released or extinguished. *Bird v. Christopher*. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate.

I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power.

Quære. Could such a power in gross in a tenant for life be released? If he were grantor, it is decided by *Albany's Case* and *Leigh v. Winter* that it could be released; and I think it may equally be released, if he is grantee; because his release must be to him who takes subject to the power; and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land. Sed quære.

Mr. Preston admits all this reasoning as applied to general powers, but disputes it as to powers to appoint to particular objects, as children. Here, he says, the power is not an interest in the appointor but in the appointee, and is, therefore, in the nature of a trust, which the trustee cannot release or extinguish.

It is not a trust, because the alleged *cestui que trust* cannot call for the execution of it. It may be exercised or not; and a dealing with the estate, inconsistent with the exercise of it, determines the option to exercise it. In *King v. Melling*, the power was a particular power.

But this reasoning would apply to a power simply collateral. The difference, however is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasible.

Mr. Preston urged the relief given against frauds upon the power; as in the case of an appointment by a father substantially to himself. This, however, does not prove the existence of a trust. It proves only that a power given for a particular purpose shall not by circuitry be exercised for a different purpose.

It does not, upon the whole, appear to me to be a proper case to decide the general principle, that every power reserved by a grantor may be released or extinguished, although he reserved no other interest in the estate,—or the other principle, that every grantee for life with a power in gross may in like manner release or extinguish; although I was and am of opinion, that such two general principles are established. But I decide the case upon the ground that the settlement of

1811 was substantially and equitably an appointment by Sir J. Berney in favor of his eldest son, and that the limitations in the settlement were to be considered as limitations made by him.⁹

SMITH v. PLUMMER.

(Court of Chancery, 1848. 17 Law J. Ch. [N. S.] 145.)

The bill stated that by a settlement made upon the marriage of William Smith, since deceased, and Caroline, his wife, dated the 22d of September, 1807, certain freehold estates were conveyed and settled to the use of W. Smith and Caroline his wife for their respective lives, and after the decease of the survivor, to the use of all or any of the child or children of the said marriage, as W. Smith and his wife should jointly appoint, and in default of joint appointment then as the survivor should appoint. The husband became the survivor. The power was to be exercised by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in manner therein mentioned, or by his last will and testament in writing; and in default of such appointment, to the use of all the said children equally to be divided between them as tenants in common. That Caroline Smith died in March, 1837, and there were issue of the said marriage five children living, and also several other children, all of whom died in infancy without leaving issue; that W. Smith and Caroline his wife never exercised the joint power of appointment amongst the children; that W. Smith executed a deed-poll bearing date the 5th of February, 1842, which recited that the real estates had been sold and converted into money under the powers in the settlement; that W. Smith had never in any manner exercised the power of selection or distribution of or among the children of his marriage with the said Caroline his wife, given or reserved to him by the indenture of the 22d of September, 1807, as aforesaid, and that he was desirous of absolutely releasing and extinguishing such power; that by the said deed-poll William Smith did absolutely and for ever release and discharge the hereditaments comprised in the said recited indenture of the 22d of September, 1807, and the proceeds of the sale thereof, and the stocks, funds, and securities representing the same, or any part thereof, and all lands and hereditaments, if any, purchased or to be purchased with such proceeds, stock, funds, and securities respectively, or any parts thereof respectively, and all and every person and persons who might become interested therein respectively, from the power, and all right and title to exercise the power of selection or distribution of or among the children of the marriage of William Smith with the said Caroline his late wife, given or reserved to

⁹ Accord: *Smith v. Death*, 5 Mad. 371 (1820); *Bickley v. Guest*, 1 Russ. & M. 440 (1830).

him, William Smith, in and by the said indenture of the 22d of September, 1807, as aforesaid, to the intent that such power and all right and title to exercise the same might thenceforth be absolutely released and extinguished, and be of no effect, in like manner as if such power had never been given or reserved to William Smith.

The bill then stated that William Smith made his will, dated the 22d of May, 1843, and thereby, after referring to the power of appointment given him by the settlement of September, 1807, the testator in execution of the said power gave and bequeathed to his eldest son William Haden Smith the sum of £4000 stock; to his son Joseph Smith £10,000 stock, and to his daughter Elizabeth Caroline £100 stock, which said several sums comprised nearly the whole of the produce of the sales of the estates mentioned in and sold under the said settlement.

The suit was instituted to carry the trusts of the deed of settlement of 1807 into effect, and the bill prayed that in case the court should be of opinion that the deed-poll of the 5th of February, 1842, was inoperative, the same might be declared void and be delivered up to be cancelled, and that the will and testamentary appointment of the 22d of May, 1843, might be established, and that the rights of all parties under the deed of settlement, the deed of appointment and the will, might be ascertained and declared by the court.

THE VICE-CHANCELLOR decided that the release of the power effected by the deed-poll of February, 1842, was valid and effectual, and that the children of the testator were consequently entitled to share the property in equal proportions under the marriage settlement of September, 1807, as in default of appointment.¹⁰

HORNER v. SWAN.

(Court of Chancery, 1823. Turn. & R. 430.)

William Horner being seised of the premises in question, subject to a joint power of appointment by him and his father, which was not exercised, devised to Mansfield and Holloway, and their heirs, all his real and personal estate, to hold the same unto the use of them, their heirs, &c. upon trust "to permit his wife, Elizabeth Horner, to use the same for her use, and for the purpose of maintaining his children until they should attain the age of twenty-one, and during her life in case she should so long continue his widow; and after her decease, then for such or all of his children and their respective lawful issue, and for such estates," &c., as his wife by her last will, or by any writing purporting to be her will, &c., should give, devise, and bequeath the same; and in default of such will, in trust for all and every his

¹⁰ See *Atkinson v. Dowling*, 33 S. C. 414, 12 S. E. 93 (1890).

children living at his decease, or born in due time afterwards, and their heirs, &c. respectively, share and share alike; but if any of them died under twenty-one, without leaving lawful issue, then in trust, as to the share or shares of such child or children, for the survivors or survivor, and their respective heirs, &c., share and share alike. He subsequently directed, that, in case his wife should marry again, the trustees should convey and assign to each of his children successively, upon their respectively attaining the age of twenty-one, so much of the real and personal property as would amount to his or her equal share thereof; and in case any of his children should die after his wife should marry again, and leave lawful issue, he gave to the use of the said issue, their heirs, &c., the same proportion of his real and personal property as their father or mother would have been entitled to, in case he or she had lived to attain twenty-one; but in case any of his children should die, after his wife should marry again, without leaving lawful issue, he directed that the share of such child should go to the survivor.

The testator left a widow and four children, all of whom attained twenty-one. One of them died subsequently, leaving her eldest brother her heir at law. The widow and the three surviving children contracted to sell the devised estate; and the bill was filed by them for the specific performance of the contract.

The purchaser, by his answer, submitted, that the plaintiffs could not make a good title by reason of the widow's power of appointing by will, and of the contingent interests given to the issue of the children.

Mr. Sugden and Mr. Sidebottom, for the plaintiffs.

The question is, whether the wife's power can be released or extinguished. It is not a power simply collateral, but is a power in gross, and is therefore capable of being destroyed by the donee; and the circumstance, that it is to be exercised in favor of a limited class of objects, namely, the children or their issue, does not alter its nature. The point, though once regarded as liable to doubt, must now be considered as settled; for it was expressly decided in *Smith v. Death*, 5 Mad. 371.

Mr. Cooper, contra.

It has hitherto been considered a very doubtful question, whether such a power, as is here given to the widow, can be destroyed. "Lawyers of great eminence," says a text-writer, "have been of opinion, that a power to a tenant for life, to appoint the estate among his children, is a mere right to nominate one or more of a certain number of objects to take the estate; and that, consequently, it is merely a power of selection, and cannot be barred by fine." Sugden on Powers, 73, 5th edition. In *Jesson v. Wright*, 2 Bligh, 15, Lord Redesdale says, "How can a man, having a power for the benefit of children, destroy it?" *Tomlinson v. Dighton*, 1 P. Wms. 149, leans toward the

same conclusion. The solitary decision in Smith v. Death cannot be considered as determining the point so conclusively, that the court will compel a purchaser to accept a title like this.

THE MASTER OF THE ROLLS [SIR THOMAS PLUMER]. The Vice-Chancellor has given a solemn opinion upon the point; and his decision has been acquiesced in. I shall therefore follow it.

As to the second point raised by the answer, it was admitted, that, upon the true construction of the will, none of the limitations over could take effect, when all the children had attained twenty-one.

Decree for specific performance.¹¹

¹¹Accord: Barton v. Briscoe, Jac. 603; Davies v. Huguenin, 1 Hem. & Mil. 730; Columbia Trust Co. v. Christopher, 133 Ky. 335, 343, 117 S. W. 943; Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. 589 (semble); Thorington v. Thorington, 82 Ala. 489, 1 South. 716 (semble). In Thomson's Executors v. Norris, 20 N. J. Eq. 489, the release by the donee for his own special advantage was set aside as a fraud upon the power.

CHAPTER II

CONTRACTS TO APPOINT AND APPOINTMENTS IN
FRAUD OF THE POWER

LEAKE, DIGEST OF LAND LAW (2d Ed.) pp. 311–313: “* * * If an appointment, though correct in point of form and operative at law, be made for any indirect or ulterior purpose not warranted by the power, it will be set aside in equity as a fraud on the power. (Portland [Duke] v. Topham, 11 H. L. C. 32; 34 L. J. C. 113; Topham v. Portland [Duke], L. R. 5 Ch. 40; 39 L. J. C. 259; Sugden, Powers, 606; notes to Aley v. Belchier, 1 Eden, 132; 2 Wh. & T. L. C. Eq. 308.) * * * Where a father, having a power of appointment amongst children, appointed to one who was a lunatic and likely to die, for the purpose of himself succeeding to the appointed share as his representative, the appointment was held to be fraudulent against the other objects of the power and void. (Wellesley v. Mornington [Earl], 2 K. & J. 143.)”

“If a parent, having a power of appointment amongst his children, execute it in consideration of some immediate benefit to be derived to himself from the appointment, as upon an agreement with the appointee for a payment or advance of money, the appointment is void as being in fraud of the power in regard to the other children; and as the appointee is a participator in the fraud and benefits by it, such appointment will be set aside in toto, and not merely to the extent of the sum (if any) diverted from the objects of the power. (Daubeny v. Cockburn, 1 Mer. 626; Farmer v. Martin, 2 Sim. 502; Arnold v. Hardwick, 7 Sim. 343; Re Perkins, [1893] 1 Ch. 283; 62 L. J. Ch. 531; Jackson v. Jackson, Drury, 91. See Palmer v. Wheeler, 2 Ball & B. 18; Hall v. Montague, 8 L. J. O. S. C. 167.)

“Where the consideration for the preference of one of the children is given by another person, and not derived out of the property appointed, and though without the knowledge of the appointee, the appointment will be set aside; for it is a fraud upon the power in regard to the other objects who are thereby excluded from the property appointed. (Rowley v. Rowley, 1 Kay, 242; 23 L. J. C. 275.)”

“An appointment made upon any bargain or understanding that the appointee shall dispose of the property to persons who are not objects of the power is void and will be set aside. (Sugden, Powers, 615; Salmon v. Gibbs, 3 De G. & Sm. 343; 18 L. J. C. 177; Birley v. Birley, 25 Beav. 308; 27 L. J. C. 569; Pryor v. Pryor, 2 De G. J. & S. 33; 33 L. J. C. 441; Re Kirwan’s Trusts, 25 Ch. D. 373; 52 L. J. C. 952.) An appointment made for the purpose and in the expectation

that the appointee would transfer the property to a person, not an object of the power, was held void, though that purpose was not at the time communicated to the appointee. (Re Marsden's Trust, 4 Drew. 594; 28 L. J. C. 906.)"

PALMER v. LOCKE.

(Chancery Division, Court of Appeal, 1880. 15 Ch. Div. 294.)

Judah Guedalla, by his will, dated the 21st of December, 1839, gave his residuary personal estate to three trustees upon trust to sell and convert the same and to hold the proceeds, as to one third part thereof, upon the trusts therein declared during the life of his son Moses Guedalla, and after his death upon trust for his wife during her life, and after the death of the survivor in trust for such of the children of his said son Moses by his present or any future wife, or the issue born in his lifetime of such children, with such provisions for their maintenance, and at such ages and lawful times, and upon such conditions as his said son Moses by his last will or any codicil thereto should direct or appoint; and in default of such direction or appointment, and so far as the same, if incomplete, should not extend, in trust for all the children of his said son Moses who should attain the age of twenty-one years or marry under that age.

Judah Guedalla died in 1858.

Moses Guedalla had six children, one of whom was Joseph Guedalla.

Moses Guedalla made his will, dated the 4th of January, 1873, and thereby, after reciting the power of appointment given to him by his father's will, in exercise of the said power directed that the trustees or trustee for the time being of his father's will should out of the said third part of the residuary estate pay to his son Joseph Guedalla £5000, and appointed the remainder of the third part to his other children in different proportions.

On the 19th of February, 1873, Moses Guedalla executed a bond for £5000 to his son Joseph Guedalla, in which he recited the power of appointment contained in Judah Guedalla's will, and that he intended to appoint or give, or had appointed or given, by will or codicil pursuant to the recited will or otherwise, the sum of £5000 at the least to his said son Joseph Guedalla, either out of the property subject to the recited will or the property of the said Moses Guedalla, and by way of making the said Joseph Guedalla entitled in any event to that sum on the death of the said Moses Guedalla, either in possession or in reversion on the death of his present wife, the said Moses Guedalla, by way of advancement for his son and to forward his prospects in life, had determined and agreed to execute the above written bond. The condition of the bond was that it should be void if Moses Guedalla should by his last will or any codicil thereto appoint or give the sum of £5000 at the least to Joseph Guedalla absolutely, either under the

recited will of the said Judah Guedalla or out of the property of the said Moses Guedalla, subject only to the life interest of his present wife; and if such sum, or any part thereof, should be given out of the property of the said Moses Guedalla, then if such property should be sufficient to make good the same; or if the said Joseph Guedalla should on the decease of Moses Guedalla become entitled in default of appointment or otherwise to such sum under the said recited will.

On the 23d of April, 1873, Joseph Guedalla mortgaged his interest under Judah Guedalla's will to George Gilliam for £600, with a power of sale in case of default of payment.

Moses Guedalla died on the 24th of September, 1875. His widow was still living.

By subsequent assignments the reversionary interest of Joseph Guedalla became vested in the plaintiffs, and they put it up for sale by auction on the 1st of May, 1879, when it was purchased by the defendants for £2000. Difficulties having arisen respecting the title to the property sold, the plaintiffs brought the present action, claiming specific performance of the contract for sale.

The court directed a reference as to the title, and the conveyancing counsel of the court to which it had been referred reported that a good title could not be made, on the ground that the appointment made by the will of Moses Guedalla was in discharge of his own personal liability under his bond, and was void on the authority of Sugden on Powers, 8th ed. p. 615; Reid v. Reid, 25 Beav. 469; Duke of Portland v. Topham, 11 H. L. C. 54.

The Chief Clerk having certified in accordance with this opinion, the plaintiffs took out a summons to vary the certificate, which was adjourned into court.

The summons came on to be heard on the 19th of April, 1880.

JESSEL, M. R. I decide this case simply on authority; and the most singular part of it is that I concur so much in the reasoning of the decision in *Coffin v. Cooper*, 2 Dr. & Sm. 365, which I am bound to follow, that it makes it, if I may say so, more obligatory on me to follow that authority, because that case, which was decided in the year 1865 by Vice-Chancellor Kindersley, lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was; and he actually decided that a covenant by a lady to make an appointment in favor of her son for the very purpose of enabling him to borrow money, although the appointment was to be testamentary, was a valid covenant which would render her estate liable in damages, and that if she made the appointment in pursuance of the covenant, so as to exonerate her estate from that liability to damages, the appointment was a valid appointment.

Now there is no possible distinction worth considering between the present case and the case of *Coffin v. Cooper*. Of course, it makes no real difference whether the case is one of a bond or a covenant. You can recover under the bond only the actual damages sustained; though if the amount of damages exceeds the amount of the penalty, you can recover no more than the penalty.

Then it is suggested that the bond here was only defeasible in case the obligor paid the amount out of his own property; but so it would have been if he had not said so. If it was only defeasible as it was in *Coffin v. Cooper* you could only have got the amount of damages sustained, and if the estate of the covenantor or obligor had paid damages the covenant or bond would have been got rid of. So that the provision or condition that if the money is paid the covenant or bond shall be void makes no difference, because in no case can you recover under the covenant or bond more than the amount of the damages sustained. The present case is, to my mind, utterly undistinguishable from that of *Coffin v. Cooper*. It makes no difference whether or not it is expressed in terms that the payment out of the obligor's own estate shall or shall not satisfy the bond.

That being so, and finding the exact point decided by Vice-Chancellor Kindersley, as I said before, so long ago as 1865, and that case not having been disturbed since in any way, and finding that the decision was based upon the then state of the authorities,—which it is unnecessary for me to examine again,—I think it is impossible for a court of first instance to say that that decision was erroneous. But I must also mention that the matter came before the Court of Appeal in 1870 in *Bulsteel v. Plummer*, Law Rep. 6 Ch. 160, where Lord Hatherley, who was then Lord Chancellor, states most distinctly his concurrence in the decision of Vice-Chancellor Kindersley; and I concur in his opinion. In fact, Lord Hatherley says this (Law Rep. 6 Ch. 163): “To hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far.” If the decision of the Vice-Chancellor needed confirmation or approval, we have it in this dictum of the Lord Chancellor in *Bulsteel v. Plummer*.

Therefore I must decide in favor of the plaintiffs, and hold that the appointment was valid.

From this decision the defendants appealed. The appeal came on to be heard on the 26th of July.

JAMES, L. J. I am of opinion that the decision of the Master of the Rolls must be affirmed. He found himself bound by the decision of Vice-Chancellor Kindersley in *Coffin v. Cooper*, 2 Dr. & Sm. 365, and Vice-Chancellor Kindersley was rightly bound by what he considered to be, and what I consider to be, the common course of decision, which really prevented this point from being successfully raised. It had been decided in various cases that such a power as this could be released, because, although in some sense it is fiduciary, it is fiduciary only to this extent, that the donee of the power cannot use it for any corrupt

purpose, cannot use it for any purpose of benefiting himself or oppressing anybody else. This was so decided in the case of the Duke of Portland v. Topham; and it is sufficient to say that I agree with what Lord Chancellor Hatherley said, that to hold that such an appointment as this is void because there has been a deed of covenant executed previously, would be to strain the doctrine of improper appointment beyond anything which the cases require. In my opinion, it would be to strain it most improperly, and in effect to shake a great number of appointments which I have not the slightest doubt have been considered sound both before and since the decision of Vice-Chancellor Kindersley.

With regard to the other point, it seems to me that you cannot act upon suspicion. It is said the will made in January was void by reason of a bond made six weeks afterwards, and it is supposed there was some corrupt bargain between father and son, of which there is not the slightest trace, and which you may as well suppose in every case where there is a testamentary appointment made. It may be said, "How do you know he was not bribed? How do you know that there was not some corrupt object?" In the absence of some ground for supposing it, we must assume everything was done rightly, otherwise the result would be that every disposition made under a power, whether testamentary or otherwise, given to a father for his children would be laid under suspicion when the father is dead, for it would be almost impossible to prove that there was not some bargain between them. I am of opinion the decision ought to be affirmed, and the appeal must be dismissed with costs.

BRETT, L. J. I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of Coffin v. Cooper, 2 Dr. & Sm. 365, which was decided so long ago, and which has probably been acted upon; but I confess that it seems to me that, according to principle, the case of Coffin v. Cooper was right. To my mind it does not make any difference whether the covenant in this case was entered into before or after the will was executed. If I thought that the covenant was binding upon the person who entered into it, I should have felt some difficulty, because then it might be said, and truly said, as it seems to me, that the exercise of the appointment would be an exercise made to the advantage of the person making it, that is to say, that the effect of it would be to relieve his estate from an obligation into which he had entered. But I must confess that I agree entirely with the view which was taken by Lord Justice James in Thacker v. Key, Law Rep. 8 Eq. 408, that such a covenant as is here in question, and as was in question in Coffin v. Cooper is a wholly void covenant, and that no remedy could be had upon that covenant against the covenantor. If a consideration was given for the covenant, then it is admitted by everybody that it would be absolutely fraudulent, and, if fraudulent, it would be of course void, because both parties are parties to the fraud. It seems to me that al-

though there is no consideration given for the covenant it is not a binding covenant, because it would be contrary to public policy to allow a person in the position of a trustee to enter into such a covenant so as to bind himself. And if the covenant is a void covenant, then what is the fetter which is put upon the exercise of the power of appointment which has been delegated to the donee of the power? Under those circumstances there is no fetter at all, unless it be said that a bare promise which cannot be enforced, a moral obligation, as it is called, to keep a bare promise, is such a fetter. Now the law, at all events, does not recognise that there is any fetter in a bare promise, and I can see none really; and if you take it to be a bare promise and not an effective covenant, then I should absolutely agree with what Lord Justice James has before said, and which was adopted by Lord Hatherley, namely, that it would be far too great a strain to say that a mere bare promise is to be considered a fetter upon the power of appointment, because there is a kind of moral obligation to keep the promise. I confess myself I do not think there is any such moral obligation as is asserted; I think the morality of the thing is in favor of the breach of such a promise rather than in favor of keeping it. Therefore, for these reasons, both upon principle and authority, it seems to me that there is no objection to the exercise of the appointment because of the existence of the void covenant. It was suggested that by so holding we should destroy the effect of these powers of appointment. It seems to me absolutely the contrary. We give them the greatest possible effect, because we say that no such covenant as this can prevent the exercise of the power of appointment, that is to say, that the person who has entered into such a covenant may, without any risk, exercise his discretion up to the last day of his life. If such a covenant as this were held to be a release, then the former decisions with regard to release might be a considerable difficulty in the way, but it seems to me that it cannot possibly be said that such a covenant as this is a release. As to the case of *Davies v. Huguenin*, 1 H. & M. 730, which is referred to in the judgment of Vice-Chancellor Kindersley, I confess that as stated by him I have some difficulty in saying that I could entirely agree with what was held in *Davies v. Huguenin*; but it seems to me that even if *Davies v. Huguenin* were held to be wrong that would have no effect upon the decision in this case.

With regard to the second point in this case, taken at a late moment, I think there can be no doubt the suggestion, if true, would show that the covenant was a fraudulent agreement between both parties to it, and fraud is never presumed by the court; those who suggest it have to prove it.

COTTON, L. J. I am of opinion that the decision of the Master of the Rolls is correct; and from the judgment of the Master of the Rolls which has been read to us, I think that our decision is also in accordance with the views of the Master of the Rolls; but whether that is so or not, I think that, both on authority and principle, the judgment that

was given was right. It was said that this was a fiduciary power, and that therefore the donee of the power was in the position of a trustee, and must be so down to the time of his death, absolutely unfettered. Now I asked Mr. Davcy, during the course of his argument, how he could develop and define a fiduciary power, and I leave out entirely that kind of fiduciary power, if it is so called, where from the form of the power given there is an implied gift in default of an express gift. But a fiduciary power in this case one must consider as a power which is sometimes said to be given to the person as a trustee. Now I think a great deal of inaccurate argument arises from expressions undeveloped and not explained which may bear two senses. How can you say that a man is properly a trustee of a power? As I understand it, it means this, in the words of Lord St. Leonards, that it must be fairly and honestly executed. A donee of such a power cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. That is, it is something given to him from which he is to derive no beneficial interest. In that sense he is a trustee, and he is liable to all the obligations of a trustee in this sense, that he must not attempt to gain any indirect object by the execution of the power in a way which in form is good, but which is a mere mask for something that is bad. Now it is not here suggested, or barely suggested, that the appointment was a mask to do something which could not be done. It was an absolute gift to his son in effect, with a covenant or bond that he would not revoke the appointment in favor of the son, but there was no possible suggestion, with one exception, that the intention was in any way to benefit himself. It was done for his son; taking the whole transaction, it was what he thought would be best for the interests of the son, and it is clearly the duty of a father, who has such a power, to do what on the whole he considers to be the best for the family amongst whom the property is under the power to be distributed.

There are two matters, no doubt, which I must deal with. It was said that the execution of the power by the will was to relieve the father from the obligation which he contracted under the bond. I do not go so far as to give an opinion that the bond is absolutely bad. The question may hereafter arise, but I give no opinion upon that point at present. In one sense it is clearly bad, namely, that it cannot be construed as an exercise of a power of appointment, nor is it one that a Court of Equity would specifically perform; but I do not give any opinion that it is one under which no relief could be sought by way of damages from the father's estate. But in reality the will was not executed in order to relieve the father from the obligation. The obligation began after the will was executed, and the whole was one transaction, and if anything, it was a contract not to revoke the will which he had made. But it is not every possible benefit to the donee of a power from the exercise of it which will make the execution of the

power bad. Mr. Davey went so far as to say—I think his argument necessitated it—that a moral obligation on the part of a donee of a power would be sufficient to vitiate the exercise of a power, and I put to him such a point as this, than which I can conceive no stronger moral obligation. A man has no property of his own, but has a daughter who is going to marry. He says: “I cannot make you any present allowance, or give you any present fortune, but I will see that you are provided for by my will.” He has nothing but a power of appointment by will. Can it be said, without straining to an excess, which makes it almost absurd, the doctrine of this court, that a will executed under those circumstances in favor of that daughter or her husband would not be a good execution of a power? To say so would be to defeat the very object of the power. No doubt it is in the power of the father at the time of his death to make or not to make the will, and to distribute in such proportions as he thinks fit, but there is a moral obligation of the strongest kind to make a provision for the daughter in consequence of the circumstances under which the marriage takes place. Then suppose this further case. Suppose a father is surety for his son; if the son has got no money, the father will be called upon to pay: but can it be said that an appointment to the son under those circumstances is bad? The result indirectly will be that, instead of the father’s own estate paying that debt, the son will pay out of money which he gets from the appointment, and, as has been said already by Lord Justice James, and as was said by Lord Hatherley, one really must not strain too far the doctrine of this court in order to avoid execution of powers which are done honestly and for the benefit of the objects of the power according to the best judgment of the donee, without any indirect motive to secure a benefit to himself. Of course if there is anything of that sort—anything corrupt—no appointment can possibly stand. So, if there is any attempt to do what cannot be done by means of the power, that is bad. In the present case, by the mere exercise of the power no indefeasible interest could have been given to the son at the time, and it may be said that this therefore is attempting to do indirectly what cannot be done directly. But there is the absolute appointment to the son as far as it can be made absolute, leaving him to deal with it as he thinks fit for his benefit, and it is not that the father deals with it by way of raising money, or deals with it under any contract or engagement that he makes, but as far as he can, leaving it by will to the son, he puts the son in the position of doing what the son thinks most for his interest and what the father does not think for his disadvantage. It is to the appointee, and to him only, that the father looks, so as to enable him, as far as he can, having regard to the nature of the power, to do what is most for his benefit.

I have dealt with the case without reference to the authorities, but when we look at the authorities, it is clear that it is settled that such a covenant as this does not vitiate an appointment made in accordance

with it. We have the decision of *Coffin v. Cooper*, 2 Dr. & Sm. 365, before the Vice-Chancellor Kindersley, carefully considered, where, throwing aside what would be pushing the doctrine to an extreme, he gave effect to the appointment, and held it not to be bad. We have also the same point decided in the Court of Appeal in the case of *Bul-teel v. Plummer*, Law Rep. 6 Ch. 160.¹

I must add one word more to explain why I hesitate to say that such a bond as this is entirely void. It has been held that under certain circumstances such a bond, or one very like it, can be held to be a release of the power. If it is bad, it must be bad in toto, and I am not satisfied that it can be good as a release of a power and yet bad altogether as a covenant. But at the present time I give no opinion whether this covenant is in law bad, and whether, under those circumstances, it could be enforced against the assets, if there were any, of the donee.

In re BRADSHAW.

BRADSHAW v. BRADSHAW.

(Chancery Division, 1902. L. R. 1 Ch. 436.)

Adjourned Summons.

William Bradshaw by his will, dated January 22, 1853, devised and bequeathed a portion of his residuary real and personal estate to a trustee upon trust to pay the yearly rents and profits thereof to his son Arthur Bradshaw during his life, and after his decease in trust for all and every or such one or more exclusively of the other or others of the children or other issue of his said son Arthur Bradshaw (such other issue to be born within the limits allowed by law), for such estate or estates, and if more than one in such proportions and with such limitations over for the benefit of the said children or other issue or some or one of them, and with such restrictions and in all respects in such manner as his said son Arthur Bradshaw should by his will or any testamentary writing appoint, and in default of such appointment in trust for all and every the children and child of his said son Arthur Bradshaw, who being a male or males should attain

¹ In *Bul-teel v. Plummer*, L. R. 6 Ch. 160, a testatrix, having power to appoint by will a certain fund amongst all and every of her children and their children, covenanted to appoint a certain sum to one child. She then by her will appointed that sum. Lord Hatherley, L. C., in considering whether this appointment was void, said: "But I think it would be a very forced application of the doctrine as to appointments if this were held bad. It is true that there is something like an improper exercise of the power, as, of course, she tries to exonerate her own estate. A question further arises, whether this was a good covenant on which damages could be recovered, as to which I desire to say nothing; but I think that to hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far. The testatrix did not wish to get any benefit for herself, and I think that she was not prevented from appointing the £2500."

the age of twenty-one years, and who being a female or females should attain that age or marry, equally to be divided between such children, if more than one, as tenants in common, their respective heirs, executors, administrators, and assigns respectively, and if there should be but one such child, then the whole for that one, his or her heirs, executors, administrators, and assigns respectively.

William Bradshaw died on July 12, 1855, and his will was proved on September 26, 1855.

Arthur Bradshaw was twice married. By his first marriage he had two children, Arthur Evelyn Bradshaw and Margaret Beatrice Good. By his second marriage had two children Moey Violet Frances Bradshaw and William Pat Arthur Bradshaw, who were both infants.

Previously to the second marriage two deeds of covenant were executed by Arthur Bradshaw. By the first of these deeds, dated February 7, 1893, and made between himself of the first part, Arthur Evelyn Bradshaw of the second part, Margaret Beatrice Good of the third part, and William Graham Bradshaw of the fourth part, he in effect covenanted to appoint to his son and daughter not less than one-third part of the property subject to the power of appointment given to him by the will of William Bradshaw. In the result no question arose as to the effect of this covenant.

By the second of these deeds, dated February 8, 1893, and made between Arthur Bradshaw of the first part, Maud Annette Letitia Elizabeth, his then intended wife, of the second part, and Francis Cooper Dumville Smythe, Dudley Ferrars Loftus, and William Graham Bradshaw of the third part (being the settlement made on Arthur Bradshaw's second marriage), Arthur Bradshaw covenanted with the parties of the third part that if the said intended marriage should take place, he would, in exercise of the power reserved to him by the will of William Bradshaw, by will appoint and direct that if any issue of the said marriage should survive him, Arthur Bradshaw, a part or share of the several trust real and personal estate by the will of William Bradshaw directed to be held in trust for Arthur Bradshaw and his children, not being of less value at the time of the decease of Arthur Bradshaw than £6000, should from his death be held by the trustees or trustee for the time being of the will of William Bradshaw upon trust for the child or children or issue of the said marriage (such issue to be born within twenty-one years from the death of Arthur Bradshaw) in such shares and proportions as Arthur Bradshaw should appoint; and Arthur Bradshaw further covenanted with the parties of the third part that, in case there should be issue of the marriage living at his death, he would not exercise the power of testamentary appointment given to him by the will of William Bradshaw over the trust premises thereby settled in favour of his children or issue by any other marriage, so as by any means to reduce the part or share of the same trust premises which he had thereby

covenanted to appoint in favour of the child or children of the then intended marriage to a less amount than the sum of £6000., or to postpone the vesting of that part or share beyond the period of the death of him, Arthur Bradshaw.

Arthur Bradshaw by his will dated April 9, 1896, made before the birth of his youngest child, in execution of the power of appointment conferred by the will of William Bradshaw, appointed certain freeholds to Margaret Beatrice Good for her life, and after her death to her children "then living"; but if no child should attain a vested interest, then in the same manner as the remainder of the property thereby appointed. The testator then directed and appointed that the remaining property subject to the power of appointment and all other his real and personal estate should be held in trust as to three equal fifth parts for the benefit of his son Arthur Evelyn Bradshaw as thereafter declared, and as to the remaining two equal fifth parts for the benefit of his daughter Moey Violet Frances Bradshaw. As to the three-fifths, the testator declared that it should be held upon trust for A. E. Bradshaw for life, and after his death upon certain trusts in favour of his children or issue "then living," and in the event of his son leaving no child who should live to attain a vested interest, then upon the trusts declared concerning the two-fifths. As to the two-fifths the testator directed that the same should be held upon certain trusts for the benefit of his daughter M. V. F. Bradshaw during her life, and after her death upon certain trusts in favour of her children "then living," and in the event of his said daughter leaving no child who should attain a vested interest, then upon the trusts declared concerning the three-fifths. The testator appointed his son A. E. Bradshaw and another executors of his will.

The testator Arthur Bradshaw died on March 22, 1900, and his will was proved by A. E. Bradshaw alone on June 23, 1900.

It was not disputed that the appointments made by the will of Arthur Bradshaw subsequent to the life interests of Mrs. Good, A. E. Bradshaw, and M. V. F. Bradshaw were respectively void for remoteness. The gifts in favour of A. E. Bradshaw and M. V. F. Bradshaw and their children or issue extended to and comprised property of the testator Arthur Bradshaw in addition to the property settled by the will of William Bradshaw; and accordingly the question arose whether A. E. Bradshaw and M. V. F. Bradshaw were bound to elect between the interests they took in Arthur Bradshaw's property and their interest in default of appointment under the will of William Bradshaw.

Arthur Evelyn Bradshaw had four children, all of whom were infants. Mrs. Good had one child, who was an infant.

This summons was taken out by Arthur Evelyn Bradshaw, as plaintiff against the trustees of the indentures of February 7 and 8, 1893, Maud A. L. E. Bradshaw, Margaret B. Good, Moey Violet F. Brad-

shaw, William Pat Arthur Bradshaw, the four infant children of the plaintiff, and the infant child of Mrs. Good as defendants, for the determination of numerous questions arising in the administration of the estate of Arthur Bradshaw, and in particular (a) whether any case of election was raised by the will of Arthur Bradshaw, and (b) for the direction of the Court as to whether any and what provision ought to be made out of the estate of Arthur Bradshaw for the purpose of satisfying the covenants contained in the indenture of February 8, 1893, in case the Court should be of opinion that such covenants remained unsatisfied.

The question of election was first argued. [The opinion on the question of election is omitted.]

KEKEWICH, J. A general power of appointment is broadly distinguishable from property, but in its practical results, and in what I may call its market value, it is really equivalent to property. The donee may deal with it as he pleases. He may not only release it, but may sell it, or bind himself to exercise it in any way he pleases. This is equally true whether the power is to be exercised by deed, by deed or will, or by will only. In the last case, of course, there is more practical risk, because a man cannot make a will which will operate previously to his death. But no legal difficulty arises, and cases frequently occur where a man has a general power of appointment and deals with it, either by covenant or otherwise, as property—that is to say, he treats the subject of the power as property over which he has control. But when the power is a special one you have a different subject altogether. What is a special power? The most familiar instance (for there are many others) is a power of appointment amongst children. Such a power as commonly given to parents is intended not to make a provision for the children, for that is done by the gift in default of appointment, but to confide to the parents the determination in what shares and proportions the children shall take—whether, for example, if women, they shall take for their separate use with or without restraint on anticipation, or, if men, shall take life interests determinable on bankruptcy. It is a discretion vested in the parent for determining what the particular provision shall be. That, as it seems to me, is nearly akin to a trust, and might well be described as a trust, but at all events it is a fiduciary power. Is it right that a man having that fiduciary power should bind himself to deal with it in any particular manner? If it were by deed or by deed or will, the case might be more difficult; but where it is a power to appoint by will, it seems to me to be clear that the intention of the person creating such a power, whether by settlement or by will, is that the donee of the power shall keep the exercise of it under his control until the time of his death. A will being revocable may be altered from time to time, and it is common knowledge that the exercise of powers is continually altered with reference

to the different events of family life. It seems to me that to say that a person having a power to appoint by will may bind himself to exercise it in a particular way is to defeat the object of the creation of the power, and to put the donee in a position to do the very thing which the settlement must be taken to say he shall not do. There is no real authority upon the point, and therefore I have stated what I conceive to be the principle. But there are certain guides. The first case bearing on it is the case of *Bulteel v. Plummer*, L. R. 6 Ch. 160, where there had been a covenant to exercise a special power which was aptly described as a power of distribution, and it was held that, notwithstanding that the appointment was made in pursuance of a covenant to appoint, the power might be well exercised. Lord Hathery, Id. 163, said this: "A question further arises, whether this was a good covenant on which damages could be recovered, as to which I desire to say nothing; but I think that to hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far." All we have, therefore, is that the point occurred to a learned judge of great eminence and experience, and that he held that it was not necessary for him to dispose of it. James, L. J., was a party to the judgment, but I do not see that he noticed this point. But it had come before him in *Thacker v. Key*, L. R. 8 Eq. 408, and there he expressed a distinct opinion. He says (Id. 414): "Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void. The testator is the donee of a testamentary power, which was to be exercised by him as a trustee. It was a fiduciary power in him to be exercised by his will, and by his will only; so that, up to the last moment of his life, he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children." James, V. C., there stated in cogent language what I have attempted to say. The only other case is *Palmer v. Locke*, 15 Ch. D. 294, before the Court of Appeal, and there Brett, L. J., made a more direct statement of his opinion, though again it was not necessary to decide the point judicially. He says, 15 Ch. D. 301: "It seems to me that although there is no consideration given for the covenant it is not a binding covenant, because it would be contrary to public policy to allow a person in the position of a trustee to enter into such a covenant so as to bind himself." That is in support of the view that the covenant is wholly void, and that no remedy is available for the breach of it. Cotton, L. J., did not concur, but he did not differ; he merely reserved his opinion. It is to be remarked that James, L. J., was a party to the decision, and that he said nothing upon that view of the case. The explanation may be that he had already had the point before him and that delivering the first judgment he did not notice a point which did not directly arise.

It seems to me that I have a substantial amount of opinion or inclination of opinion in favour of the view I take, and that the safe and right thing is to say that a covenant of this kind is bad and cannot be sued on.

Mr. Lawrence makes two remarks which ought to be noticed. First, he says that this is a family arrangement. The Court has gone far in upholding family arrangements, and the doctrine goes so far back that I think it would be difficult to find when it was first introduced. But Mr. Lawrence has not cited any decision in which the doctrine has been applied to a case such as the present one. Then again, he called my attention to the case of *Coffin v. Cooper*, 2 Dr. & Sm. 365. It is quite true that it is possible to get rid of a good deal of the doctrine of fiduciary power. It has been held, and usefully held, that a power of this kind can be released. A man can say in a proper, solemn manner, "I will not exercise the power at all," with the result that he does then and there confer upon every one of his children an equal portion of the settled property. He does in effect covenant that the power shall not be exercised. But the answer is that the release of a power depends on a foundation of its own. There was a time when it was a question how far a power of this kind can be released. The question has now been decided, and the decision is found convenient, but I do not think it ought to be carried further. It would be carrying it a long way to say that because a man may release a power, therefore he may covenant to exercise it in a particular way. * * * [The balance of the opinion relating to the subject of costs is omitted.]

In re PARKIN.

HILL, v. SCHWARZ.

(Chancery Division, 1892. L. R. 3 Ch. 510.)

Adjourned Summons.

Hugh Parkin, by his will dated the 13th of December, 1860, bequeathed all the 2½ per cent. stock which at the time of his death he should hold or be possessed of to trustees upon trust for his daughter Mary Creighton (afterwards Mrs. Tetens), during her life without power of anticipation, and after her death, as to the sum of £5000 part thereof, upon trust for such persons or purposes as Mrs. Tetens should, notwithstanding her then present or any future coverture, by will appoint, and in default of, and subject to, any such appointment, upon trust for the benefit of two others of his daughters and their issue as therein mentioned.

The testator died on the 16th of March, 1871, possessed of £7000 2½ per cent. stock.

By an indenture dated the 20th of December, 1867, being the settlement made on the marriage of Mary Creighton with the Defendant,

Emil Tetens, after a recital that by an indenture of settlement made in 1848 Mrs. Tetens then stood possessed of certain powers of appointment over divers sums of money, stocks, funds, and securities, and the annual produce thereof respectively, subject to a life interest therein of her father, Hugh Parkin, it was witnessed that Mrs. Tetens, by virtue and in execution of the power for that purpose given by the recited indenture of settlement and of all other powers and authorities enabling her in that behalf, appointed certain funds to the trustees of the settlement of 1867, upon trusts (after the intended marriage) for Mrs. Tetens during her life, for her separate use without power of anticipation, and after her death out of the income to pay an annuity of £100 to Jules Creighton, her son by her first marriage, and subject thereto to pay the income to Mr. Tetens during his life, determinable as therein mentioned, and subject thereto upon trust for the child or children of Mrs. Tetens (including her said son by her first marriage) who should be living at the death of the survivor of Mr. and Mrs. Tetens, and for the issue then living of any and every of Mrs. Tetens' then deceased child or children (including her said son by her first marriage) who, being males, should attain twenty-one, or, being females, should attain that age or marry, to take, if more than one, in equal shares as tenants in common per stirpes; and in the case of the decease of Mrs. Tetens without leaving any such child or issue, who should live to attain a vested interest in the premises, then upon trusts for a sister of Mrs. Tetens and her issue.

The settlement contained the following covenants, upon which the question in this case arose:

The said Emil Tetens and Mary Creighton severally covenanted that all the estate, property, and effects whatsoever which the said Mary Creighton, or the said E. Tetens in her right, should at any time during the coverture become possessed of or entitled to at law or in equity in any manner whatsoever should be settled; and also that any other powers or power of appointment over any estate, property, and effects whatsoever of which she might then or at any time thereafter during such coverture be the donee under any settlement, will, or other instrument whatsoever, should, if executed by her, be executed only in favour of the trustees or trustee for the time being, of the settlement, in order that all such estate, property, and effects should be effectually vested in and be held by them or him upon the trusts declared by the settlement.

There was no issue of the marriage between Mr. and Mrs. Tetens.

Mrs. Tetens, by her will dated the 29th of March, 1889, appointed her husband and Mr. Frank Milner Russell her executors, and, after bequeathing £100 to Mr. Russell and reciting the power conferred on her by the will of her father of appointing by will £5000 2½ per cent. stock, she directed and appointed that from and after her death the trustees of her father's will should stand possessed of the said sum of £5000 upon the trusts following, viz., as to the clear sum of

£1000, part thereof in trust for her nephew Hugh Campbell Rowley, to whom she bequeathed the same accordingly free of legacy duty; and as to the residue thereof (subject to the payment thereof of her just debts, funeral and testamentary expenses, and the legacy bequeathed to H. C. Rowley and the legacy duty thereon) in trust for her husband absolutely.

She made a codicil dated the 5th of December, 1889, by which she revoked the appointment and bequest in her said will contained of £1000 to Hugh Campbell Rowley, and directed and appointed that from and after her death the trustees of her father's will should out of the sum of £5000 2½ per cent. stock referred to in her will, raise and pay certain legacies amounting to £700 and, subject to the aforesaid legacies, should stand possessed of the residue of the said stock upon the trusts by her said will declared with reference to the residue of the same after payment to the said H. C. Rowley of the legacy thereby revoked.

Mrs. Tetens died on the 19th of January, 1892, leaving Mr. Tetens and her son by her first marriage her surviving. Her will and codicil were proved on the 8th of March, 1892, by both executors.

Questions having arisen as to the effect of the covenants on the part of Mr. and Mrs. Tetens contained in the settlement of the 20th of September, 1867, and the testamentary dispositions made by Mrs. Tetens, an originating summons was taken out by the trustees of Hugh Parkin's will for the purpose of obtaining the decision of the Court upon them. This summons was intituled in the matter of the estate of Hugh Parkin, in the matter of the trusts of the settlement of the 20th of December, 1867, and in the matter of the trusts of the will of Mrs. Tetens. The questions for the determination of the Court were (*inter alia*)—

(1) Whether the £5000 2½ per cent. stock ought to be paid to the trustees of the settlement or to the executors of Mrs. Tetens' will; (2) Whether under the terms of the settlement Mrs. Tetens was under any and what liability to exercise the power of appointment conferred upon her by the will of the testator in favour of the trustees of the settlement; (3) Whether by reason of the exercise of the power of Mrs. Tetens, as in her will and codicil mentioned, her estate had become liable to the trustees of the settlement, and to what extent; (4) What interest the Defendant Emil Tetens was entitled to under the appointment contained in the will and codicil of Mrs. Tetens; (5) Whether the Defendant Emil Tetens was liable in respect of such interest or otherwise to the trustees of the settlement to any and what extent.

The summons came on for hearing on the 19th of May, 1892.

STIRLING, J. [stated the facts and continued:]

It was contended, on behalf of Jules Creighton, that inasmuch as Mrs. Tetens had made a will executing the power contained in the will of her father, the property which she had power so to dispose of

was, as against volunteers claiming under her, bound by the covenant contained in her settlement. It was not disputed that if Mrs. Tetens had not made a will, the £5000 stock must have gone to the persons entitled under Hugh Parkin's will in default of appointment by her; but it was said that the persons claiming under her will, being mere volunteers, could not set up a title to the appointed property against persons claiming it for valuable consideration; and in support of this contention the following cases, amongst others, were cited: *Goylmer v. Paddiston*, 2 Vent. 353; s. c. sub nom. *Goilmere v. Battison*, 1 Vern. 48; and *Fortescue v. Hennah*, 19 Ves. 67.

Unquestionably these cases shew that the Court has gone a long way in enforcing, by way of specific performance, contracts to leave property by will; but not one of them is a case of a contract to leave by will on the part of one who was merely donee of a testamentary power of appointment. In my judgment, specific performance ought not to be decreed in such a case.

"It is not, I apprehend, to be doubted," says Rolt, L. J., in *Cooper v. Martin*, Law Rep. 3 Ch. 47, 58, "that equity * * * will never uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention." In *Reid v. Shergold*, 10 Ves. 370, 380, Lord Eldon, speaking of a claim by a purchaser from the donee of a testamentary power to the assistance of the Court, says: "The testator did not mean, that she should so execute her power. He intended, that she should give by will, or not at all; and it is impossible to hold, that the execution of an instrument, or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power."

These remarks were made in a case in which the contest was between the purchaser and a person claiming in default of appointment. I think that in principle they apply where the question arises between persons claiming under a contract for value on the one hand, and those claiming under the will on the other. I think, therefore, that this contention fails.²

I have next to consider what are the legal rights of the trustees of the settlement in respects of the covenants. Can they recover for breach of the covenant on the part of the wife contained in the settlement, and if so what amount of damages, and against whom? First, has Mrs. Tetens broken her covenant? She covenanted that "any other power or powers of appointment over any estate, property, or effects whatsoever, over which the said Mary Creighton may now, or

² See, also, *Wilks v. Burns*, 60 Md. 64.

Nor will equity aid as a defective appointment the covenant to appoint by will to a particular individual, where the donee has died without exercising a testamentary power. Post, p. 367, note 2.

at any time hereafter, during such coverture as aforesaid, be the donee under any settlement, will, or other instrument whatsoever, shall, if executed by her, be executed only in favour of" the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment, which she might have exercised in favour of the trustees. The power was executed by her, but not in favour of the trustees. It seems to me that this constituted a breach of the covenant. Next, what is the amount of damages to be recovered in respect of such breach? It is said that the damages ought to be nominal only because the trustees are in no worse position than if the wife had declined to exercise the power (which, no doubt, she was at liberty to do), with the result that the fund had gone as in default of appointment. It seems to me, however, that as the wife might have exercised the power in favour of the trustees, and she did exercise it, but not in their favour, the covenantees ought to be placed, as nearly as may be, in the same position as if the covenant had been duly performed; and, consequently, that the trustees are entitled to recover by way of damages the value of the stock which would have come to their hands if the appointment actually made had been in their favour.

Then comes the question, Who is liable in respect of the breach? * * * [The court then held that the legal personal representatives of the wife were liable on the wife's covenant to the extent of assets coming to ~~other~~ hands. The court abstained from expressing any opinion as to the effect of the husband's personal covenant.]

BEYFUS v. LAWLEY.

(House of Lords, 1903. L. R. App. Cas. 411.)

See post, p. 361, for a report of the case.

ON NONEXCLUSIVE POWERS AND ILLUSORY APPOINTMENTS—See *Wilson v. Piggott*, 2 Ves. Jr. 351 (1794); *Young v. Waterpark*, 13 Sim. 199 (1842); *Ricketts v. Loftus*, 4 Y. & C. 519 (1841); *Gainsford v. Dunn*, L. R. 17 Eq. 405 (1874).

Gray, Powers in Trust, 25 H. L. R. 26: "But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge—by Sir Richard Pepper Arden (afterwards Lord Alvanley), M. R., in *Spencer v. Spencer*, 5 Ves. 362 (1800), and *Kemp v. Kemp*, Id. 849 (1801); by Sir William Grant, M. R., in *Butcher v. Butcher*, 9 Ves. 382 (1804); and by Lord Eldon, C., in *Bax v. Whitbread*, 16 Ves. 15 (1809), and *Butcher v. Butcher*, 1 Ves. & B. 79, 94, 96 (1812)."

In this country the doctrine of illusory appointments has been repudiated, without the assistance of legislation, in *Graeff and Wife v. De Turk*, 44 Pa. 527; *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885.

St. 11 Geo. IV and 1 Wm. IV, c. 46 (1830), provided that no appointment could be disregarded because it was illusory; i. e., because of the smallness of the share appointed.

St. 37-38 Vict. c. 37 (1874), made every power exclusive, unless the donor expressly provided otherwise.

CHAPTER III

SURVIVAL OF POWERS

ST. 21 HEN. VIII, c. 4: * * * For remedy whereof, be it enacted, ordained, and established by the authority of this present Parliament, That where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them only of the said executors that so doth accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will or testament, shall be as good and as effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare any such will, of any such lands, tenements, or other hereditaments after his decease, to be sold by his executors.

II. Provided alway, That this Act shall not extend to give power or authority to any executor or executors at any time hereafter to bargain or put to sale any lands, tenements, or hereditaments, by virtue and authority of any will or testament heretofore made, otherwise than they might do by the course of the common law afore the making this Act.¹

¹ Woerner, *American Law of Administration*, § 341: "The American statutes mostly extend the power to the survivor or survivors of several executors who have qualified, of whom one or more may die, resign, or be removed, as well as to one or more who may qualify of a larger number to whom the power is given, of whom one or more may refuse to act, and to the administrator with the will annexed."

ATWATERS v. BIRT.

(Court of Queen's Bench, 43-44 Eliz., 1603. 2 Cro. Eliz. 856.)

Ejectione firmæ. Upon a special verdict the case was, one Robert Stanton, seised in fee of the land in question, infeoffed thereof Thomas Molyns and three others, to the use of himself for life, and after to the use of Richard his second son in tail, remainder to George his eldest son in tail, remainder to his right heirs; with a proviso, "that if he paid twelve pence at any time to the said Thomas Molyns, and the three others, and good and sufficient cause was shewed unto them by the said Robert Stanton the father of the abuses by Richard the son, and that so by the said Thomas Molyns and three others (reciting their names), shall be thought convenient, that then the afore-said uses shall cease, and then to be to the use of him and his heirs." One of the four feoffees died; Robert Stanton paid the twelve pence to the other three, and shewed cause of abuse by Richard his son, which was approved by the three. He then declares by a new deed, that the said Thomas Molyns and the other two feoffees, for good consideration expressed in the deed, should stand seised of the said land, to the use of himself for life, and after to new uses, etc. and, whether these uses should take effect or not? was the question.

First, whether this be a good revocation of the first uses, one of the feoffees being dead?

Secondly, admitting that they are revoked, whether it be a good new limitation of the last uses?

As to the first, all the Court resolved, that it was not a good revocation; for it is but an authority which is given to revoke, and it is to be done by the assent of the four; and any of them being dead, the authority is determined, and shall not survive. And for this reason, as Popham said, the common law before the statute of 21 Hen. 8, c. 4, was, that if one devised his land to four to sell, and one of them dies, the survivors, because they have an interest, may sell; but if he had devised that three should sell his land, and one of them dies, the survivors, because they have but a mere authority, cannot sell.² Vide 49 Edw. 3, pl. 16; 2 Eliz. Dyer, 177, 189, 217.

Secondly, admitting that the first uses are well revoked; yet they held, that this second indenture is not a sufficient limitation of the new uses, and raising of them: for although the consideration therein be sufficient, viz. blood and affection, yet he doth not covenant to raise them out of his own possession; but that his feoffees shall be seised, &c. and none other but them shall stand seised; and he hath not any feoffees, and therefore no use can rise. And although it were said, that it shall be expounded as a will, according to the intent of

² See, also, *Montefiore v. Browne*, 7 H. L. C. 241; *Hawkins v. Kemp*, 3 East, 410.

the parties, forasmuch as he hath not feoffees, that he himself shall be seised, &c. it shall not be so in construction of deeds; and so there did not any uses arise, and therefore the lessor of the plaintiff hath not any title. Whereupon it was adjudged for the defendant.

HOUELL v. BARNES.

(Court of King's Bench, 1634. Cro. Car. 382.)

Upon a suit in chancery, a case was agreed by the counsel of both parties and referred to JONES, BERKLEY, and myself, Justices, to consider and certify our opinions.

The case was, One Francis Barnes, seised of land in fee, deviseth it to his wife for her life, and afterwards orders the same to be sold by his executors hereunder named, and the moneys thereof coming to be divided amongst his nephews; and of the said will made William Clerk and Robert Chesly his executors. William Clerk dies; the wife is yet alive.

Two questions were made:

First, whether the said William Clerk and Robert Chesly had an interest by this devise, or but an authority?

Secondly, whether the surviving executor hath any authority to sell?

We all resolved, that they have not any interest by this devise, but only an authority, and that the surviving executor, notwithstanding the death of his companion, may sell; and so we certified our opinions. But whether he might sell the reversion immediately, or ought to stay until the death of the wife, was a doubt. Vide 30 Hen. 8, Br. "Devise," 31; 9 Edw. 3, pl. 16; Co. Lit. 112, 113, 136, 181; 8 Ass. 26.³

³Accord: *Brassey v. Chalmers*, 4 De G., M. & G. 528, 536, reversing 16 Beav. 223, 231; *Forbes v. Peacock*, 11 M. & W. 630; *Peter v. Beverly*, 10 Pet. (U. S.) 532, 564, 9 L. Ed. 522; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; *Id.*, 14 Johns. (N. Y.) 527; *Wardwell v. McDowell*, 31 Ill. 364; *Warden v. Richards*, 11 Gray (Mass.) 277; *Muldrow's Heirs v. Fox's Heirs*, 2 Dana (Ky.) 78; *Berrien v. Berrien*, 4 N. J. Eq. 37; *White v. Taylor*, 1 Yeates (Pa.) 422; *Bredenburg v. Bardin*, 36 S. C. 197, 15 S. E. 372; *Diek v. Harby*, 48 S. C. 516, 26 S. E. 900; *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294; *Robertson v. Gaines*, 2 Humph. (Tenn.) 367; *Davis v. Christian*, 15 Grat. (Va.) 11, 38; *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 322.

Where the power is conferred upon executors to sell, not, however, to pay debts and legacies, but to hold the proceeds for the benefit of those entitled to the land, in place of the land, it has been held that the power does not survive. *Clinfelter v. Ayres*, 16 Ill. 329; *Woolldridge's Heirs v. Watkins*, 3 Bibb (Ky.) 349; *Shelton v. Homer*, 5 Metc. (Mass.) 462; *Chambers v. Tulane*, 9 N. J. Eq. 146, 156; *Clay v. Hart*, 7 Dana (Ky.) 7; *Tarver v. Haines*, 55 Ala. 503; *Robinson v. Allison*, 74 Ala. 254. Especially where the language creating the power reposes a personal confidence and discretion in the executors. *Tarver v. Haines*, 55 Ala. 503; *Chambers v. Tulane*, 9 N. J. Eq. 146; *Clay v.*

YATES v. COMPTON.

(Court of Chancery, 1725. 2 P. Wms. 308.)

A. devised that his executors should sell his land in Dale, and with the money arising by that sale and the surplus of his personal estate, should purchase an annuity of £100 for the life of Jane Styles, and should allow to her so much thereof as would maintain her and her children, and gave £30 to each child to be raised out of the said annuity and the personal estate he should die possessed of, and the overplus of his personal estate he gave to Jane Styles, and made B. and C. executors.

The testator died, and Jane Styles, the intended annuitant died within three months after him; B. and C. the executors renouncing, administration with the will annexed was granted to the plaintiff who was also the administrator of Jane Styles (the intended annuitant) and with the children of Jane brought this bill against the heir of the testator, to compel him to join in a sale of these lands in Dale.

For the defendant it was objected, that there wanted parties, in regard the executors ought to have been made defendants, for notwithstanding they had renounced yet the power of sale continued in them, and was altogether collateral to their executorship.

But there being only a power and no estate devised to the executors, this objection was over-ruled, (tamen Q.)

The plaintiff's counsel then proceeding upon the merits, it was contended on behalf of the heir, that as nothing but a bare power of sale was given to the executors, so such power was for a particular purpose, to buy an annuity for Jane Styles, and forasmuch as that purpose could not now be answered, Jane Styles being dead, there ought not to be any sale.

That this was within the reason of the case where one devises lands for the raising portions for daughters, and the daughters die before they are marriageable, the lands ought not to be sold, but go to the heir at law; so where lands are devised for payment of debts, and the testator himself lives to pay his debts, in such case there shall be no sale; and here it was the same as if the intended annuitant had died in the life of the testator, in which case there should have been no sale, and by the same reason there ought to be no sale now.

That neither Jane Styles or her children would be any sufferers by this construction, since if there had been a sale of the lands, and out of the money arising thereby an annuity had been purchased for Jane Styles, the same had determined by her death; and the children could be no sufferers, because they were to have their maintenance only out

Hart, 7 Dana (Ky.) 7; Robinson v. Allison, 74 Ala. 254. In the following cases, however, it was held that the power did survive: Farrar v. McCue, 89 N. Y. 139, 144; Dick v. Harby, 48 S. C. 516, 518, 26 S. E. 900.

of the said annuity, which would now have been at an end had it been bought.

That out of a very large estate of the testator, this farm in question, which was not above £20 per annum, was all that was left for the heir, and if any act of chance or providence should have thrown any pittance upon the heir, it would be hard for the Court to interpose to the prejudice of him who is the favourite of all Courts both of Law and Equity.

But by LORD CHANCELLOR [KING]. The intention of the will was to give away all from the heir, to turn this land in question into personal estate, and this must be taken as it was at the death of the testator, and ought not to be altered by any subsequent accident.

Then it was insisted, that the estate in question descended to the heir at law, for which reason he ought to have the rents till the sale.

But THE COURT denied this, it being by the will changed into personal estate; and said that if the executors had sold the land within three months after the testator's death, and before the death of Jane Styles the intended annuitant, then (probably) the executor of Jane Styles, should on her death have had the money, or (perhaps) she might in her life time have come into equity, and have prayed that at least part of the money should have been kept for the children, and not invested in the annuity; nor ought the delay of the executors in not selling the land in question within the said three months to hurt Jane Styles the intended annuitant, or her children. So decreed the land to be sold,⁴ and the money arising by the sale as personal estate to be paid to the plaintiff, he paying the children's legacies.⁵

But the heir at law was ordered his costs.⁶

⁴ "And the heir to join in the sale." Reg. Lib. B. 1725, fol. 242.

⁵ Co. Lit. 113a, Hargraves' Note: "But whether Lord Coke's notion of the power not surviving, or the opposite one, most conforms to strictness of law, is not now of any great importance; as such a power, though extinct at law, would certainly be enforced in equity. This has long been the practice of our courts of equity: these rightly deeming the purpose for which the testator directs the money arising from the sale to be applied, to the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting the court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the trust, and compelling the heir, or other person having the legal estate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or supposed to be so, but also such as, in point of law, either for want of the will's naming by whom they should be executed, or because those named had died before the testator, never could exist or take effect. Some of these precedents are as early as the reign of Charles the first. See *Locton and Locton*, 2 Freem. 136, and 1 Cha. Cas. 179. *Garfoot and Garfoot*, 1 Cha. Cas. 35. *Gwilliam and Rowel*, Hardr. 204. *Pitt and Pelham*, 2 Freem. 134. 1 Cha. Rep. 283, and 1 Cha. Cas. 176. T. Jo.

⁶ Though by the Register's book the decree appears to have been as here stated, yet it is not mentioned in what right the Court took the plaintiff to be entitled.—*Rep.*

LANE v. DEBENHAM.

(Court of Chancery, 1853. 11 Hare, 188.)

Daniel Foster, by his will, dated in 1843, gave and devised unto J. E. Lane and E. Powell, their executors and administrators, his freehold house and premises, known as the George Inn, and the appurtenances, a piece of freehold meadow land called Holywell, two freehold cottages situated in Spicer-street, and a plot of ground at the corner of Dagnal-lane, all in Saint Albans; and also all or any sum or sums of money which might be due or coming to him on the security of any bill or bills, note or notes of hand or other memorandums, a schedule or list of which was therewith enclosed, all book or other contract debts, "and all other his (my) real and personal estate and effects whatsoever and wheresoever," and declared the trusts as follows: "That the sum of £2000 shall, as soon as convenient after my decease, be raised out of my said estates by sale or otherwise, at the discretion of my said trustees, and that the said sum of £2000 shall be invested in some good and safe security in the names of my said trustees, and the interest and dividends arising therefrom shall be appropriated to the maintenance, support, and education of my daughter Sarah Ann, until she shall attain the age of twenty-one years, after which the said interest or dividends shall be duly paid to my said daughter half yearly for her separate use," for her life, or until the trusts thereof particularly created were otherwise determined. The testator then directed that the residue of his personal and real estate and effects should be invested or secured at the discretion of his trustees, and the rents, issues, and profits paid over to his wife for her life, subject to certain legacies to legatees therein named, to be paid

25. 1 Lev. 304. See also Max. of Eq. 57, and Vin. Abr. Devise, Q. e. and S. e. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to persons of particular and favoured descriptions, such as wife, children, or creditors; for though in some of the old cases, the persons relieved were of one or other of these descriptions, yet in others nearly of the same time the parties are not stated to have fallen within either of them; and we have not heard of any case, in which relief has been refused on that account. See *Locton and Locton* already cited, and the case of *Tenant and Browne* cited in 1 Cha. Cas. 180. The reason of not favouring particular persons in this instance will appear evident, when it is considered that testamentary powers to sell are deemed to be in the nature of trusts, and trusts are executed in equity for all persons indiscriminately."

See the following cases in support of the same rule: *Tainter v. Clark*, 13 Metc. (Mass.) 220, 230; *Greenough and Wife v. Welles*, 10 Cush. (Mass.) 571, 578, 579; *Compton v. McMahan*, 19 Mo. App. 494, 510.

A power in executors does not usually survive, so that it may be exercised by an administrator with the will annexed. *Conklin v. Egerton's Adm'r*, 21 Wend. (N. Y.) 430; *Wills v. Cowper & Parker*, 2 Ohio, 124-132; *In re Clay and Tetley*, 16 Ch. Div. 3-7.

See, however, the following cases, where the power seems to have been exercisable by such an administrator: *Putnam v. Story*, 132 Mass. 205, 212; *Mott v. Ackerman*, 92 N. Y. 539-541; *Wilcoxon, Adm'r, v. Reese*, 63 Md. 542, 546.

at their respective ages of twenty-one. And the testator directed that, at the decease of his wife, all such rents, issues, and profits should thenceforth be paid to his daughter, her executors, administrators, or assigns; and in case his daughter should die leaving lawful issue, then he directed that all the said real and personal estate and effects should become the absolute property of such issue; and in case his daughter should die before his wife, and leave no issue, he directed that all his said real and personal estate should be divided between certain nephews and nieces of himself and his wife therein named. By the usual trustee clauses, the testator declared, that his said trustee and trustees of that his will should be charged and chargeable only with such moneys as they should actually receive by virtue of the trusts thereby reposed in them, &c.; and that it should be lawful for his said trustees respectively, by and out of the moneys which should come to their or his hands, to retain or allow to each other all costs, &c.; but there was no clause declaring that the receipts of the trustees or trustee should be an indemnity to purchasers of the testator's estate for the moneys therein expressed to be received. The testator thereby appointed his wife executrix, and Lane and Powell trustees and executors of his will; and he died in 1845. Lane and Powell and the widow proved the will, and the two former accepted and acted in the trusts of the devise. Powell died in 1851, the £2000 not having been raised.

Lane, for the purpose of raising the £2000, caused certain of the devised premises to be offered for sale by public auction on the 19th May, 1852. The ninth condition of sale was as follows:—The whole of the property is sold by the vendor under the trusts of the will of Mr. Daniel Foster, deceased, the produce of which is to be invested upon the trusts of such will, and the purchaser shall be satisfied with the investment by the vendor, or, in case of his death, by his personal representatives, of the purchase-money for each lot (after deducting the costs incident to the sale of the property) within twenty-one days after the receipt of such purchase-money, in the name of the vendor or his personal representatives, in such of the public funds as he or they may elect; and he or they will, if required by any purchaser, sign a declaration, that such investment is made on the trusts of the will of the said Daniel Foster, every such declaration to be prepared and executed at the expense of every purchaser requiring the same; and the respective purchasers are hereby excluded from making any objection to the title on account of the omission from the said will of a clause authorizing his trustees or the vendor to give discharges for the purchase-money of the property to be sold under the trusts of the will.

The defendant G. Debenham became, at the sale, the purchaser of Lot 1. He subsequently objected to the title, on the ground that the trust in the will for raising the sum of £2000 could not be exercised by

the plaintiff as the surviving trustee. This question the parties agreed to submit to the court in the form of a special case.

VICE-CHANCELLOR [SIR WILLIAM PAGE WOOD]. The devise in this case to Lane and Powell, their executors and administrators, of the specific freehold estate and other property, "and all other his real and personal estate and effects whatsoever and wheresoever," upon the trusts subsequently declared, is a devise which clearly passes the whole fee to the trustees, although the words executors and administrators are inapt words as to the realty. The question as to the mode of raising the £2000 will not arise, unless the legatee for whose benefit it was intended is alive, a fact which is not stated in the special case. Looking at the question, which, it appears by a letter stated in the case, was asked by the purchaser, whether that person were alive,—to the fact that the abstract was then sent, and that the objection taken was that the discretion as to sale cannot be exercised by one trustee alone, and that the sum might be raised otherwise, I think I may assume the fact of the existence of the party interested at the time of the sale. It will be proper that the declaration of the court should be prefaced by reciting that it proceeds upon that assumption.

The main question is, whether or not, there being a direct trust to raise £2000 by sale or otherwise,—and thus a discretion to be exercised, and one of the trustees being dead,—it is thereby rendered impossible for the surviving trustee to execute this trust without the direction of the court. The money, it is clear, must be raised; can the surviving trustee raise it by means of a sale, or is it necessary to come to the court in order that the court may exercise its discretion whether it is to be by sale, by mortgage, or by some other appropriation?

Mr. Walker has argued, that, whether the case be one of a power or a trust, if it be confided to two persons, or if it be a mere trust for sale, if it be said that the sale is to be made by two persons, a survivor of the two can never execute it. The argument proceeds, as it appears to me, upon an entire disregard of the distinction between powers and trusts. No doubt, where it is a naked power given to two persons, that will not survive to one of them, unless there be express words, or a necessary implication upon the whole will, showing it to be the intention that it should do so. But the ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et forma*. It is therefore a rule of law, that, in all cases of powers, the previous estate is not to be defeated unless the

power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust; thus, if the direction be to raise a certain sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. upon trust to sell, and thereby raise such a sum, it is I think a novel argument, that, after A.'s death, B. cannot sell the estate and execute the trust.

In *Nicolson v. Wordsworth*, 2 Swanst. 365, and *Crewe v. Dicken*, 4 Ves. 97, and that class of cases, the question was a different one,—whether, under a devise to several persons, upon trust to sell,—where the sale takes place in the lifetime of one who has released or disclaimed the trust, the other trustees, in whom the estate is vested by such release, can execute the trust. In *Crewe v. Dicken*, there was a gift to A. and B., in trust that they and the survivor of them should sell. One disclaimed, so that in fact the sale was not made by the survivor, and the question was whether the other trustee could sell. Mr. Walker said, that that class of cases turned on the construction given to the word survivor; but it was not only that—it was a question whether, in an event not contemplated by the testator, a person who was acting in the trusts, and in whom the devised estate was vested, could make a good title. In *Nicolson v. Wordsworth*, Lord Eldon said, he had not much doubt, and that in his own case, if he were himself the purchaser, he would not reject the title on that ground alone. Where there is a power given to A. and B., and no estate given to them, if A. dies or renounces, B. alone cannot make a title. Lord St. Leonards thus states the rule:—"It is regularly true at common law, that a naked authority given to several cannot survive" (1 Sugd. Pow. 143); and he adds, "the same doctrine applies to powers operating under the Statute of Uses;" and he cites the case from *Dyer*, "where cestui que use in fee, before the Statute of Uses, willed that his feoffees A., B., and C. should suffer his wife to take the profits for her life, and that after her decease the premises should be sold by his said feoffees,—one of the feoffees died, and then the wife died;" and it was ruled that the survivors could not sell. But if an estate be given to two persons, upon trust to sell, there is no doubt the survivor may sell. The case is then within the rule put by Lord Coke, and which I am not aware has ever been disputed, that "as the estate, so the trust shall survive."

The case of *Cooke v. Crawford*, 13 Sim. 91, and others, which were relied upon, turned upon the question, whether the trustee could delegate his authority. The parties to whom the estate had been devised for sale had attempted to transfer or devise it to others; and it was held, that the parties thus irregularly constituted trustees of the estate

could not exercise the powers, or sell or give discharges to the purchasers.

The case before the Master of the Rolls, *M'Donald v. Walker*, 14 Beav. 556, was of the same description. The estate and powers were given to two trustees and the survivor of them; and the question was, whether the survivor could hand over to a devisee of the estate the performance of the powers also; and the Master of the Rolls held that to be so doubtful, that he could not force it upon an unwilling purchaser. Here the estate has not been transferred or devised to other persons, but remains in the survivor of the trustees, in whom the testator placed it.

The real difficulty, if it be one, is in the second point; upon which the argument for the defendant proceeded,—the trust to raise “by sale or otherwise.” I do not think the words, “at their discretion,” are important. It is said, that the sum might be raised by mortgage or appropriation; and that this is a species of authority which the court will not permit one person to exercise, where it was given originally to two. If, it was asked, the authority follows the estate,—when, on the decease of the trustee, the real and personal estate is separated,—with which estate does it go? Is the heir or the executor to have it? I do not say that a difficulty might not arise upon this point, but it has not arisen. There might be some question whether the authority had come to an end if the real and personal estate had fallen into different hands; but one trustee still alive; and I apprehend, that where you have an absolute trust to raise out of a common fund a sum of money, either by sale or otherwise, in clear terms, as in this case, there is no such difficulty as has been suggested. The sum being necessary to be raised, it is clear, that, if the case were brought here, the court would direct the surviving trustee to raise the money, he having the whole legal estate, and being subject to the obligation to execute the trust. He has the same power as was given to the two trustees;—a power arising from the combined circumstances of the absolute duty which is imposed upon him, accompanied by an estate which enables him to perform it.

The trustee has, in this case, executed the duty which the trust has cast upon him; and I am asked by the defendant to say, that, in doing so, he has committed a breach of trust, because he has proceeded to raise the money after the death of his co-trustee. If I were to lay down such a rule, where is it to stop? It would follow, that, whenever an estate is vested in two or more trustees to raise a sum by sale or mortgage, or even to sell by auction or private contract, the parties must, after the death of one of the trustees, come to this court for directions before they can execute the trust. The court has not better means of exercising the option than the party against whom the objection is taken, nor are its means so good. I think, as I have

observed, that the fallacy of the argument on behalf of the defendant is in mixing together the rules applicable to bare powers or authorities, and those applying to interests.⁷

⁷Accord: *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. 499; *Attorney General v. Gleg*, 1 Atk. 356; *In re Cookes' Contract*, 4 Ch. Div. 454; *Golder v. Bressler*, 105 Ill. 419; *Gray v. Lynch*, 8 Gill (Md.) 403; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635; *Bradford v. Monks*, 132 Mass. 405; *Putnam v. Fisher*, 30 Me. 523; *Gainey v. Fender*, 82 Mo. 497, 506.

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. *Belmont v. O'Brien*, 12 N. Y. 394; *Parker v. Sears*, 117 Mass. 513. But see *O'Brien v. Battle*, 98 Ga. 766, 25 S. E. 780.

If the power in trustees is to appoint in a manner different from that prescribed by the settlor, it has been held that the power, though given, proceeds generally, was exercisable only by those named, so that upon the death of one, the power could not be exercised. See *Cole v. Wade*, 16 Ves. Jr. 27; *Hadley v. Hadley*, 147 Ind. 423, 46 N. E. 823; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60.

But in *In re Smith* [1904] 1 Ch. 139, 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 the power could be exercised by any trustee for the time being.

In *Pennsylvania Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166, where the power of sale was given to four trustees, all of whom qualified in Pennsylvania, the domicile of the testator, but one of whom was a Pennsylvania corporation which did not comply with the laws of Illinois, and therefore could not act in the sale of Illinois land with the other trustees, it was held that the power could not be exercised by the three trustees who were competent to act in the sale of Illinois real estate, and that specific performance would not be decreed for the trustees against a purchaser.

CHAPTER IV

POWERS IN TRUST AND GIFTS IMPLIED IN DEFAULT OF APPOINTMENT

HARDING v. GLYN.

(Court of Chancery, 1739. 1 Atk. 469.)

Nicholas Harding in 1701 made his will, and thereby gave "To Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did desire her at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and among such of his own relations, as she should think most deserving and approve of," and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth his widow made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestate's effects.

MASTER OF THE ROLLS [HON. JOHN VERNEY]. The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words willing or desiring have been frequently construed to amount to a trust, *Eacles & ux. v. England & ux.*, 2 Vern. 466, and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such, that it is impossible for the court to determine what persons are meant, it is very strong for the court to

construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word relations is a legal description, and this is a devise to such relations, and operates as a trust in the wife by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.¹

In re PHENE'S TRUSTS.

(Court of Chancery, 1868. L. R. 5 Eq. 346.)

Edward Phene, by his will, dated the 2nd of November, 1836, bequeathed to his executors the sum of £3000 £3 per cent Reduced Annuities, upon trusts for the benefit of his sister Charlotte Mill during her life; and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage."

Charlotte Mill died on the 28th of May, 1867, having had issue five children, two of whom died in her lifetime. Of the other three, one had not been heard of for many years, another died in January, 1868, and the third was still living.

The executors named in the will died in the lifetime of Charlotte Mill, and the fund was after her death transferred into court by the legal personal representatives of the surviving executor.

A petition was now presented by the surviving child of Charlotte Mill for payment or transfer to him of such share of the fund as he was entitled to under the will of the testator.

Two questions were raised: 1. Whether the children who predeceased the tenant for life took any interest in the fund; and 2. If they did not, whether the children who survived the tenant for life took as tenants in common or as joint tenants.

¹ See, also, *Doyley v. Atty. General*, 4 Vin. Abr. 485. pl. 16 (1735); *Brown v. Higgs*, 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803).

LORD ROMILLY, M. R. I think it is very clear that only the children who survived their mother take, and that they take as tenants in common.

The case of Brown v. Higgs, 8 Ves. 561, shows that a testator may give to his executors an arbitrary power of determining to whom a fund shall go; and that if he does so, this arbitrary discretion can be exercised only by the persons to whom it is given; even the court cannot exercise it. The testator may also say that the discretion shall be exercised at a particular time; and I think he does so here by fixing the time when the fund is to become divisible. Again, you must consider who are the objects of the discretion; they must be persons in existence at the time when the discretion is exercised; the discretion cannot be exercised for the benefit of a dead person.

Now, the gift here is from and after the death of the tenant for life, for the benefit of her children, to do that which the executors might think most to their advantage. I think that gives the fund to the executors to divide among the class of children who survive the tenant for life. The court is performing the office of the executors, and must give it to the same persons.

Then the testator says to his executors, "You may give it amongst that class as you think fit." That does not create a joint tenancy, because his meaning clearly is, that the executors are to divide the fund; and the court, standing in their place, must also divide it, that is, give it to the objects of the testator's bounty as tenants in common.²

CASTERTON v. SUTHERLAND.

(Court of Chancery, 1804. 9 Ves. 445.)

Thomas Fowler, by his will, dated the 30th of January, 1766, devised all his freehold lands, &c., in Chelsea, or elsewhere, to his wife Lucy for her life, and from and after her decease to his children in the following manner: "Unto and amongst all and every our children, in such manner and in such proportions as my said wife shall either in her lifetime or by her last will and testament direct and appoint." He empowered his wife to sell the estates, and to lay out the money, and receive the interest for her life; and after her decease he directed and appointed the same, both principal and interest, to be paid and applied "to and among our children in such proportions as aforesaid." He appointed his wife executrix. The testator left his wife surviving him, and five children: John, Thomas, William, Henry, and Lucy. John, Thomas, and William died infants and unmarried in the life of their mother. Henry attained 21, and married; but died

² Accord: In re White's Trusts, II. R. V. Johns. 656 (1860); Carthew v. Euraght, 20 W. R. 743.

in the life of his mother; leaving issue one daughter, Sarah Caster-ton. Lucy, the daughter, survived all her brothers; but died also in the life of her mother; having married the defendant Thomas Sutherland the elder; by whom she had issue the other defendant, Thomas Sutherland the younger. The widow died; not having executed any appointment. The bill was filed by James Caster-ton and Sarah, his wife; claiming in her right under the will.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT] was clearly of opinion, upon *Reade v. Reade* [5 Ves. 744], that this was a tenancy in common among the children in fifths, subject to the power of appointment; and that though in the devise of the lands in the first part of the will there were no words of inheritance, yet in the subsequent part the testator giving his wife power to sell the estate, and appointing the money, both principal and interest, among the children, as the testator could not be supposed to intend to give them a larger interest in that part than in the former, they took several estates of inheritance.

The decree declared, that the children of the testator, living at his decease, became entitled equally as tenants in common to the freehold estates, of which he died seised, subject to the estate for life and power of appointment of the widow; and, the widow having made no appointment, the plaintiff Sarah Caster-ton, as only child and heiress at law of her father Henry Fowler, who was heir at law of his brothers William, Thomas, and John, who survived the testator, and died unmarried, and without issue, is in the events, that have happened, entitled to four fifths; and the testator's daughter Lucy, the deceased wife of Thomas Sutherland the elder, was entitled to the remaining fifth; and the defendant Thomas Sutherland the younger is entitled, as her only son, to that fifth.³

KENNEDY v. KINGSTON.

(Court of Chancery, 1821. 2 Jac. & W. 431.)

Ann Ashby, by her will, dated the 3d of August 1785, bequeathed as follows: After the decease of my sister Charlotte Williams, I give £500 to my cousin Ann Rawlins for her life, and at her decease to divide it in portions as she shall chuse "to her children; and in case she dies before me, I leave the sum to be equally divided amongst

³ Accord: *Faulkner v. Wynford*, 15 L. J. N. S. 8 (1845) (devise to trustees with active duties in trust for the daughter for life, at her decease to "receive the same to and for the use and benefit of all such child and children as she might leave, equally between them, share and share alike, at his and their ages of twenty-five years, in such manner and form as his [the testator's] said daughter should by deed or will direct"; in case he left no child, or her children should die before 25, then over).

See, also, *Burrough v. Philcox*, 5 Myl. & C. 72 (1840); *Lambert v. Thwaites*, L. R. 2 Eq. 151 (1866); *Wilson v. Duguid*, 24 Ch. Div. 244 (1883).

her children, after the decease of my sister Charlotte Williams." She appointed her sister sole executrix; who survived her, and died in the year 1795.

Ann Rawlins had four children, William Rawlins, Charlotte Hawkesworth, Jane Walsh and Elizabeth Ann Rainsford. W. Rawlins died in the year 1807; and after his death, Ann Rawlins made a will, by which she appointed £250, part of the sum of £500, to her daughter, E. A. Rainsford; £100 to C. Hawkesworth, and the remaining £150 to Jane Walsh. She survived her daughter E. A. Rainsford, and made a codicil to her will, which however did not affect the sum of £250 appointed to her. She died in November 1812, leaving her two daughters C. Hawkesworth and Jane Walsh surviving her. C. Hawkesworth died in the year 1809 [1819?]. A suit had been instituted, having for one of its objects, to secure the legacy of £500, and a petition was now presented, praying that the rights of the parties to it might be declared.

THE MASTER OF THE ROLLS [SIR THOMAS PLUMER]. This question arises on a very short clause in a will; the sum is given to Ann Rawlins for her life, "and at her decease to divide it in portions as she shall choose to her children." It is first to be considered what is the import of these words, taken alone, without reference to those which follow. Two out of the four children died in the lifetime of the donee of the power, one before and the other after the execution of the appointment. The question will be, whether it is not to be construed as pointing out as the objects of bounty those only who should survive the mother; for the power given is, to divide at her decease. Then, could it be executed in favour of one who died in her lifetime? The term children is general, but as the power is to be executed at her decease, it must be for the benefit of those then capable of taking. It is, therefore, necessarily confined to children in existence at the time of her death. Therefore none but the two who have survived can take under the power; they are clearly entitled to the sums appointed to them.

The difficulty is with respect to the part as to which there is, in the events that have happened, a non-execution. There is no gift over in default of appointment in express terms; but if the mother had died without making any appointment, would not the children surviving her have been entitled? would they, though certainly objects of the testatrix's bounty, have taken nothing? Upon that question the case becomes one of that class where the objects of the power are definite, and the power is only to appoint the proportions in which they are to take, without excluding any; for here the mother must have given a share to each; she could not have made an exclusive or an illusory appointment. The power, therefore, must be understood as tacitly including a provision for an equal division of the fund amongst the objects, in the event of no appointment being made. The two who sur-

vived would, therefore, be the only persons to take; they only could take under an appointment, and if no appointment were made, they would take by necessary implication.

Supposing that to be the construction, if the bequest were confined to the first clause, the next question is whether the other part makes any difference? In case of Ann Rawlins dying before the testatrix, the sum is to be equally divided amongst the children; and it is said that the mention of one event upon which they were to take in default of appointment, is an exclusion of any other; and that it was, therefore, not meant to go to them except upon an event that has not happened. But this does not appear to me to be a necessary consequence. She might die in the lifetime of the testatrix; she might survive and make a complete appointment; or she might survive and make an incomplete appointment. There is no provision in express terms for the event which has actually happened of her surviving and making an incomplete appointment or for her making no appointment at all; but that is quite consistent with the express provision for her dying before the testatrix, as in that event the fund was not disposed of by the previous part of the will.

It does not, therefore, seem to me that this provision annihilates the implication arising from the previous part of the sentence, which I consider as embracing a power to appoint to the children who should survive, with a gift to them in default of appointment. The two survivors, therefore, are entitled alone to the whole sum.⁴

⁴ See, also, *Walsh v. Wallinger* (1830) 2 R. & Myl. 78 (devise to trustees upon trust to sell, and, after paying expenses, encumbrances and debts, to pay the residue "unto his said wife, to and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and at her decease, give and bequeath the same to her children by him in such manner as she should appoint") *Freeland v. Pearson* (1867) L. R. 3 Eq. 658 (testator appoints wife executrix and gives her for her sole use during her life all his property, both personal and real, and then proceeded, "I also direct her, my dear wife aforesaid, to pay my funeral expenses, and all my just debts, and at her decease to make such a distribution and disposal of all my then remaining property among my children as may seem just and equitable, according to her best discretion and consideration").

Moore v. Ffolliot, 19 L. R. Ir. 499 (1887): Devise to three nieces for their joint and several lives subject to the following: "In leaving my property to my three nieces as co-heirs, it is my wish that if my nephew James William Chaine conducts himself to their satisfaction the (sic) shall leave him the property I now leave to them." In the absence of any appointment and the nephew having predeceased the nieces, thus claiming that the nephew was not entitled, but the heirs at law of the testator were entitled, The Master of Rolls said:

"There are several classes of cases in which the question arises whether a power to appoint is a mere power, so that its non-execution defeats the objects, or whether it is to be regarded as in the nature of a trust to which this court will give effect, even when the power is not executed.

"First, an estate of inheritance, with power of appointment. If the language used in the execution of the power amounts to a precatory trust, the trust will fasten itself on the inheritance: the donee of the power will be

In re WEEKES' SETTLEMENT.

(Chancery Division, 1897. L. R. 1 Ch. 289.)

Summons for payment out of court of a sum of Consols standing to the credit of ex parte the London, Brighton and South Coast Railway Company, the account of the persons interested in Brookside Farm under the settlement referred to in the summons.

By a settlement dated April 27, 1857, made on the marriage of Emily Mary Weekes with James Slade, certain real property to which Emily Mary Weekes was entitled, which included the remainder in fee of Brookside Farm expectant on the death of her mother, was settled to uses in favour of the intended wife for life, and upon her death as she should, whether covert or sole, by will appoint, and in default of appointment to the use of the person or persons who at the decease of E. M. Weekes would have been entitled thereto by descent in case she had died seised thereof by purchase intestate and a widow.

By a settlement of even date certain personal property therein described was settled in favour of James Slade and his wife during their lives and the life of the survivor, and after the decease of the survivor in trust for the issue of the marriage as the husband and wife should by deed jointly appoint, and in default as the survivor should by deed or will appoint, and in default of appointment for all the chil-

bound to execute it, and if he fail to do so the court will carry it into effect as if he had. This is the case of *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 499, 8 Ves. 561, 18 Ves. 192, and the like. In *Brown v. Higgs* stress is laid on the circumstances that the testator had given the donee of the power 'an interest extensive enough to enable him to discharge it.'

"On the other hand, if the words used indicate a mere power, and do not impose an obligation, or even amount to a request, then the court will treat the power to appoint as mere surplusage—such a power being involved in the nature of the estate already conferred on the donee. In such a case, if the power be not exercised, the court will of course not interfere. * * *

"There is however, a distinct class of cases where the donee of the power takes not more than a life estate. In these, however clear the expression of desire on the part of the donor in favor of a particular person or class of persons may be, yet, as the donee has no estate, or none beyond his life, the trust to exercise the power is as such personal, and does not directly attach upon the inheritance, save in so far as the court finds in the language an implication in favor of the objects of the power in default of appointment. In this case, if they take the estate they take it by implication, and thus by way of limitation under the instrument creating the power. In the former class of cases the court acts by executing the power in lieu of the donee; in the latter by simply giving effect to the estate implied in the words of the deed or will.

"That such an implication may arise from the language in which the power to appoint is itself couched, without anything else, is well settled; and in the case now before me it is not disputed that an implication is to be discovered in favor of James W. Chalne. The question in dispute is, what is the estate or interest to be implied, and in what event? I am of opinion that in cases where the implication is to be gathered from the words of the power to appoint, and from them alone, the estate cannot be greater than the greatest estate which the object would have taken under the power, and that no estate can be implied when the exercise of the power by the donee, if living, would have been impossible."

dren who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares.

Pursuant to the powers given to them by their Acts the London, Brighton and South Coast Railway Company took certain parts of the Brookside farm and paid the purchase money into Court, and the Consols in court represented such purchase-money.

Emily Mary Slade died in May, 1885, having made her will, dated April 15, 1885, which so far as is material was in the following words: "I bequeath to my husband James Slade a life interest in all property real or personal which may come to me in accordance with the will of my late father Richard Weekes and also in the house which I took under the will of my late cousin George Weekes and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements. I also bequeath unto him the said James Slade all my effects clothes jewellery and other articles to be at his entire will and disposal." The will contained no gift over in default of appointment.

James Slade died in February, 1893, intestate and without having exercised the power of disposition given him by the will of his wife, Emily Mary Slade.

There were fourteen children of the marriage, eight of whom survived their mother and were living.

The tenant for life having recently died, this was an application for payment out of the Consols in court in eighths on the ground that the will of Emily Mary Slade gave to James Slade a life interest in the Brookside Farm with a power to appoint among the children of the marriage, and that this power not having been exercised the children were entitled equally. The respondent, the eldest son, claimed the Consols as heir-at-law of Emily Mary Weekes.

ROMER, J. By the settlement of April 27, 1857, the property now represented by the Consols in court was settled on Emily Mary Slade for life with remainder as she should by will appoint, and with a gift over in default of appointment.

By her will, dated April 15, 1885, Mrs. Slade bequeathed the property in the following terms: [His Lordship read the will as above set out.]

The husband did not exercise the power of appointment, and the question is whether the children take in default of appointment.

Now, apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust that he was bound to exercise. I see no words in the will to justify me in holding that the testatrix intended that the children should take if her husband did not execute the power.

This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power.

If in this case the testatrix really intended to give a life interest to her husband and a mere power to appoint if he chose, and intended if he did not think fit to appoint that the property should go as in default of appointment according to the settlement, why should she be bound to say more than she has said in this will?

I come to the conclusion on the words of this will that the testatrix only intended to give a life interest and a power to her husband—certainly she has not said more than that.

Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not shew, in my opinion, that there is a hard and fast rule that a gift to A. for life with a power to A. to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases shew (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint.

I will now examine the authorities which have been cited, and shew that this is so, though I may remark that the case before me is peculiar in this, that there is a gift over in default of appointment by the husband by force of the settlement, so that this will need not in any case come within the general proposition above stated.

Now do the authorities bear out what I have stated? One of them, an Irish case, *Healy v. Donnery*, 3 Ir. C. L. Rep. 213, clearly tells against the proposition contended for. In that case there was a gift of a freehold interest to a daughter for life, with power by deed or will to dispose of the same to and among her children, with no gift over in default of appointment. There was indeed a residuary gift, but that, as pointed out by the Court of Appeal in *In re Brierley*, 43 W. R. 36, is not equivalent to a gift over in default of appointment for the purposes of the above proposition. The case, therefore, was merely a devise for life with power by deed or will to appoint the remainder to and among the children, and that was held not to give an estate by implication to the children. The proposition now contended for was then urged also by the party who failed, and was thus dealt with by Pennefather, B. in his judgment, 3 Ir. C. L. Rep. 216: "It is argued that the power to appoint among the children is tantamount to a trust created for them. I have always considered that there was a

distinction between a mere power and one coupled with a trust; and though I called on counsel for an authority to the contrary, no such case has been cited. But particular cases have been cited, in which Courts have thought that they collected from the peculiar words of the power an intention of the testator to give to children in default of appointment. The general position" (quære proposition) "contended for by the defendant's counsel has never been laid down; and I cannot say that this case falls within the authority of any of the cases cited."

But other cases have been cited to me, so I will refer to them also, and shew that this statement of the law by Pennefather, B., is correct.

In *Brown v. Higgs*, 4 Ves. 708, the gift was as follows: [His Lordship stated the gift.] In other words, it was a gift of the kind I have before indicated—a gift to such of the children as a certain person should appoint, that is to say, there was a mere power of selection given. The will on its wording sufficiently set forth the intention that the class or some of the class should take. That this was really the ground of the decision of the Master of the Rolls (Lord Alvanley) is apparent from his judgment, for he says, 4 Ves. 719: "Upon the true construction of this will I am of opinion, it is equivalent to saying, he gives to the children of Samuel Brown or of William Augustus Brown, with a power to John Brown to select any he thinks fit and to exclude the others; and it is too much to contend that nothing is intended for them exclusive of the appointment of John Brown. The fair construction is, that at all events the testator meant it to go to the children; and these words of appointment he used only to give a power to John Brown to select some and exclude the others." That is to say, where you can find that the power is only a power to select, the gift being to a class, of course, if the power is not executed the class take. That case came before the Court again, 5 Ves. 495. The particular point that I am considering is dealt with, 5 Ves. 500, and Lord Alvanley, again considering the case, says this, after referring to the words of the will: "Upon this disposition and the facts, that have taken place, the question is, whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown a power if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is anything more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him in trust for these children at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his nonexercise of that power, or the circumstances of his being incapable of exercising it, will not prevent the objects of the testator's bounty from taking in some manner; though the power

of distribution on account of the death of the trustee cannot now be exercised."

The case finally came on appeal before Lord Eldon, 8 Ves. 561, and he dealt with the precise point, *Ibid.* 570, as follows: "It is perfectly clear, that, where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. One question therefore is, whether John Brown had a trust to execute, or a power, and a mere power." And under the wording of that will he held that it was a trust. That case, therefore, obviously, is no authority for the general proposition contended for before me.

Next comes the case of *Burrough v. Philcox*, 5 My. & Cr. 73. In that case the will was very peculiar. The testator directed that certain stock and real estate should remain unalienated until certain contingencies were completed, and, after giving life interests in such stock and estates to his two children with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned, that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate "amongst my nephews and nieces, or their children, either all to one of them or to as many of them" as his surviving child should think proper. This was held to create a trust in favour of the class subject to a power of selection and distribution in the surviving child. And why? Because by the terms of his will the testator intended and purported to dispose of the property absolutely, seeing that on the contingencies being completed he declared that the property should be "disposed of as after mentioned." The ground of the decision is stated in the judgment, *Ibid.* 92, thus: "These and other cases shew that when there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made the Court will carry into effect the general intention in favour of the class." This case, therefore, is equally no authority in favour of the proposition.

With regard to the case of *Witts v. Boddington*, 3 Bro. C. C. 95, that, again, was on a peculiar will, the decision being that the power as between the testator and the donee of the power was in the nature of a trust.

Forbes v. Ball, 3 Mer. 437, is very shortly reported. It was held that the power had been exercised, and there is only a short statement that, 3 Mer. 440, "the Court was of opinion that the words in the testator's will raised a trust for the wife's relations, subject to her appointment." That is all that is stated on that point; but if that was decided, then it is clear at least to my mind that it is a decision upon the particular wording of the will, which was as follows: "I give to A. C. £500., and it is my will and desire that A. C. may dispose of the

same amongst her relations, as she by will may think proper." The Court must have held, I have no doubt, that by force of the words "my will and desire" there was a sufficient indication of the intention of the testator that A. C. should dispose of it. The words "my will and desire" might be said (especially as the authorities on precatory trusts then stood) to be incompatible with the idea that a mere power was given to A. C. which she might or might not exercise at her option. That case is no authority for the general proposition.

It is clear, in my opinion, from the judgment in *Birch v. Wade*, 3 V. & B. 198, that the true ground of the decision there was that the power was in the nature of a trust by force of the words that had been used by the testator of his "will and desire."

In *Re Caplin's Will*, 2 Dr. & Sm. 527, the testator, after giving a fund to his wife for life, directed that after her death it should be paid to such and so many of the relatives or friends of the wife as she should by will appoint—in other words, it was a case of the kind I have before referred to, a gift to a class or such of a class as should be selected by the donee of the power. In that case there was a general statement, 2 Dr. & Sm. 531, which went beyond the case: but that statement of the judge should, I think, be considered with reference to the case that the Vice-Chancellor had before him.

Re White's Trusts, Joh. 656, 659, was like *Re Caplin's Will*, 2 Dr. & Sm. 527. It was a trust "for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of testator's children, or their issue, as the trustees should think fit, for the interest and good of testator's family." There, again, there was a general statement made by the learned judge, and in my opinion, unless checked by reference to the case before him, that statement was too large. The Vice-Chancellor said: "It is settled by *Brown v. Higgs*, 4 Ves. 708, and *Burrough v. Philcox*, 5 My. & Cr. 73, that, where there is a power to appoint among certain objects, and no gift in default of appointment, the court will imply a gift to the objects of the power equally." I have pointed out that those two cases did not decide that. I have no doubt *Wood, V.-C.*, in making that statement, meant it to be considered with reference to cases where the facts were similar or somewhat similar to those in *Brown v. Higgs*, 4 Ves. 708, and *Burrough v. Philcox*, 5 My. & Cr. 73,—that is to say, cases where you can gather from the will that the class are intended to take, and a selection only is given to the person having the power of appointment, as was shewn by the observation in *Burrough v. Philcox*, *Ibid.* 92, to which I have already referred.

Butler v. Gray, L. R. 5 Ch. 26, was a case where there was a sufficient indication that the class was to take; and lastly, *In re Brierley*, 43 W. R. 36, was a decision not in point on the proposition contended for.

I have now shewn that none of the cases relied on by the applicants establish the general proposition; and I hold that in this case there

was no gift by implication to the children of Emily Mary Slade in default of appointment by her husband.⁵

⁵ See *Rogers v. Rogers*, 2 Head (Tenn.) 660 (1859); *McGaughey's Adm'r v. Henry*, 15 B. Mon. (Ky.) 383 (1854); *Smith v. Floyd*, 140 N. Y. 337, 35 N. E. 606 (1893); *Milhollen's Adm'r v. Rice*, 13 W. Va. 510, 543, 566 (1878).

ON LAPSED APPOINTMENTS.—See *Chamberlain v. Hutchinson*, 22 Beav. 444 (1856); *Brickenden v. Williams*, L. R. 7 Eq. 310 (1869); *In re Van Hagan*, L. R. 16 Ch. Div. 18 (1880); *In re Marten*, [1902] 1 Ch. 314; *In re Thurston*, 32 Ch. Div. 508 (1886); *In re Davies' Trusts*, L. R. 13 Eq. 163 (1871).

ON EFFECT OF A RESIDUARY APPOINTMENT UPON THE SUBJECT-MATTER OF A LAPSED APPOINTMENT.—See *In re Harrie's Trusts*, H. R. V. Johns, 199 (1859), where out of a fund slightly exceeding £5,000 the donee appointed £1,000 to each of four daughters, and the residue to five sons equally, the sons took any amount which lapsed by the death of a daughter in the life time of the donee.

In Eales v. Drake, L. R. 1 Ch. D. 217, Jessel, M. R., said: "The case is this. A testator, having power to appoint £7,000 by will, thinks he has power to appoint £10,000; and accordingly makes a will appointing sums of £1,995, £4,000, £4,000, and £5. If nothing more had happened it is quite clear that all these gifts must have abated, because there is not enough to pay the bequests in full. But one of the appointees has died, which augments the fund, exactly in the same way as if the testator had given pecuniary legacies of greater amount than his whole personal estate, and then one of these legatees had died. In that case the personal estate would have been augmented for the benefit of the other legatees, and the appointees here are in the same position."

CHAPTER V
APPOINTED PROPERTY AS ASSETS

CLAPP v. INGRAHAM.

(Supreme Judicial Court of Massachusetts, 1879. 126 Mass. 200.)

Bill in equity, filed April 21, 1876, by the executor of the will of Caroline A. Ingraham, against the children of the testatrix, and her creditors, for instructions, alleging that on January 1, 1828, the Massachusetts Hospital Life Insurance Company received from Joseph Head, trustee of Caroline A. Ingraham, wife of Daniel G. Ingraham, the sum of \$3000, and executed to him an instrument in writing, whereby they promised and agreed with him, his executors and administrators, to invest the same, and to pay the income thereof quarterly to Mrs. Ingraham, "during the natural life of the said Caroline, upon her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; for her separate use, free from the debts, control or interference of any husband she now has, or may hereafter have; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof;" and further agreed with the said trustee, his executors and administrators, "that, in sixty days after proof of the decease of the said Caroline, they will assign, transfer and pay the amount of the aforesaid principal sum (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said company or their servants), and all interest then due thereon at the time of her death, in real estate, stocks, notes, bonds and mortgages, belonging to said company, all, any or either of them, at the pleasure and discretion of the directors, at the prices at which the same respectively shall stand charged in the books of the company at the decease of said Caroline, in the way and manner provided in said extract from said article, to her executors or administrators in trust, and for the special use and benefit of such person or persons as the said Caroline by her last will and testament, or any revocable appointment in nature thereof, may direct; and if no such will and appointment be made, then to such person or persons as may be her heirs at law."

The bill further alleged, that Caroline A. Ingraham died on January 20, 1876, leaving a will, dated October 16, 1871, which was duly admitted to probate, appointing the plaintiff her executor, and containing the following clause: "I direct my said executor to receive from the Massachusetts Hospital Life Insurance Company the sum

of three thousand dollars and all interest and accumulations thereon, or the real estate, stocks, notes, bonds, and mortgages in lieu of said sum with interest and accumulations, which by the terms of a contract in writing between said company and Joseph Head, trustee, executed the first day of January, one thousand eight hundred and twenty-eight, the said company agrees to assign, transfer and pay to my executors or administrators in sixty days after proof of my decease; and out of the money or other property received from said company, I direct my said executor to have and keep, for his own use and benefit, the sum of four hundred dollars; and to assign, transfer and pay over all the remainder of the money, or other property received from said company, after deducting said sum for his own use and benefit, to my children and the issue of any deceased child or children by right of representation in equal shares."

The bill further alleged, that the plaintiff had received from said company the sum of \$3000, and that, after diligent search and inquiry, no other property of the testatrix had come to his possession or knowledge; that the testatrix left two children surviving her, who contended that they were entitled to receive the whole of the sum remaining in the plaintiff's hands after deducting the sum of \$400; that the testatrix left debts to a large amount, and that the creditors contended that said sum was liable, in the plaintiff's hands, as executor, for the payment of such debts.

The children of the testatrix and certain of the creditors filed answers, admitting the allegations of the bill, and setting up their respective claims; and the case was heard by Morton, J., upon the bill and answers, and reserved for the consideration of the full court.

GRAY, C. J. It was settled in the English Court of Chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate. *Thompson v. Towne*, Prec. Ch. 52; s. c. 2 Vern. 319. But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power, when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the doner of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's

pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money should be considered part of his assets, and his creditors should have the benefit of it. *Townshend v. Windham*, 2 Ves. Sen. 1, 9, 10; *Ex parte Caswell*, 1 Atk. 559, 560; *Bainton v. Ward*, 7 Ves. 503, note; s. c. cited 2 Ves. Sen. 2, and *Belt's Supplt.* 243; 2 Atk. 172; *Pack v. Bathurst*, 3 Atk. 269. The doctrine has been upheld to the full extent in England ever since. *Chance on Powers*, c. 15, § 2; 2 *Sugden on Powers* (7th Ed.) 27; *Fleming v. Buchanan*, 3 De G., M. & G. 976.¹

Although the soundness of the reasons on which the doctrine rests has been impugned by Chief Justice Gibson, arguendo, and doubted by Mr. Justice Story in his Commentaries,² the doctrine is stated both by Judge Story and by Chancellor Kent as well settled; and it has been affirmed by the highest court of New Hampshire, in a very able judgment, delivered by Chief Justice Parker, and applied to a case in which a testator devised property in trust to pay such part of the income as the trustees should think proper to his son for life, and, after the son's death, to make over the principal, with any accumulated income, to such persons as the son should by will direct. *Commonwealth v. Duffield*, 12 Pa. 277, 279-281; *Story*, Eq. Jur. § 176, and note; 4 *Kent*, Com. 339, 340; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694.

A doctrine so just and equitable in its operation, clearly established by the laws of England before our Revolution, and supported by such a weight of authority, cannot be set aside by a court of chancery, because of doubts of the technical soundness of the reasons on which it was originally established. It is true that, as the rights of the creditors could only be enforced in a court of chancery, they were remediless so long as no adequate equity jurisdiction existed in this Commonwealth. *Prescott v. Tarbell*, 1 Mass. 204. But such a consideration affects the remedy only, and not the right, and affords no reason for denying the right now that this court, sitting in equity, has been

¹ Accord: *Edie v. Babington*, 3 Ir. Ch. 568.

The property appointed by will is not assets for the creditors of the deceased until the property to which the deceased was entitled has been exhausted. *Fleming v. Buchanan*, 3 De G., M. & G. 976; *Patterson v. Lawrence*, 83 Ga. 703, 705, 10 S. E. 355, 7 L. R. A. 143.

Nor does the appointment under a general testamentary power abate with legacies payable out of the estate of the testator. *White v. Mass. Inst. of Tech.*, 171 Mass. 84, 96, 50 N. E. 512.

If no appointment is made, the property subject to the power is not assets of the donee for his creditors, even where the power is general to appoint by deed or will. *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206, 214; *Gilman v. Bell*, 95 Ill. 144, 149; *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Ryan v. Mahan*, 20 R. I. 417, 39 Atl. 893.

² See, also, *Humphrey v. Campbell*, 59 S. C. 39, 45, 37 S. E. 26; *Wales' Adm'r v. Bowdish's Ex'r*, 61 Vt. 23, 33, 17 Atl. 1000, 4 L. R. A. 819.

vested by the Legislature with ample powers to maintain and protect it. Gen. Sts. c. 113, § 2; *Rogers v. Ward*, 8 Allen, 387, 390, 85 Am. Dec. 710.

By the instrument of trust in the case before us, an annuity was payable quarterly to Mrs. Ingraham during her life, and the principal after her death to her executor or administrator in trust and for the special use and benefit of such persons as she by her last will, or by any revocable appointment in the nature thereof, might direct, and if no such will or appointment should be made, then to her heirs at law. The only restrictions expressed are, that the annuity during her life is to her separate use, free from debts or control of her husband, and each instalment thereof is to be paid upon her order when or after it has fallen due, so that she would have no right to assign it by way of anticipation, *Perkins v. Hays*, 3 Gray, 405; and that the annuity and the principal are both declared to be "inalienable by the respective grantees thereof,"—which clearly has no application to the general power of appointment, conferred upon her by the express terms of the trust, to dispose of the principal, after her death, by will or testamentary instrument in the nature thereof; and, she having exercised the dominion so granted to her, the property is thus brought within the equitable doctrine which makes it subject to her debts.

We are aware that it has been held by Vice Chancellor Kindersley, and by Lord Romilly, M. R., that the doctrine does not extend to the case of the execution of a general power by a married woman, without fraud. *Vaughn v. Vanderstegen*, 2 Drew. 165, 363;³ *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Hobday v. Peters*, 28 Beav. 354; *Shattock v. Shattock*, L. R. 2 Eq. 182; s. c. 35 Beav. 489. We need not consider whether those cases were well decided, or are applicable in this Commonwealth, where, by statute, every married woman has long been liable to be sued, and her property taken on execution, upon contracts made by her for her own benefit, and, since 1874, upon all her contracts with any person but her husband. Gen. Sts. c. 108, §§ 1, 3; St. 1874, c. 184; *Willard v. Eastham*, 15 Gray, 328, 334, 77 Am. Dec. 366; *Major v. Holmes*, 124 Mass. 108. It is quite clear that, even in England, all restrictions on her capacity and liability would terminate with her coverture. *Tullett v. Armstrong*, 1 Beav. 1, 32, and 4 Myl. & Cr. 377, 395 et seq. And in the present case it does not appear, and has not been contended, that Mrs. Ingraham continued to be a married woman at the time of contracting the debts in question, or of exercising the power.

In *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, and in *Durant v. Massachusetts Hospital Life Ins. Co.*, 2 Low. 575, Fed. Cas. No. 4,188, the settlement differed from that before us in expressly providing that the property should not be subject to the debts of the cestui

³ *Contra*, *Godfrey v. Harben*, 13 Ch. Div. 216, 221.

que trust, and in giving no general power of appointment; and there is nothing in the decision or opinion, in either of those cases, that is adverse to the claims of creditors in the case at bar.

Decree for the creditors.

BEYFUS v. LAWLEY.

(House of Lords. L. R. [1903] App. Cas. 411.)

The Hon. F. C. Lawley under the will of Lady Wenlock had a general power to appoint by will £10,000 which in default of appointment was to go as part of her residuary estate. By a mortgage of April 7, 1892, to secure a loan of £1000 and interest he covenanted that he would immediately after the execution thereof sign his will of even date already prepared, whereby in exercise of the general power under Lady Wenlock's will he appointed that the trustees of her will should stand possessed of the £10,000 and the investments representing it, upon trust to pay to the mortgagee thereout, in preference and priority to all other payments, the £1000 and interest, and that he would not revoke or alter his will without the consent of the mortgagee. The same day he executed his will containing the above provisions and stating that it was his wish that the loan should be a first charge on the £10,000. On his death in 1901 the £1000 with interest was still due. The question then arose in an administration action whether the executors of the deceased mortgagee were entitled to priority as to the trust fund over other creditors of Mr. Lawley. Joyce, J., held that they had not priority, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy, L. JJ.). [1902] 2 Ch. 799.

The mortgagee's executors appealed.

EARL OF HALSBURY, L. C. My Lords, your Lordships have listened to a very protracted argument in this case, and the only answer I have to give to that argument is that whatever merits it might have had half a century ago, it is too late now. The language which was used by Knight Bruce, L. J., in *Fleming v. Buchanan*, 3 D. M. & G. 976, 980,⁴ is in accordance with the opinions delivered by each of the three learned Lords Justices of Appeal, and beyond some abstract reasoning which, as it appears to me, would get rid of the rule altogether, I have seen no reason to think that the judgment of the Court of Appeal is wrong.

I content myself with saying that in view of that language of Knight

⁴ This language is as follows: "On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part. Not only in point of principle and reason, but of precedent and authority, I apprehend that the same rule applies to real estate where it is subject to a general power exercised by will."

Bruce, L. J., which has not been challenged for half a century, this appeal against the decision of the Court of Appeal is hopelessly unarguable, and therefore I invite your Lordships to dismiss the appeal with costs.

LORD MACNAGHTEN. My Lords, I agree. I am of opinion that the passage from the judgment of Knight Bruce, L. J., in *Fleming v. Buchanan*, 3 D. M. & G. 976, 980, which has been so often quoted in this case, is an accurate statement of the law on the subject, and that it does not require any qualification as Vaughan Williams L. J. seems to suggest. Whatever the origin of the rule may have been, it is in my opinion much too late to question it now or to attempt to cut it down.

LORD LINDLEY. My Lords, I am of the same opinion. The doctrine that an appointee under a power derives title from the instrument conferring the power and not from the appointment is well established; but a qualification or exception has been long grafted upon it and is equally well established. For it cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof.

The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him.⁵ When I say assets I do not mean

⁵ In *O'Grady v. Wilmot*, L. R. [1916] A. C. 231, the donee had a general testamentary power and exercised it. The property, subject to the power, was not, however, needed for the payment of debts. If the property subject to the power passed to the donee's "executors as such," the death duty was to be paid by the donee's residuary legatee out of the general assets belonging to the donee. If, on the other hand, the property subject to the power did not so pass, the death duty was payable out of the property appointed. Held: The appointed property did not pass to the donee's "executor as such." Lord Buckmaster, L. C., said (p. 248): "Property subject to a general power of appointment exercised by deed or will could be made available for payment of the testator's debts by proceedings instituted in chancery. It was considered contrary to good faith to permit a power to be exercised in favour of volunteers so as to defeat the creditors of the donee of the power. The court therefore intercepted the fund—to use the language of Lord Hardwicke, 'stopped it in transitu'—and either by regarding the appointee as trustee for the creditors, or by virtue of saying that in the circumstances the creditors had an equity against the fund, caused it to be applied for payment of the debts: but the fund was not any part of the estate of the donee of the power, nor was it anywhere decided that it passed to the executor."

Lord Sumner said (p. 270): "* * * How and in what sense does the subject of a general testamentary power pass to an executor on the effectual exercise of the power? The rule first appears in the seventeenth century. It takes shape in the middle of the eighteenth. In *Lord Townshend v. Windham* [2 Ves. Sen. 1, 11] Lord Hardwicke says that the Courts 'stop in transitu, as it is called,' and he appears to have accepted in *Troughton v. Troughton* [3 Atk. 656] the expression 'the Court ought to intercept it for the benefit of a creditor.' The rule arose out of tenderness for creditors. 'It would be a strange thing if volunteers * * * should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this court.' *Bainton v. Ward* [2 Atk. 172], afterwards affirmed in the House of Lords. See *Lassells v. Lord Corn-*

general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted. Again, personal property appointed by will under a general power although not a legacy for all purposes is treated as personal estate bequeathed by him.

It is settled that, except by making a creditor an executor, a person disposing of his own property by will cannot by his will prefer one

wallis [2 Vern. 465]. Since the right to exercise a power is not property, equity, regardless of the facts, assumed that a man in debt, who might have used the power to pay his debts, could not really mean to exercise it so as to benefit a volunteer and leave his debts unpaid. Fundamentally this has nothing to do with executorship, for, provided a court of equity sees that the creditors are paid out of the subject of the power, if need be, the executor's position is at most ministerial. He may be no more than a necessary party. The theory of the executor's position has been developed in various ways since Lord Hardwicke's time, but the theories are so discordant that, with all humility, I think them confusing. The rule now is that the trustees of the fund are bound to pay it over to the executor whether the appointor's estate is indebted or not, and by doing so they discharge themselves (Hayes v. Oatley [L. R. 14 Eq. 1]; In re Hoskin's Trusts [5 Ch. D. 229; 6 Ch. D. 281]). This is said (In re Hadley, [(1909) 1 Ch. 20, 30]) to be by reason of the probate and because the payee is executor. By exercising the power the testator has been thought to make the subject of the power his own and part of his assets; hence the executor is entitled. Having received the fund, the executor is, no doubt, accountable, and this consideration apparently led to the opinion, expressed in Hadley's Case [(1909) 1 Ch. 20, 30], that a fund of personalty appointed by will under a general power must be classed as legal assets. The authorities do not seem to have been cited on that occasion, and the point is one which has long been of diminishing importance. In the proper sense of the words I do not think that this opinion can be regarded as correct. I cannot find that evidence of receipt of such a fund has ever been admitted where, in an action at law by a creditor, an executor has pleaded *plene administravit*, and issue has been joined thereon, or that an executor has ever been allowed to exercise his right of retainer against it. The rule is a rule of equity and applies to realty as well as to personalty, while an executor holds a common law office and at common law did not take the realty of his testator. Mr. Joshua Williams thought that the fund vested in the executor, which is inconsistent with the decision in *Drake v. Attorney-General* [10 Cl. & F. 257]. Again it was contended (per Wilde, S.-G., *arguendo*) in *Platt v. Routh* [6 M. & W. 756] that equity by implication makes the donee of the power a trustee for his creditors, if he exercises the power at all. This suggestion seems to have gone no further. Leach, V.-C., in *Jenney v. Andrews* [6 Madd. 264], said that the appointee was trustee for the creditors. What in the report of that case seems to have been only a dictum is converted by Romilly, M. R., into a decision in *Williams v. Lomas* [16 Beav. 1]. Nevertheless it is the executor who gets the money and pays the creditors. The appointee does not; he takes what the executor has left, and keeps it. The now appellant's argument is, following the view which Kekewich, J. (In re *Treasure* [(1900) 2 Ch. 648]), took of In re *Philbrick's Settlement* [34 L. J. (Ch.) 368], as extended by the language of James, L. J., in In re *Hoskins Trusts* [6 Ch. D. 281, 283], that the executor becomes a trustee of the fund for the creditors, but, as Buckley, J., points out (In re *Moore* [(1901) 1 Ch. 691, 695]), he only becomes trustee, in the sense of trustee of the fund for the appointees, subject to another duty which the trustee of the fund had not, namely, the duty before he hands anything to the appointees to take the whole fund, or as much as is necessary to satisfy the debts of his testator.' In truth, as nobody appointed the executor a trustee, as the original trustees of the settlement remain such till they have got rid of the money by paying it to him, and as the whole intention of the appointor was to appoint so as to

creditor to another or make a gift by will payable before a debt. A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will and not a preferential debt. The attempt to confine the rule to volunteers cannot, I think, now be supported when speaking of powers to appoint by will.⁶

The order of the Court of Appeals affirmed and appeal dismissed with costs.

pass his creditors by, I think this theory is only an attempt to state the working rule of administration in terms of a particular and inapplicable category of equity. On the other hand the executor has been said to be an appointee of the fund himself. Here, too, I think the same observation may be made. His relation to the appointed fund has become defined in a series of cases, sometimes casually and sometimes anomalously. He is the proper person to receive it; he ought to apply it, so far as may be necessary, in due order of administration, and in a court of equity is accountable and compellable to do so. Clearly he is entitled to possession of it and is bound to administer it in the course of his executorship. I think that is really all. Be the theory what it may, surely this relation to the appointed fund cannot be correctly described as a passing to the executor as such. It never became *bona testatoris* in any real sense; before the will spoke the testator was dead, and till the will spoke there was no appointment. The distinction between a will as a testamentary disposition of property naming an executor as the legal personal representative of the deceased, on the one hand, and a will as a prescribed mode of exercising a power with an executor named therein only to effectuate the appointment, on the other, is illustrated by *Tugman v. Hopkins* [4 Man. & G. 389]; and see *In re Tomlinson* [(1881) 6 P. D. 209]. What makes him executor, entitled to what had belonged to the testator in his lifetime, is the testamentary disposition, which appoints him. What makes him recipient of the appointed fund and administrator of it is the control which courts of equity have exercised over funds which did not belong to the testator in his lifetime, and to which the will gives the executor no title at all. I think that Lord Hardwicke's language, that equity intercepts the fund or stops it in transitu, is much the clearest guide, and sufficiently explains what is a rule rather than a principle. There is high authority for this view. 'In favour of creditors,' says Lord Thurlow (*Harrington v. Harte* [1 Cox, 131]), 'this court would arrest the fund in transitu.' 'A rule of equity,' says Lord Abinger, 'subjects a fund so appointed to the debts of the appointor.' *Platt v. Routh* [6 M. & W. 756, 789]. It is 'considered as part of the estate of the testator at the time of his death.' *Lord Townshend v. Windham* [2 Ves. Sen. 1, 11]. It is 'considered as assets, if wanted.' *Grant, M. R., in Daubeney v. Cockburn* [1 Mer. 626, 639]. And 'the court will for creditors lay hold of the money when it is appointed for a volunteer.' *Holmes v. Coghill* [7 Ves. 499, 508]. 'Such property is not the personal or real estate of the testator,' *Droner, L. J.*; it is resorted to in aid of 'the testator's estate in a more accurate sense of the word,' *Knight Bruce, L. J.* (both in *Fleming v. Buchanan* [3 D. M. & G. 976, 979, 981]). It is 'treated as personal estate bequeathed by the testator.' *Lord Lindley in Beyfus v. Lawley* [(1903) A. C. 411, 413]. By thus 'considering' and 'treating' it as what, 'in a more accurate sense,' it is not, the executor is made the recipient of the fund. It is only by the will that property passes to the executor as such.⁷

Lord Parmoor dissented.

See, also, *Commonwealth v. Duffield*, 12 Pa. 277 (1849).

⁶ *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143, semble, that the execution of a testamentary power to validate a title attempted to be conveyed *inter vivos* is an execution for value, and hence the appointed property was not assets for creditors.

CHAPTER VI
DEFECTIVE EXECUTION

SMITH v. ASHTON.

(Court of Chancery, 1675. 1 Ch. Cas. 263.)

J. S., seised of lands in two counties, conveyed part to the use of himself for life, with remainder, and power to charge the lands so conveyed, with £500 by deed or will in writing under his hand and seal. This conveyance was voluntary, and without valuable consideration, and after by his last will in writing, not sealed, devised the £500 to his younger children, in whose right the bill is exhibited against his son and heir to have the £500.

Against which the counsel for the defendant insisted, that the law was against the plaintiff; and both parties claiming under a voluntary settlement, and the same consideration, (viz.) natural affection, therefore he that hath the law on his side ought not to be charged to the younger children.

THE LORD KEEPER took time to deliberate, and now decreed the £500 though the will was not under seal, and the power not legally pursued. He cited Prince and Chandler's Case, decreed by the Lord Egerton, where there was a power to make leases on a covenant to stand seised to uses, on consideration of natural affection, and the lease was for provision for younger children.

Decreed good against the heir, for two reasons, 1st, for that the law was not then adjudged in Mildmay's Case. 2d. Because the son did claim by the same conveyance by which the power was limited. So 17 June, 8 Car. the jointure of the Countess of Oxford decreed good, where the power was not pursued; yet only part of her jointure depended on the question.

For he that reserveth such a power under circumstances, they are but cautions that another might not be imposed, or made without hint. The substantial part is to do the thing, and therefore where it is clear and indubitable, the neglect of the circumstances shall not avoid the act in equity; possibly when from home or sick he remembered not the circumstance of his power; and the powers of this kind have a favorable construction in law, and not resembled to conditions, which are strictly expounded; for a power of this kind may be executed by part, and extinct in part, and stand for the rest; but a purchaser shall defend himself in such case, but with difference, though not exe-

cuted according to the circumstances; for if he hath notice (quære if he meant of the original conveyance only, or of the ill executed estate) he purchaseth at his own peril.¹

TOLLET v. TOLLET.

(Court of Chancery, 1728. 2 P. Wms. 489.)

The husband by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first, &c. son in tail male, with a power to the husband to make a jointure on his wife by deed under his hand and seal.

The husband having a wife, for whom he had made no provision, and being in the Isle of Man, by his last will under his hand and seal, devised part of his lands within his power to his wife for her life.

Object. This conveyance being by a will, is not warranted by the power which directs that it should be by deed, and a will is a voluntary conveyance, and therefore not to be aided in a court of equity.

MASTER OF THE ROLLS [SIR JOSEPH JEKYLL]. This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for; and as a court of equity

¹ Sugden on Powers (8th Ed.) —, said:

"Thus, then, the jurisdiction stands, and we may inquire what amounts to such a consideration as will enable equity to interpose its aid in favor of a defective execution of a power.

"The aid of equity then will be afforded to a purchaser which term includes a mortgagee and a lessee. And even where an estate was, by a mistake in law, sold under a power by a stranger, the rule was supported, in consequence of acquiescence and acts by the cestuis que trust.

"And to a creditor.

"The like aid will be afforded to a wife, and to a legitimate child; for wives and children are in some degree considered as creditors by nature; and although to constitute a valuable consideration for a settlement on a wife or child, it must be made before marriage, yet the marriage and blood are meritorious considerations, and claim the aid of a court of equity in support of a defective execution of a power in their favour, although the power was executed after the marriage. * * *

"The like equity is extended to a charity. Lord Northington laid it down that the uniform rule of the court before, at, and after the statute of Elizabeth, was, where the uses are charitable and the person has in himself full power to convey, to aid a defective conveyance to such uses.

"But it has been decided that a defective execution of a power by a wife cannot be aided in favour of her husband; nor can a disposition by a married woman in conjunction with her husband, without the solemnities required by the power, although the trustees of the fund act upon it, be supported on the ground of the intention and the power to do the act; for the ceremonies in such a case are introduced for the express purpose of protecting the wife against the husband, and are matters of substance and not of form.

"Nor is the equity extended to a natural child.

"Nor, as it has at length been determined, to a grandchild.

"Neither will it extend to a father or mother, or brother or sister even of the whole blood, much less of the half blood, nor to a nephew, or cousin.

"And a fortiori, it cannot be afforded to a mere volunteer."

would, had this been the case of a copyhold devised, have supplied the want of a surrender, so where there is a defective execution of the power, be it either for payment of debts or provision for a wife, or children unprovided for, I shall equally supply any defect of this nature: the difference betwixt a non-execution and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.²

² Accord: *Sneed v. Sneed*, Ambl. 64 (1747).

In *Cooper v. Martin*, 3 Ch. 47. 58, Sir John Rolt, L. J., said: "Now, was it not a material part of the testator's intention, as declared in this case, that the power should be exercised, as he has said by deed or sealed instrument in writing, and not by will? In the same will, in creating a power over other subjects, the £70,000 and the Regent's Park ground rents, the testator has said that it might be exercised by deed or instrument in writing (omitting here the word "sealed") or by will; and again, if there should be no children, the general power given to the widow over the same properties was to be exercised by will only. Why these distinctions? It could not have been accidental, the proviso also that the power should be exercised before the youngest child attained twenty-five pointing in the same direction. On the whole of the will, it appears to me plain that the distinction was adopted because the testator thought it material that the power over the Pain's Hill estate, and over the residue, should not be exercised either by will or by an unsealed instrument."

In *Reid v. Shergold*, 10 Ves. Jr. 370, the devisee having a life estate in copyhold with the power of appointment by will sold and surrendered the estate to a purchaser and then died without appointing. Lord Eldon determined that equity could give no aid to the purchaser as on a defective appointment. He said: "The testator did not mean, that she should so execute her power. He intended, that she should give by will, or not at all; and it is impossible to hold, that the execution of an instrument, or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power. That therefore will not do."

SERGESON v. SEALEY.

(Court of Chancery, 1742. 2 Atk. 412.)

William Pitt,³ the son of Samuel Pitt, married Mrs. Speke, and by the marriage articles it was covenanted that if there should be one son only, and no younger children, and the wife should survive the husband, that she should have the power of disposing of £4000 by deed or will executed in the presence of three witnesses to any person she should appoint, and this sum was to be a charge upon the real estate of the husband.

Mr. William Pitt died, leaving only one son, Samuel Pitt the younger, who lived to be only nineteen, and dying before he came of age, his real estate descended upon Mr. Sergeson, the plaintiff's wife, who is great-niece of Samuel the elder, and heir-at-law to him, and to William Pitt his son, and to the infant Samuel the younger, the grandson of Samuel the elder.

After the death of Mr. William Pitt, Mr. Speke marries the widow; but before her second marriage, she, by articles executed in the presence of two witnesses only, appoints the sum of £2000 out of the £4000 to be for the use and benefit of her intended husband, during the coverture, and after her death to her son Samuel Pitt.

The other £2000 she makes a voluntary disposition of by will, but did not execute it in the presence of three witnesses.

LORD CHANCELLOR [HARDWICKE]. The question is, whether the articles entered into upon Mrs. Speke's marriage with Mr. Speke amount to an appointment within the power?

I am of opinion, that it is a good appointment of £2000 for the benefit of Mr. Speke; and notwithstanding it is insisted that it is a defective appointment, because there are only two witnesses,⁴ yet this court will supply the defect, where it is executed for a valuable consideration, much more where it is an execution of a trust only; and though the appointment is inaccurately expressed, and in an informal manner, it shall still amount to a grant of the £2000 to Mr. Speke; and if it amounts to a grant, what is the effect? Why, that Mr. Speke shall have the whole use and benefit of it during the coverture; and falls exactly within the reason of Lady Coventry's Case [2 P. Wms. 222]; where a tenant for life, with a power to make a jointure, covenants, for a valuable consideration, to execute his power, this court

³ Part of the case, relating to different points, is omitted.

⁴ So where the power is to appoint by will attested by three witnesses, and the appointment is by will attested by two witnesses, there is a substantial execution, and equity will, if the other requirements are fulfilled, aid it. *Wilkes v. Holmes*, 9 Mod. 485 (1752); *Morse v. Martin*, 34 Beav. 500 (1865). (Appointment attested by one witness instead of two.)

But by the Wills Act. St. 7 Wm. IV and 1 Vict. c. 26, § 10, no appointment made by will in the exercise of any power is valid unless executed in the manner required for the execution of a will.

will supply a defective execution, or a non-execution against the remainder-man.⁵

The next question is, as to the remaining £2000.

This was not an appointment for a valuable consideration, but only a voluntary disposition, and therefore as the will under which the £2000 is given was not executed in the presence of three witnesses, it has not pursued the power, and consequently was a void appointment, so that this £2000 sunk in the infant's real estate.

BLORE v. SUTTON.

(Court of Chancery, 1817. 3 Mer. 237.)

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT].⁶ This is a bill for the specific performance of an agreement to grant a lease. The agreement is alleged to have been entered into with the agent of the late Countess of Bath, who was tenant for life, with a power of granting leases in the manner and on the terms specified in the power; and the question is, whether there be any such agreement in this case as is binding upon the remainder-man, the defendant Sir Richard Sutton.

It appears to me that there is no sufficient agreement in writing; first, because Charles Noble, who signs his initials to the memorandum written on the plan, is neither alleged by the bill, nor proved by the evidence, to have been the authorized agent of Lady Bath; secondly, because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent, and the number of years. It does not even specify the commencement of the lease. By the parol evidence, indeed, it is said, that it was to be from the expiration of a subsisting lease. But then the whole agreement is not in writing.

It was insisted, however, that there is a parol agreement, in part executed; for the plaintiff has expended large sums in building upon the premises, partly in Lady Bath's lifetime, but principally since her death. The agreement, it is said, is therefore binding on the remainderman. It is rather difficult to say, that there is even a parol agreement by an authorized agent of Lady Bath. For the evidence is, that Noble, by the direction and with the privity of Mr. Cockerell, who was Lady Bath's agent, did make a verbal agreement with the plaintiff. This seems rather a delegation of Cockerell's authority, than the

⁵ So in the following cases a covenant to appoint in the exercise of a power to appoint inter vivos was enforced in equity as a defective appointment: Clifford v. Clifford, 2 Vern. 379 (1700); Fothergill v. Fothergill, 1 Eq. Cas. Ab. 222, pl. 9 (1702); Jackson v. Jackson, 4 B. C. C. 462 (1793); Shannon v. Bradstreet, 1 Sch. & L. 52 (1803). (Covenant to exercise a power to lease.)

⁶ The opinion only is here given.

personal exercise of it. He does not appear to have had any communication with the plaintiff. He does not say, I ratify the terms agreed upon by Noble, but, I authorize Noble to make the agreement. Supposing, however, that, by the effect of Cockerell's direction to Noble, this can be construed to be the parol agreement of Cockerell himself, and that, subsequently to such agreement, and on the faith of it, an expenditure has been made by the plaintiff, there is no authority for holding that the remainder-man is bound by such an agreement.

It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement, to attempt to take advantage of its not being in writing. But of what fraud is a remainder-man guilty, who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could have relied? The only way in which he could be affected with fraud, would be by showing, that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge, there is nothing in the mere circumstance of expenditure. For the prima facie presumption is, that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainder-man in this case, or those acting on his behalf, had any such knowledge, is neither alleged, nor proved. The reason, therefore, fails, on which the case of a parol agreement, in part performed, is taken out of the Statute of Frauds.

On the strict construction of the power, the remainder-man would only be bound by a lease executed conformably to it. But Lord Redesdale has, I think, in the case of *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, given satisfactory reasons, why a clear, explicit, written agreement ought, in equity, to be held equivalent to a lease, and as binding on the remainder-man as a formal lease conceived in the same terms would have been. But, to go farther, and say, that a man shall be bound, not by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the Statute of Frauds, without the existence of any of the pretexts on which it has been already too much infringed.

On the supposition that the plaintiff cannot obtain specific performance, he prays that he may be reimbursed for his expenditure out of Lady Bath's assets. This would be, as against her representatives, a decree merely for damages, and not a compensation for the benefit her estate has received. It is the estate of the remainder-man that is benefited by the houses built upon it. The competency of a court of equity to give damages for the non-performance of an agreement, has, notwithstanding the case of *Denton v. Stewart*, 1 Cox, 258, been questioned by very high authorities. In that case, however, the party was guilty of a fraud, in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it. But Lady Bath never refused to perform the agreement. On the contrary, the plaintiff alleges, that, if she had lived, she would have

granted him a lease. Then the case is only that he himself has been so improvident as not to get from Lady Bath that which, he says, she would have given him; namely, a lease that would have been binding on the remainder-man. That, surely, is not a case in which a court of equity will exercise a doubtful jurisdiction, by awarding damages for a loss, which, if it shall ever be sustained, will have been occasioned, more by the plaintiff's negligence, than by Lady Bath's fault. I say, if it shall be ever sustained; for it does not appear that the plaintiff has been yet evicted; and I cannot believe that Sir Richard Sutton, when able to judge and act for himself, will think of taking the benefit of the plaintiff's improvements, without making him a compensation for them. But, be that as it may, I should not be warranted in straining general principles in order to obviate the hardship of a particular case.

The bill must be dismissed, but without costs.⁷

SAYER v. SAYER.

INNES v. SAYER.

(Court of Chancery, 1848. 7 Hare, 377.)

The testatrix, Judith Innes, was, at the date of her will, entitled, under three different instruments, to the dividends on several sums of stock for her life, with general powers of appointment as to part of the funds under two of the instruments. 1. Under a settlement made in February, 1800, on the marriage of herself and Thomas Innes, her deceased husband, she was entitled for her life to £1826 8s. 11d., £3 per cent. Consols, standing in the names of the trustees of that settlement, with a power of appointment of £1000, like stock, part thereof, by her last will and testament, in writing, or any writing purporting to be her last will and testament, to be by her signed, sealed, and published, in the presence of and attested by two or more witnesses, and, in default of appointment, in trust for her next of kin living at the time of her decease. 2. The testatrix was entitled for her life to a sum of £559 4s. 9d., New £3½ per Cents., produced by property acquired after her marriage, standing in the names of the trustees of an indenture of August, 1823, limited in remainder to the sisters of the testatrix and their issue. 3. And, under the will of her deceased husband, Thomas Innes, dated in February, 1824, the several sums of £10,000, £3 per cent. Consols; £5000, New £3½ per Cents.; £300, Long Annuities; and £1500 14s. 5d., £3 per cent. Reduced Annuities, constituting his residuary personal estate, stood in the names of the executors and executrix of such will, of whom the testatrix was one, to the dividends of which sums she was entitled for her life, with re-

⁷ Cf. *Morgan v. Milman*, 3 De G. M. & G. 24 (1853).

remainder as to a third part of the same sums unto such person or persons, at such time or times, and in such parts, shares, and proportions, manner and form, as she, by any deed or deeds, writing or writings, to be by her duly executed, according to law, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or codicil, to be by her signed and published in the presence of, and attested by two or more witnesses, should give, bequeath, direct, limit, or appoint the same; and, in default of such gift or appointment, the testator, Thomas Innes, bequeathed the same to his brother, Alexander Innes, and his children, as therein mentioned.

The testatrix had also, at the date of her will, £800, New £3½ per Cents., standing in her own name, to which she was absolutely entitled, and which, by the additions she subsequently made, was augmented at the time of her death to £12,909 19s., like stock.

The testatrix, by her will, dated in January, 1833, unattested and not referring to the power, gave to the treasurer for the time being of the Sailors' Home "£1000, in the £3 per cent. Consols;" to the treasurer of the Strangers' Friend Society "£1000, in the £3 per cent. Consols;" to the British and Foreign Bible Society £500, in the £3 per cent. Consols, and the like sum to the Church Missionary Society, to be paid within six months after her decease; and to Harriet Ker Innes £500, in the £3 per cent. Consols, free of legacy duty, to be paid within such six months. The testatrix then proceeded: "The remainder in the £3 per Cents., and three separate sums in the New £3½ per Cents., with £100 a year, Long Annuities, and any other property I may die possessed of, of what nature or kind soever, I leave to my brothers," upon the trusts thereafter named. The testatrix made eight other unattested testamentary papers, giving legacies or revoking legacies previously inserted, the last of which papers was dated the 1st of September, 1836. At the foot of the eighth testamentary paper, the testatrix had written, "This will has not been witnessed, as I intend, if I am spared, to write it out fair." The testatrix made no appointment in exercise of her powers, unless such testamentary papers could be so considered.

The testatrix died in June, 1844, and the will and other testamentary papers or codicils were admitted to probate. There was no issue of the testatrix and her husband.

The suit of Sayer v. Sayer was instituted for the administration of the estate of the testatrix; and in that suit the treasurers of the several charities claimed to be allowed their several legacies as general legacies payable out of the personal estate. The master allowed their respective claims. The report was excepted to by the residuary legatees under the will of the testatrix.

The principal question argued was whether the gifts of Consols, in the will of 1833, were to be treated as a disposition or an intended disposition of that species of stock over which the testatrix had pow-

he took nothing —
a volunteer

ers of appointment under her marriage settlement and the will of her husband.

[The opinion of Sir James Wigram, V. C., on this question is omitted.]

The suit *Innes v. Sayer* was instituted by one of the four children of Alexander Innes, who were the residuary legatees under the will of the testator Thomas Innes, against his surviving executor, (the other children and residuary legatees being defendants,) praying that the plaintiff's fourth share of the third part of the four sums of stock might, as on default of appointment by the testatrix Judith Innes, be transferred to the plaintiff. After the judgment had been given on the exceptions in *Sayer v. Sayer*, the treasurers of the several charities were made parties to the suit *Innes v. Sayer*, by amendment, as adverse claimants on the third part of the £10,000, £3 per cent. Consols one of such four sums. At the hearing,

VICE-CHANCELLOR [SIR JAMES WIGRAM]. The Ecclesiastical Court has decided, that, notwithstanding the clause at the foot of the codicil of 1836, the will is a complete testamentary paper in this sense, that the testatrix means it to operate. If the testatrix meant the will of 1833 to operate, I have only to take the paper and inquire into its construction. The question of construction was the point I had to consider in the case of *Sayer v. Sayer*. I thought the language did necessarily refer to the property the subject of the power; and, referring to that property and intending the paper to operate as her will, (which I now assume to be the case,) I must conclude that the testatrix has declared her intention to execute the power. The only point, then, which has to be considered, is, what the effect of the will is to be.

It is only in the case of the legacies to the charities that the claim which I have now to consider can be made; and it appears to me, that the only question is, whether the authorities ought to bind me. I must attend to the decisions to ascertain whether they cover a given point, and when I have done so, and find that there are decisions in analogous cases, and that there are also dicta of learned judges pointing to the same conclusion, consider whether I ought, by any decision of mine, to shake that which is considered to have been the settled law, if not before the Statute of Elizabeth, certainly ever since. It cannot be denied that there are express decisions of the highest authority, that the court will supply the want of a surrender of a copyhold in favor of a charity. The supplying the surrender of a copyhold, and the supplying the execution of a power which is defective in form, go hand in hand. It appears to me, that wherever you find a decision that the court will supply the surrender, it follows (unless this case be an exception) that the court will also supply the defective execution of a power. Such a case is, by analogy at least, a strong authority for the proposition contended for.

With regard to a tenancy in tail, the distinction is palpable. No

doubt the tenant in tail has the whole interest. It is not the case of a mere execution of a power. At the same time, if he does not acquire the dominion of the estate in the form which the law requires, it goes to the issue in tail as a quasi purchaser. The issue take, not under the immediate ancestor, but under the author of the estate tail. Yet, even in this case, we find that, although the court will not perfect any intention which the testator may have manifested to bar the estate tail in favor of his creditor, wife, or child, that object not having been effected, the court will give effect to the intended disposition of the estate in favor of a charity—carrying it therefore in the case of a charity, for some reason or other, beyond the case of the creditor, wife, or child. The existence of such a class of cases certainly furnishes a second ground for following what has hitherto been considered the rule of the court.

The third ground is the dicta which unquestionably are to be found in favor of the proposition, that a charity is entitled, notwithstanding the power is not well exercised. The case of *Piggot v. Penrice*, Pre. in Ch. 471, with the note, Id. 473, appears to be an authority for the proposition in question. As the case is reported in *Comyns*, page 250, it would appear to be a direct authority on the point. At all events, I cannot disregard it as a decision, unless those who ask me to do so can show me that the case is materially distinguishable from the present case.

So much of analogy and dicta being found, I may refer to the opinion of text writers; and when text writers of great experience treat it as a settled principle of law, that the court will supply the execution,—so much, as I have said, being found to justify their opinion,—that is also a reason why I ought not to take upon myself to unsettle what hitherto has been considered the rule of the court.

The principle upon which the court appears to go is this, that, if a person has power by his own act to give property, and has by some paper or instrument clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shown his intention to do it, the court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion, whether the principle is right or not. There appears to be very high authority for the application of the principle, independently of the Statute of Elizabeth; and it has been applied since the Statute. I think, therefore, I ought not to entertain any question upon the point. If the point is to be hereafter considered and treated differently, it ought to be ruled by a higher authority than the judge who presides in this court.

There is another question, with reference to the different sums of Consols, which I must consider. It is, no doubt, the intention of the testatrix that the persons who would take in default of appointment

under her husband's will, should not take the residue of the stock. It is clear she meant to trench on the £1000 stock under the settlement; for by her will she disposes of more than the third of the Consols to which the power under her husband's will extends. There is nothing upon the will to intimate that she intended the fund to come out of one of those sums of stock, rather than the other. I must take the will as saying, "There are two sums of Consols over which I have a power of appointment: with respect to that stock, I give so much to the charity, and the residue to certain persons named." Those persons cannot take under that appointment, although the charity can. I do not see my way to marshalling the claims on the different funds. If I attempted to do so, I might to some extent be giving effect to the appointment in favor of those persons who are excluded by the circumstance of its informality.

The case was afterwards spoken to on minutes. The £1000 Consols, standing in the names of the trustees of the settlement of February, 1800, not being a subject of this suit, it was suggested that the charities should in this suit take no more than an apportioned part of their legacies out of the Consols which formed part of the residuary estate of Thomas Innes to be administered in this suit.⁸

JOHNSON v. TOUCHET.

(Court of Chancery, 1867. 37 Law J. Ch. [N. S.] 25.)

Bill⁹ against John Hastings Touchet, Richard Burgass, and Mary Dennis, the trustees and executors of the will of James Dennis, praying a declaration that a covenant in the marriage settlement of the plaintiff with Ann Dennis ought, in equity, to be deemed a sufficient execution of a power given to her by the will of James Dennis.

James Dennis, who died in 1855, devised and bequeathed the residue of his real and personal estate to the defendants upon trust, as to one

⁸ The minute of decree was: "Declare, that the testatrix intended by her unattested will, dated the 13th of January, 1833, to execute the general power of appointment given or reserved to her by the will of her late husband Thomas Innes, deceased, over one-third part of his residuary estate; and that the defective execution of the said power, by reason of the non-attestation of the will of the said testatrix, ought to be supplied in favor of the four charitable institutions therein mentioned. Directions for transfer of the stock, and payment of the accrued dividends to the several treasurers accordingly. Such transfer and payment to be without prejudice to the right (if any) of the plaintiff and the other residuary legatees of Thomas Innes to enforce contribution in respect of the said sums, stocks, and cash, against the £1000. £3 per cent. Consols, standing in the names of the trustees of the settlement of February, 1800, on which the testatrix had a general power of appointment."

The judgment of the Vice-Chancellor was affirmed, *Innes v. Sayer*, 3 Mac. & G. 606, 620-622 (1851); and was followed in *Pepper's Will*, 1 Pars. Eq. 436 (1850).

⁹ The following statement is substituted for that in the report.

undivided fifth part thereof, "for such person and persons, for such estate or estates, interest and interests, intents and purposes, and altogether in such manner and form" as Ann Dennis, after she should "attain the age of twenty-five years and not before" should by deed or deeds from time to time and at any time appoint, and in default of such appointment to pay the income to Ann Dennis during her life, and after her decease "for such person or persons, for such estate or estates, interest or interests, intents and purposes, and altogether in such manner and form" as Ann Dennis after she should "attain the age of twenty-five years and not before" should, by her last will, appoint; and in default of such appointment for her children, who being males should attain twenty-one, or being females should attain that age or marry.

In 1859, by an indenture between the plaintiff, Ann Dennis, and the defendant, John Hastings Touchet, and one James Dennis, after a recital that Ann Dennis was then about twenty-three years old, that a marriage was contemplated between her and the plaintiff, and that upon the treaty for the marriage it was agreed that Ann Dennis should enter into the covenant therein contained, it was witnessed that in pursuance of said agreement, and in consideration of said contemplated marriage, Ann Dennis and the plaintiff covenanted with said Touchet and James Dennis that in case the marriage should take effect and Ann Dennis should attain the age of twenty-five, she would appoint the property over which she should, on attaining twenty-five, have a power of appointment to said Touchet and James Dennis, in trust to pay the income to Ann Dennis during her life, and on her death to the plaintiff, and on the death of the survivor, to hold the principal for such one or more of her children, as she should appoint, and in default of such appointment for her children who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with gifts over.

After the making of this indenture the marriage between the plaintiff and Ann Dennis took effect. Ann Johnson attained the age of twenty-five in 1861. She died in 1864, leaving a husband and two children, and not having exercised the power of appointment.

STUART, V. C. The principles on which cases of this description depend are well settled. A covenant to exercise a power, if it has any operation at all, has it from the time of the execution of the covenant. If the covenant be one in favor of the children, or of persons who acquire rights recognized by the court, such as purchasers under a marriage settlement, it becomes particularly the object of the court's attention. The main argument against the alleged operation of the covenant in the present case was, that there was an express provision in the creation of the power that it should not be exercised until the donee of it should have attained the age of twenty-five years. It appears, however, that the donee, at the age of twenty-three years, executed

the covenant which is now asked to be declared a valid exercise of the power. The object of the donor of the power, in providing that the donee should not exercise it until twenty-five years of age, is fully attained by the circumstance that, from the nature of the covenant itself, it could have had no operation if the donee had died before attaining the age of twenty-five years. There cannot, I think, be a doubt, where there is a covenant of this kind, that, if the donee, having executed the covenant, survives the prescribed age, but refuses to perform the covenant by executing a formal appointment, this court will compel him to do so. Had that been the case here, it would have been one of a person called upon to perform a covenant entered into for a valuable consideration, contemplating the execution of an appointment at a future time. The effect of such a covenant is to bind the property by an equitable execution of the power. I abide by all that is stated in the report of my judgment in the case of *Affleck v. Affleck*.¹⁰ The decision arrived at in that case was founded on the accurate statement of the principles laid down by Lord Redesdale in *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. There, Lord Redesdale, in speaking of powers to jointure, said: "It has been determined that a covenant is a sufficient declaration of intent to execute, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute. In all these cases courts of equity have relieved." There, as in other cases, the covenant was made before the strict right to execute the power had, according to the terms of it, arisen; but it was decided that that was no substantial reason why the court should refuse to treat the covenant as a sufficient execution of the power. The other argument put forward in the present case to induce the court to treat this covenant as an invalid execution was, that the children, who are the objects of the original power as well as of the marriage settlement, will, if the covenant in it is not held to be an execution of the power, take immediately, under the limitation in the will, in default of appointment. But then the question still remains the same. If the covenant is a valid execution of the power, it cuts off the limitation in default of appointment. The case of the children might have been better if the covenant had not been executed; but as it is, they do not suffer much. Then, again, there is the interest of the husband to be considered. He is clearly entitled, under the marriage settlement, to the benefit of the covenant. Its execution formed part of the consideration for the marriage contract; and the court is bound to regard that. There must, therefore, be a declaration that the

¹⁰ 3 Sm. & G. 394 (1857). In this case A. on his marriage covenanted that if he came into possession he would exercise a power of jointuring which could be exercised only by tenant for life in possession. Before coming into possession G. became lunatic. Stuart, V. C., held, that the covenant was a defective execution of the power, and should be enforced after G. came into possession against the remainderman.

covenant binds the property. The costs of all parties as between solicitor and client, must be paid out of the share of the trust property to which the suit relates.¹¹

¹¹ In Cooper v. Martin, L. R. 3 Ch. 47, the widow was given a power to appoint by deed or instrument sealed and delivered before the youngest child attained the age of twenty-five. Held, that her will executed before the youngest child attained twenty-five, by taking effect by her death, after that period, was not an appointment and was not such a defective execution as would be relieved against in equity. Lord Cairns, L. J., said: "The power given to the widow was to be exercised by her before the youngest son attained twenty-five. The reason for this appears obvious on the face of the will. The residuary personal estate was to be distributed at the time, and although the life estate of the widow in Pain's Hill might as to it postpone the sale and distribution to a later period it was clearly in the highest degree desirable that at the period when the residuary estate should become divisible the children of the testator should know definitely what were their vested and transmissible rights in all his property. The time within which an appointment was to be made by the widow was therefore, in my opinion, not a matter of form, but of the substance and essence of the power."

CHAPTER VII
WHAT WORDS EXERCISE A POWER

SIR EDWARD CLÈRE'S CASE.

(Court of Queen's Bench, 1599. 6 Coke, 17b.)

See ante, p. 36, for a report of the case.

STANDEN v. STANDEN.

(Court of Chancery, 1795. 2 Ves. Jr. 589.)

Charles Millar by his will gave the sum of £200 to trustees upon trust to place "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen now residing with a company of players," apprentices, as the trustees should think fit. The testator then directed his real estate to be sold; and gave the money arising from the sale and the residue of his personal estate in trust for his wife for life; and after her decease as to one moiety for such person or persons as she should by any deed or writing or by will with two or more witnesses appoint, and for want of appointment, for "all the legitimate children of Charles Standen living at his decease, share and share alike;" and if but one, then for that one; "and if it should happen, that there should be no legitimate child of Charles Standen living at his decease," then for William Seward, one of the trustees, his executors and administrators. The testator gave the other moiety in trust for "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen," equally between them, share and share alike; with survivorship between them in case of the death of either before the age of twenty-one or marriage; and if it should happen, that both of them should die before the age of twenty-one or marriage, then he gave it in trust for "such legitimate children of Charles Standen" as should be living at the decease of the survivor of those two, share and share alike; if but one, for that one; and if there should be no such child living at the decease of the survivor, or all should die before the age of twenty-one or marriage, then for William Seward, his executors and administrators; and he appointed his trustees with his wife to be his executors.

The real estate was not sold. The testator's widow received the rents and profits and the produce of the personal estate for her life; and by

her will, after disposing of some specific articles and a gold watch and some jewels, which she described to have been her husband's she gave the residue thus: "All the rest, residue and remainder of my estate and effects of what nature or kind soever and whether real or personal, and all my plate, china, linen and other utensils, which I shall be possessed of interested in or entitled to at the time of my decease, subject to and after payment of all my just debts, funeral expenses and charges of proving my will and specific legacies, I give to my worthy friend Samuel Howard for his own use and benefit; and I do appoint him my executor."

This will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold. Charles Standen in 1755 married Anne Lewis. The defendant Charles Standen, the only issue of that marriage, was born in 1758. There was an objection to the validity of the marriage; and the parties after cohabitation for six or seven years separated under articles of agreement; and Anne Lewis went by her maiden name. In 1769 Charles Standen the father married Anne Gooch; who lived with him as his wife till her death. Charles Millar Standen, Caroline Elizabeth Standen, and others, children by the second marriage, were the plaintiffs.

Under a reference to the master, Charles Standen the defendant was reported the only legitimate child. Afterwards an issue was directed; and the verdict was in his favor. Lord Thurlow being much dissatisfied with the verdict directed another trial; in which there was also a verdict for the defendant Charles Standen. Upon the equity reserved the questions were, first, whether the plaintiffs Charles Millar Standen and Caroline Elizabeth Standen were entitled to the interests under the will of Charles Millar given to them by name, but under the wrong description of legitimate children; secondly, whether the residuary clause in the will of Mrs. Millar was a good execution of her power of appointment under the will of her husband; if not, thirdly, whether the plaintiffs were entitled to share with the defendant Charles Standen under the trust, for want of appointment of that moiety, for all the legitimate children of Charles Standen. Evidence of conversations with the person, who drew Mrs. Millar's will, to show she had no other real estate than that directed by her husband's will to be sold, was rejected.

June 9. LORD CHANCELLOR [LOUGHBOROUGH]. As to Charles Millar Standen and Caroline Elizabeth Standen the question is not very great; for a wrong description certainly will not take away their legacies. The argument is a strong one, that if he meant those two as legitimate children, he must mean all subsequent children of the same marriage to be legitimate; and yet I do not know how to bring them in as legitimate children when they are not so.

June 10. LORD CHANCELLOR. The point as to legitimacy does not arise; for after the best consideration I am clearly of opinion, that the

disposition made by Mrs. Millar affects that interest given to her by the will of her husband; and therefore no part of the estate belongs to the defendant Charles Standen. I have looked into the two cases cited against this construction; and those determinations are perfectly right.

In *Andrews v. Emmot* the will upon the view of it could not give to any person an idea, that the testator had the least relation to any interest he took, limited as that interest was, by the settlement upon his marriage. By that settlement a sum of £3000 stock was conveyed to trustees in trust for the husband for life; and after his decease, if his wife should survive him, to pay £500 to her for her own use and the interest of the residue to her for life; and after the decease of both to distribute such residue among the children of the marriage; and if there should be no child, to transfer the same as the husband should by deed or will appoint. Three months after the marriage the husband made his will; and at that time it was not natural to suppose, his object was to dispose of that interest; for he had no disposable interest in the property; he had a mere contingency in default of issue, that would give him a right to appoint. The will was a plain will, giving after the death of his wife some legacies, and the residue in general terms to Emmot. He lived three years afterwards; and at his death there was no issue. The claim was set up to £2500 part of the £3000 as passing under that will; and it was set up solely upon this ground, (for there were no words at all relating to it) that he had left such legacies, as could not otherwise be paid than by taking in this fund. The argument was perfectly weak: first, he was not to be in receipt of that sum till after the death of his wife and in the event of there being no children; therefore it was not to be relied upon for payment of the legacies; but independent of that the amount of the legacies could not be an indication of the state of his personal property. An inquiry as to the amount of his property at the time of making the will was refused very properly both by Lord Kenyon and Lord Thurlow; for it is too vague to calculate, that a man must be supposed to attach a contingent interest, not fairly to be deemed a property, merely because his calculation as to what he might die possessed of had eventually failed. Then put that out of the case: it would be harsh enough as against a wife to suppose him to execute this power, where *prima facie* no intention to execute is indicated.

The case in the Common Pleas is still more distinct. The money was not at all the property of the testatrix. It was to be paid not to her executor, but to such person as she should appoint. It was claimed by the same person, executor and residuary legatee. Nothing can go as part of the residue, that would not go to the executor; and clearly there the executor was not entitled; it was made payable to her appointee purposely to exclude the executor. How does this case stand? It is material to consider, what the interest was, that she took under

her husband's will, and what has she done. She was entitled for life to the income of all the residue of his real and personal estate; and a moiety was given to her absolute disposal by any deed or writing or by her will attested by two witnesses. She was not limited as to objects; and as to the mode it was as ample a latitude, as any one could have. It is a little hard to attempt to explain, that it was not her estate. How could she have had it more than by the enjoyment during life and the power of disposing to whatever person and in whatever manner she pleased with the small addition of two witnesses. By her will she gives all her estate and effects. It is hard to say, that using that expression she meant to distinguish, and not to include, this; which is as absolutely hers as any other part of her property. But the person, who drew the will, goes on with augmentative phrases "of what nature or kind soever, and whether real or personal:" these words do not add much to the force of it: "which I shall be possessed of interested in or entitled to." It is admitted there would be no doubt, if she had said, "of which I have power to dispose." Those last words would not add much after what she said before. But take it according to the strict technical rule in Sir Edward Clere's Case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. Mrs. Millar had no other real estate. I am bound to satisfy all these words upon the technical rule. I can satisfy them no other way. I cannot avoid supposing what every one must be convinced she meant, that she made no difference between what she had from her husband and her other property. Therefore there is no difficulty as to this moiety; and the other belongs to Charles Millar Standen and Caroline Elizabeth Standen.¹

JONES v. TUCKER.

(Court of Chancery, 1817. 2 Mer. 533.)

Mary Mones, by her will, gave and devised all her freehold and copyhold estates to the use of the defendant Tucker, his heirs and assigns, upon trust to permit Elizabeth Smith, widow, to receive the rents, &c. for her life, for her own use and benefit; and, after her death, upon trust to sell and dispose of the same, and out of the produce thereof (among other things) to pay, and the testatrix thereby bequeathed, £100, "to such person or persons as the said Elizabeth Smith should by her last will appoint;" and, subject to the payment thereof, and of certain other sums thereby given, the testatrix gave and devised the said estates to the defendant, his heirs and assigns, and appointed him sole executor.

¹ The decree was affirmed in the House of Lords, 6 Bro. P. C. (Toml. ed.) 193.

Elizabeth Smith survived the testatrix Mary Mones, and made her will as follows: "I will and bequeath to Mrs. Mary Jones (the plaintiff) the sum of £100, likewise the whole of my household furniture, plate, and linen, &c. Whatever remains to me for rent from Mr. Tucker, is to discharge my rent and funeral. I likewise appoint the aforesaid Mary Jones to be my sole executor. And if the said Mary Jones should decease, her husband Mr. Richard Jones to execute instead."

Elizabeth Smith died on the 7th of March, 1814, and the plaintiff Mary Jones proved the will.

The bill, charging that Elizabeth Smith, at the time of her death, was not possessed of, or entitled to any personal estate whatever, except a few articles of household furniture, which were shortly afterwards sold by the plaintiffs for £13, and the produce applied in payment of her funeral expenses; and that she had often, before she made her will, expressed and declared it to be her intention to give to the plaintiff Mary Jones the sum of £100, over which the power of appointment was given her by the will of Mary Mones; and that, in making her will, she particularly instructed the person who prepared it, that the said sum of £100, so charged on the freehold and copyhold estates, should be thereby disposed of and given to the plaintiff; prayed that the defendant might be decreed to pay the same accordingly; or that so much of the three per cents. (wherein the produce of the estates sold had been invested) as was necessary, should be sold, and the £100 paid thereout.

The defendant, by his answer, submitted that the £100 given by the will of Elizabeth Smith was not an appointment of the £100 under the will of Mary Mones, but a general legacy; and said that, so far from having made (in the defendant's presence, or to his knowledge) any such declarations of intention as in the bill stated, Mrs. Smith had, since the date of her will, expressed a wish to sell the reserved sum of £100, and had even offered the same for sale accordingly.

No evidence was gone into; and the bill not having put in issue the fact that Mrs. Smith had no other property but the furniture, which was sold, at the time of making her will, a motion had been made before the Lord Chancellor, for liberty to amend, by inserting a charge to that effect; but which was refused, the cause being already set down for hearing; and it now came on to be heard upon bill and answer.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT]. Although the property in dispute, in this case, is of little value, the question is of considerable importance. With reference to the general rule, to which it is sought to make it an exception, it is, assuming the statement to be true, perhaps as strong a case as can be brought before the court. If a person, having no property at all, and only a power over a certain sum of money, gives that single sum, little doubt can arise as to the in-

tention. But the question is, how we can get at the fact, and whether there can be an inquiry for the purpose of ascertaining it. In *Andrews v. Emmott*, 2 Bro. 297, in the first instance, the court did direct an inquiry into the state of the property, at the time of the will being made, as well as at the time of the death. But, when the cause came on for further directions, the Master of the Rolls seems to have been of opinion, that the quantum of property was not a fit subject for inquiry. I agree that that was a weaker case than the present. It was not asserted that the testator there had no personal property, but only that he had not enough to pay all he had given; which is but a slight circumstance as an indication of intention. Here it is alleged, that the testatrix had no property, except a few articles of household furniture, which she has specifically bequeathed. Some property, however, she had. She speaks of rent due to her, as well as household furniture, plate, and linen. Then, what is to be the quantum of property that shall furnish the criterion for deciding whether a testator, making a bequest, is or is not exercising a power? It is not like an inquiry whether there be anything but copyhold to answer a devise of land. The question there is, whether there was anything for the will to operate upon at the time when it was made? A will of personalty speaks at the death. The state of that description of property at the time of the will, does not furnish the same evidence as to the intention.

In the case of *Nannock v. Horton*, 7 Ves. 398, the Lord Chancellor, referring to *Andrews v. Emmott*, and other cases of that class, takes it to be settled "that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was executing the power or not."

In my own private opinion, I think the intention was to give the £100, which the testatrix had a power to dispose of; but I do not conceive that I could judicially declare the power to have been executed, even if the result of an inquiry should verify the representation that is made as to the state of her property.

Bill dismissed.²

² Accord: *Webb v. Honnor*, 1 Jac. & W. 352 (1820); *Davies v. Thorns*, 3 De G. & Sm. 347 (1849).

Contra: *White v. Hicks*, 33 N. Y. 383 (1865). And see *Munson v. Berdan*, 35 N. J. Eq. 376 (1882).

WALKER v. MACKIE.

(Court of Chancery, 1827. 4 Russ. 76.)

The testatrix in this case had power to appoint by will a certain leasehold estate, and certain sums of 3 per cent. stock, which were standing in the name of the Accountant-General of the Court of Chancery. She was entitled to both for her life; and the stock had been transferred to the accountant-general upon a bill filed by her.

The testatrix began her will by giving certain pecuniary legacies, and then gave "all the rest and residue of her bank stock to her god-daughter, Mary Ann Wood, with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court, over which she had a power of appointment.

The question was, whether the will was a good execution of the power, so as to pass the stock.

THE MASTER OF THE ROLLS [SIR JOHN LEACH] was of opinion that the will was a good execution of the testatrix's power as to the 3 per cent. stock in court; that her pecuniary legacies were payable out of it; and that the will was also a good execution of her power as to the leasehold estate; it being plain that she meant to describe the property, over which her power extended, under the words—"all other property which she possessed,"—by excepting out of it £50 of her bank stock, which she gave to her executors.³

³ Sugd. Pow. (8th ed.) 321: "But it has been since said that Walker v. Mackie does not appear to be reconcilable with other cases, particularly that of Webb v. Honor, 3 Myl. & Kee, 697. But Webb v. Honor, it is submitted, is not an authority against Walker v. Mackie, nor is it entitled to more weight than the latter case, and the writer is not aware of any other case not reconcilable with Walker and Mackie. The observation alluded to was made in the case of Hughes v. Turner, in which Sir John Leach at the Rolls followed the doctrine in Walker v. Mackie, Hughes v. Turner, 3 Myl. & Kee, 666; but when upon the rehearing in Hughes v. Turner, it was decided that the testatrix was seised in fee of estates in the counties she mentioned in her will, the main prop of his argument was removed, and it would have been difficult to hold that the mere gift of two or three trifling articles which were in effect comprised in the power, the testatrix's possession of which was not accounted for without reference to the power, could give to a general residuary gift and devise the operation of an execution of the power."

Per Wood, V. C., In re Davids' Trusts, H. R. V. Johns. 495, 499: "The testatrix describes the subject of the gift as 'my property to be found in the Three and a Half per Cent. Reduced Bank Annuities now reduced to Three and a Quarter per Cent., and all other property whatsoever and wheresoever,' which would, to say the least, be a very fanciful way of describing the property of which she might be possessed. At the date of the will the stock had for many years ceased to bear the old name, and it would be a strange thing for a testatrix, intending to describe her possible future acquisitions:

GRANT v. LYMAN.

(Court of Chancery, 1828. 4 Russ. 292.)

The testator, John Veal, made his will, *inter alia*, in the following words: "I give and bequeath my present dwelling-house, garden, premises, and land adjoining, now in the occupation of Mr. Charles Baker, to Elizabeth, my dearly beloved wife, for her use and benefit during her life, and with a power of giving and disposing of the said house and premises after her decease, with the limitation and condition of her bequeathing the same to any one of my own family she may think proper. Item, I give and bequeath to my said wife all my household furniture, plate, linen, books, and other utensils; and, after her decease, to any one or more of my own family she may wish or direct."

Elizabeth Veal, the testator's wife, survived him, and by her will "gave and bequeathed all her leasehold property, her moneys and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money, and to stand possessed of the same, for the only use and benefit of John Grant, when he should attain twenty-one; and if he should die before twenty-one, then to the only use and benefit of the brothers and sisters of the said John Grant who should be living at the time of his decease, with benefit of survivorship between them."

It was proved in the cause, that the testatrix, at the making of her will and her death, had no other leasehold property than the dwelling-house bequeathed to her by her husband. John Grant, the legatee, was nearly related to the testator John Veal, but was one degree more remote than his next of kin.

It was not contended that John Grant could claim any part of the personal chattels of the testator John Veal, which might be in the possession of his widow at her death, under the general description of "her moneys, &c.;" but it was insisted, that, inasmuch as the testatrix had no other leasehold estate than the dwelling-house specifically

to designate them by a name which had long been obsolete. This alone seems to show that she was referring to specific stock, which had once been known as a sum in the Three and a Half per Cents., and was at the date of the will converted into Three and a Quarter stock. This view is confirmed by an additional circumstance. The power did not authorize an exclusive gift, and accordingly we find two gifts of £10 each to the only two other objects of the power, followed by the gift of all the residue of the stock and all other property to Charlotte Elizabeth Dixon. The question which I have to decide is whether, under these circumstances, I must not treat this as a gift of two sums of £10 out of specific stock, and a specific gift of the residue of such stock, together with all other property of the testatrix, to the petitioner. The distinction is a very nice one; but I am of opinion that I am justified in holding the terms to be sufficient to constitute a specific disposition of an existing fund."

described in the testator's will, the bequest of all her leasehold property amounted to evidence of her intention to exercise her power in that respect; and further, that John Grant, being one of the testator's family, was capable of taking, although not one of his next of kin.

THE MASTER OF THE ROLLS [SIR JOHN LEACH]. It is well settled, that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee, giving freehold estate, will be so far deemed an execution of the power; for otherwise the will, as to that property, would wholly fail. There is no distinction between freeholds and leaseholds in the nature of the subjects; the difference is only in the quantity of interest: and there does not appear to me to be any solid ground, upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of moneys, securities for moneys, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and as to them, the will must refer to them as the subjects of the power, or they will not pass.⁴

[THE MASTER OF THE ROLLS then considered the question whether the appointment of that moiety of the tenements in Surrey, of which she the gift to John Grant was good, and determined that it was.]

DENN d. NOWELL, v. ROAKE.

(House of Lords, 1830. 6 Bing. 475.)

This cause having been removed by a writ of error from the Court of Common Pleas to the Court of King's Bench, and thence to the House of Lords, the opinion of all the judges was now delivered by

ALEXANDER, C. B. My Lords,—there is no difference of opinion among the judges in this cause.

The question which they have had to consider in pursuance of your Lordships' order, is expressed in these words:

Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these: In the year 1749, estates, one moiety of which is now in question, upon the death of their father, Miles Poole, descended upon Sarah the wife of Thomas Scott, and Elizabeth the wife of Henry Roake, who were his daughters and co-heirs, validly settled to

⁴ But cf. *Webb v. Homor*, 1 Jac. & W. 352 (1820).

the following uses: one full undivided moiety to the use of Thomas Scott for life; the remainder to the use of Sarah Scott his wife for life; remainder to the use of such person or persons, and for such estate and estates, as the said Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time limit, direct, or appoint; and for want of appointment, to the use of the children of that marriage; and in default of issue, this moiety was limited to Elizabeth Roake for her life, with limitations to her family analogous to those which I have mentioned respecting Sarah Scott and her family.

The other undivided moiety was limited for the use of Elizabeth Roake for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the preceding moiety. It is unnecessary to detail them. Sarah Scott survived her first husband, Thomas Scott, and afterwards intermarried with one John Trymmer, whom she also survived.

She became a widow the second time in 1766. In 1775 she purchased the other undivided moiety from the family of Roake. By deeds dated in that year, that moiety was conveyed to make a tenant to præcipe, in order to the suffering of a common recovery, which recovery it was declared should inure to the use of Henry Roake for life, with remainder to Sarah Trymmer, the widow, in fee. Henry Roake died in 1777, and by his death Sarah Trymmer came into the possession of that undivided moiety. From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally by the deeds of 1750 limited to the family of Roake; and as to her own moiety, her first husband, Thomas Scott, being dead, she was tenant for life of it, with power of appointment or authority before particularly stated, and in default of appointment the estates stood limited to the several uses I have also before stated.

Such were the rights, interests, and authorities which were vested in Sarah Trymmer when she made the will to which the question put by your Lordships refers.

That will is dated on the 6th of June 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words: "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake, for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew John Roake, I devise all my estates, subject to and chargeable

with the payment of £30 a year to Ann, the wife of the said John Roake, for her life, by even quarterly payments to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew John Roake, should die without issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of £30 a year to the said Ann Roake for her life in manner aforesaid, to and among my nephews and nieces Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns forever."

My Lords, we are of opinion that this devise is not an execution of the authority given to Sarah Trymmer by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir Edward Clere's case in the reign of Queen Elizabeth, to be found in the Sixth Report, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. All the words are satisfied by the undivided moiety of which she was the owner in fee.

It is said that the present is a question of intention, and so perhaps it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled.

It would be extremely dangerous to depart from these rules, in favor of loose speculation respecting intention in the particular case.

It is, therefore, that the wisest judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them.

I will refer to one only, to *Jones v. Tucker*, 2 Mer. 533, before Sir William Grant. In that case a person had power to appoint £100 by her will; she bequeathed £100 to the plaintiff, and, it is said, had nothing but a few articles of furniture of her own to answer the bequest.

The language, which, according to the reporter, Sir W. Grant used was this, "In my own private opinion, I think the intention was to

give the £100 which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to John Roake the devisee for life, viz., that he should, out of the rents and profits of the devised premises, keep them in tenantable repair.

I say this is the only circumstance, because it has been fixed by many cases, that using the words "my estates," although the subject of the power might have been at one period the property of the person to exercise it, will not be considered as an execution of the power.

We are of opinion that the direction respecting the repairs has no effect in proving, according to the authorities, that this testatrix meant to execute her authority over the undivided moiety of this estate.

It appears to us that this would be to contradict that long list of decisions to which I have referred, and would be to indulge an uncertain speculation in opposition to positive rules.

There is no incongruity in directing a tenant for life of an undivided moiety to keep his share of the premises in repair. A person with such an interest is not without remedies for enforcing repairs, and at the worst the devise would make him liable as against the remainderman for dilapidation.

It seems, therefore, to my brothers as well as to myself that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of Sarah Trymmer did not operate as an execution of her power.

Judgment of the Court of King's Bench affirmed.⁵

⁵In the Common Pleas the defendant had judgment, *Doe d. Nowell v. Roake*, 2 Bing. 497 (1825); but this was reversed in the King's Bench on writ of error, *Denn d. Nowell v. Roake*, 5 B. & C. 720 (1826). The case in the House of Lords, where the judgment of the King's Bench was affirmed in accordance with the opinion of the judges, is reported fully, sub. nom. *Roake v. Denn*, in 4 Bligh N. S. 1.

In the following cases a residuary clause of general words of devise were held not to amount to an execution of the power. *Namock v. Horton*, 7 Ves. Jr. 391, 400; *Hollister v. Shaw*, 46 Conn. 248; *Harvard College v. Balch*, 171 Ill. 275, 283, 49 N. E. 543; *Md. Mut. Ben. Soc. v. Clendinen*, 44 Md. 429, 431, 22 Am. Rep. 52; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Meeker v. Breintnall*, 38 N. J. Eq. 345; *Bingham's Appeal*, 64 Pa. 345; *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734; *Bilderback v. Boyce*, 14 S. C. 528.

In *In re Wait*, 30 Ch. 617, 621, the testator having a special power to appoint by will two estates at B. and S. respectively and also a power to appoint some shares in the B. Colliery by his will made gifts of "my estate at B." and of "my estate at S." and another gift of "all my share and interest in the B. H. & W. Colliery Cos." He had no property of his own at either B. or S., but he had some shares of his own in the B. Colliery. Held, that the power was exercised not only as regarded the estates at B. and S.,

In re MILLS.

(Chancery Division, 1886. L. R. 34 Ch. Div. 186.)

Thomas Mills, who died in 1865, by his will dated in 1860, devised certain real estate to trustees upon trust for his widow for life, and then for his son William Braithwaite Mills for life, and after his death for such one or more of his children or other issue born in his lifetime as he, the son, should by deed or will appoint; and, in default, upon trust for the son's children equally.

The widow died in 1880.

William Braithwaite Mills, by his will, dated the 13th of November, 1884, after appointing trustees and executors, and giving his furniture and other household effects to his wife absolutely, proceeded as follows: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust," to sell and convert and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies, and to pay the income of a sum of £7,000, part of such proceeds, to his widow while she remained unmarried, with remainder, as to the capital, in trust for his children by her, or their issue, as his wife should appoint, and, in default, in trust for his children by her who being sons should attain twenty-one or daughters attain that age or marry, in equal shares. And the testator further directed his trustees to hold the sum of £3,500 in trust for his daughter Helena, and the remainder of the residuary trust funds in trust for his son John Harker Mills, but if he should die before attaining twenty-five, then for such child or children of John H. Mills as should survive him and being sons attain twenty-one or daughters attain that age or marry, and if no such child then for the testator's other children in equal shares. Then followed a direction settling the shares and interests of his daughters, including the £3,500, for their separate use without power of anticipation, with remainders to their children as they should appoint, and in default, to such children.

W. B. Mills died on the 9th of January, 1886, leaving surviving him his widow and four children, namely, his son John Harker Mills and daughter Helena Mills, both by a former wife, and two daughters by his present widow. Neither at the date of his will nor at his death had he any real estate of his own.

but also as to the shares in the B. Colliery. *Contra*: *Lewis v. Lewellyn*, 1 T. & R. 104; *Napier v. Napier*, 1 Sim. 28.

Such words in the instrument of appointment as "the residue of my estate belonging to me at the time of my decease or over which I may have any power of disposition or control," or "I bequeath all my property over which I have any disposing power," have been held sufficient to exercise the power. *In re Teape's Trust*, L. R. 16 Eq. 442; *Thornton v. Thornton*, L. R. 20 Eq. 599. But the words "all my real and personal estate to which I may be possessed or entitled or over which I may have 'any beneficial power of disposition'" has been held insufficient to execute a special power. *Ames v. Cadogan*, L. R. 12 Ch. Div. 868.

The question was whether the general devise in W. B. Mills' will operated as an exercise of the special power of appointment given him by the will of his father, Thomas Mills.

To have this question decided, the trustees of the will of Thomas Mills took out an originating summons against the widow, children, and trustees of the will of W. B. Mills, for a declaration whether the latter will did or did not execute to any and what extent the power given to W. B. Mills by the former will, and who were now beneficially entitled to the property the subject of the power; and how the costs of the application should be provided for.

KAY, J. The short question in this case is whether a special power of appointing real estate among children or issue is exercised, since the Wills Act, by a general devise of real estate where the appointor at the date of his will had no real estate of his own?

[His Lordship then stated the facts and continued:]

There is no reference in the son's will to the power of appointment or to the property comprised in it; but at the date of the will, and also at the time of his death, he had no real estate of his own. He left children by a former wife, besides children of the wife mentioned in his will.

It is argued that before the Wills Act, 1 Vict. c. 26, this would have been an exercise of the power, because at the date of the will he had no other real estate, and the general devise in the will under the old law must therefore be treated as if it had been a devise of the particular real estate which was the subject of the power.

But it is said, on the other hand, that the reason for this was because otherwise that devise could have no possible operation, whereas, this will being since the Wills Act, the testator might have acquired real estate of his own after the date of the will which would pass by such a devise.

The case of personal estate under the old law, it is suggested, could never be precisely analogous, because it could hardly happen that a testator could at the time of his will be without some personal estate. However, it is certain that under the old law a general bequest of personal estate would not operate as the exercise of a power of appointment of personal property, even where it was clear that at the date of the will the bequests in it could not be satisfied out of the testator's own personal estate. Parol evidence of that fact was not admissible. *Jones v. Tucker*, 2 Mer. 533; *Jones v. Curry*, 1 Sw. 66.

In *Nannock v. Horton*, 7 Ves. 391, 399, where the testator had power to appoint £4,000 stock by will, he, by his will, gave various sums of stock. Lord Eldon in his judgment contrasts the case of personal estate thus: "Every gift of land, even a general residuary devise, is specific. Only that, to which the party is entitled at the time, can pass. But, as to personal estate, he may give that, which he has not, and never may have; and at all events whatever he may happen to

have at his death will pass. He might have had stock, before he died; though he might have had none at the date of the codicil."

It is strange that the question should not have been determined, but counsel have not cited, nor can I find, any decision precisely in point.

It is purely a question of intention. Did the testator intend to exercise his power? *Bennett v. Aburrow*, 8 Ves. 609, 615; *Denn v. Roake*, 6 Bing. 475.

The intention of a testator can only be inferred from the words of his will, and from the circumstances which at the time of executing it were known to him, and which the court, putting itself in his place, is bound to regard.

Here, at the date of his will, the testator had no real estate. By his will he in general words gives "all my real and personal estate." Power and property are completely distinct; and if he had at that time any real estate it is clear the power would not have been exercised. The other principal facts bearing upon the question of his intention are these. The will contains a gift out of the bulk of the proceeds of his real and personal estate to his wife, who was not an object of the power, and a direction out of the same fund to pay funeral and testamentary expenses and debts, which could not be done out of the property subject to this special power. The provisions for issue of children are not confined to issue born in his lifetime, to whom alone under the terms of the power he could make a valid appointment. All these are indications which tend to prove that it was not his intention to exercise this special power. *Doe v. Bird*, 11 East, 49, shows that such indications ought to be regarded.

Besides, I must suppose him acquainted with the law which enabled him by a general devise to pass real estate he might acquire after the date of his will: in fact most people, I suppose, are now aware of this. It is the intention at the date of his will which must be considered. If the power was exercised by this general devise, any real estate acquired by the testator afterwards would also pass, unless that general devise could be read as referring exclusively to the property subject to the power, which, since the Wills Act, seems impossible.⁶

⁶ In *Wooster v. Cooper*, 59 N. J. Eq. 204, 224, 45 Atl. 381, 389, Gray, V. C. says: "It is not so clear, as the learned counsel for the defendant contends, that a general devise of lands by the donee of a power, who owns no lands at the date of the will, must, in New Jersey, be held to have been made in view of the power and with an intention to execute it. The theory upon which the above-recited cases go, is, that the testatrix must have contemplated the execution of the power, because when she made her will devising real estate she had no land of her own, and that within the power was the only land which she had at her disposal, and therefore she intended by the devise to execute the power. This theory had support as indicative of the testator's intent at the time of making his will, so long as the state of the law was such that a devise passed only those lands (whereof the testator died seized) which he owned at the time of the making of his will. *Smith v. Curtis*, 29 N. J. Law. 352. This condition of the law was, however, changed by the statute of 1851 (Gen. Stat. p. 3761, § 24), which declared that lands whereof the testator died seized, though acquired after the making of

But the cases under the old law show plainly that, if the devise did operate upon property belonging to the testator, general words such as these would not exercise a power. The reason for holding that such words did exercise the power was, that otherwise they could not have any operation. Under the old law a general devise never both passed property of the testator and also exercised a power, unless that was shown to be the intention by some other indication.

The language of Chief Baron Alexander in the House of Lords in *Denn v. Roake*, 6 Bing. 478, is this: "I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered an execution of such power or authority."

Sir William Grant in *Bennett v. Aburrow* says that the intention may be collected from other circumstances than an express reference to the power, "as, that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power."

It is impossible to say that a general devise is wholly inoperative if it passes real estate acquired afterwards; and if it might have that operation when made, it is difficult to treat it as wholly ineffectual because the testator at the date of his will had no real estate. Certainly it would at least be potentially operative. You could not say it "would be wholly inoperative."

A testator well-advised, though he had no real estate at the time of making his will, and though he desired not to exercise a special power, might still wish to insert in his will a general devise of real estate.

Perhaps the case which most nearly touches the point is *Mattingley's Trusts*, 2 J. & H. 426, in which it was decided that under the new law a special power to appoint stock among children was not exercised by appointment of "my money in the funds," although the testator at

a will, should pass by a general devise unless a contrary intention was expressed. This statute destroys the hypothesis upon which the above-stated theory depends, for since a general devise will now pass not only the lands left by the testator, which he owned at the date of his will, but also those which he acquired after that date, it is no longer true that the will of a donee of a power having, at the time of making his will, no lands other than those disposable within the power, would be inoperative unless applied to the power. The will may now operate at the time of the testator's death upon lands not within the power, which he acquired after the making of the will. The testator by his general devise may have intended to devise such after acquired lands, and as this possibility satisfies all the provisions of the will, without applying it to the power, it can no longer be maintained that a testator, who is the donee of a power, must, *ex necessitate*, be held to have intended to execute the power when making a general devise of land."

the date of the will had no stock of his own; because, as the Vice-Chancellor said, if it were held that those words pointed to a specific fund, it would follow that they would not pass any after-acquired property of that description.

That is to say, the words which are read as exercising the power in the case of personal estate must be such as refer to the property comprised in the power exclusively, and would not be operative upon after-acquired personal estate.

This was precisely the reason why a general devise of real estate under the old law effected the execution of a power where the testator had no real estate at the time. The will was read as though it contained a specific devise of the real estate which was the subject of the power, and that specific devise of course could not, under any circumstances, pass any other estate.

Speaking for myself, I have the strongest objection to anything like a general rule for discovering intention. To say that, wherever a testator making a will since the Wills Act has no real estate at the date of his will, that testator shall be taken to have intended by a general devise to exercise a special power over real estate, would to my mind be so unreasonable as to be irrational. I believe that such a rule would defeat the intention at least as often as it would effectuate it.

There being no such decision upon a will made since the Wills Act, the former authorities are not precisely in point; and I feel emancipated from any restriction they might put upon my judgment.

The far better and safer rule, in my opinion, is in each case to consider and weigh the words of the particular will and the surrounding circumstances at the date of it, amongst which the enlarged operation of a general devise is a most important one.

It has been suggested that the Wills Act shows an intention rather to extend the operation of wills in exercising powers—at least as to general powers, which by sect. 27 are to be considered as exercised by a general devise or bequest unless a contrary intention appear by the will—and that therefore a special power should be still treated as exercised in all cases where it would have been so treated under the old law. The argument involves a fallacy. If the reason for presuming the intention of the testator to exercise the special power is taken away by other provisions in the Act, the presumption ceases; and the fact that general powers are specially provided for affords no indication that the Act intended to preserve the presumption as to the exercise of special powers when it destroyed the reason for that presumption.

On the best consideration I can give in this case, to the words of the will, and to the circumstances of the testator at the time, I do not believe he intended to exercise this special power. If not exercised the property would go in default amongst all his children: it is reasonable to suppose he desired not to disturb that provision. I believe

either that he forgot all about the power or that he desired not to exercise it. If he forgot the power but intended to pass the property subject to it, possibly that might be sufficient; but I cannot find anything to satisfy me that this was his intention.

The burden of proof is on those who assert affirmatively that the power was exercised: the court must be satisfied of this by sufficient evidence. I am not so satisfied. The inclination of my opinion is that the testator did not intend to exercise this special power.⁷

The costs will come out of the general residue of the testator's estate.

AMORY v. MEREDITH.

(Supreme Judicial Court of Massachusetts, 1863. 7 Allen, 397.)

HOAR, J. The testatrix, Miss Elizabeth Amory, being in feeble health, conveyed all her real and personal estate to trustees, upon the trust to manage the property and pay the income of it to her during her life; to reconvey the whole to her whenever she and the trustees should think it expedient to terminate the trust; or, upon her decease before its termination, to convey it to such persons as she should by her last will designate; or, upon her death intestate, to her heirs at law. She afterward inherited a small amount of real and personal estate which was not included in the trust, and the trust was not terminated during her life. By her last will she gave and devised one half of all the estate, real, personal and mixed, of which she should die seised or possessed, to trustees, for the benefit of the family of a brother; one tenth in trust for a sister and her children; and the residue of her said estate to four brothers and sisters named in the will. This suit is brought by her executors and trustees to obtain the direction of the court in the execution of their trusts, on account of the conflicting claims of the heirs at law and the devisees under the will. And the question is, whether the real and personal estate embraced in the deed of trust will pass under the will?

The answer to this question is to be sought by ascertaining the intent of the testatrix as manifested by the will; and this intention being once ascertained, effect is to be given to it accordingly.

We are therefore to decide whether the language of Miss Amory's will, construed in reference to all the property in which she had a legal or equitable interest at the time it was made, and at the time of her death, shall be held to include in its disposition the property of which she had a power of appointment.

Without reviewing in detail the numerous English cases, it is perhaps sufficient to say that, according to the doctrine of the English courts of chancery, the will would certainly not be a good execution

⁷ Accord: In re Williams, 42 Ch. Div. 93.

of the power. The cases are summed up and reviewed in *Doe v. Roake*, 2 Bing. 497, and in *Blagge v. Miles*, 1 Story R. 426, Fed. Cas. No. 1479. The distinction between "power" and "property" is carefully preserved through all of them; and the refinements and subtleties to which this distinction leads are great and perplexing. The general rule is thus stated by Chancellor Kent, in his Commentaries: "In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest." "The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution of it." 4 Kent Com. (6th ed.) 335. And Mr. Justice Story, in *Blagge v. Miles*, gives three classes which "have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power." He adds that these are not all the cases, and that it was always open to inquire into the intention under all the circumstances; while he agrees that "the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation." And it has uniformly been held that a mere residuary clause gave no sufficient indication of intention to execute a power.

But the inconvenience and injustice to which the English doctrine gave rise have been a constant subject of remark by the judges who applied it. Thus in *Jones v. Tucker*, 2 Meriv. 533, a case which perhaps illustrates as well as any how far the rigid application of a rule can go in misconstruction, where a woman had a power to appoint £100 by her will, and bequeathed to the plaintiff £100, having no property of her own to answer the bequest except a few articles of furniture, Sir William Grant said: "In my own private opinion, I think the intention was to give the £100 which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

So in *Hughes v. Turner*, 3 Myl. & K. 688, Sir John Leach remarked: "The question in this case arises from the distinction which has been adopted and settled in courts of equity between the power of disposing of property, and the technical right of property; a distinc-

tion which has been regretted by eminent judges, and which as Lord Eldon has observed, although professed to be adopted in order to further the intention of the testator, in nine cases out of ten defeats that object." He held the power executed. But after his death, the case was reheard by his successor as Master of the Rolls, who reversed the judgment with the remark, "I fear that the intention of the testatrix may be defeated by my decision."

Lord St. Leonards, the highest authority on any question relating to this branch of the law, says that, "in reviewing the cases, it is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Sugden on Powers (8th Ed.) 338.

It is not surprising that a course of decisions obnoxious to such criticisms should be at length controlled by legislation. By St. 7 Will. IV and 1 Vict. c. 26, § 27, it was declared that a general devise of real or personal estate, in wills thereafter made, should operate as an execution of a power of the testator over the same, unless a contrary intention should appear on the will. Upon this English Statute Judge Story observes, in a note to *Blagge v. Miles*: "The doctrine, therefore, has at last settled down in that country to what would seem to be the dictate of common sense, unaffected by technical niceties." 1 Story R. 458, note.

We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely, in a majority of cases, to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English Statute appears to us the wiser and safer rule; certainly when applied to cases like the one now under consideration, where the testatrix is dealing with property which had been her own, and of which she had the beneficial use, as well as the power of disposal.

The point to be determined is simply this: Did Miss Amory mean to dispose of the property held under the deed of trust, by the terms of her will, in devising all the estate of which she should be possessed at her death? We can have no doubt that she did. It was originally her property by inheritance. She received the income of it during her life. She had the complete power of disposal over it by will; and it constituted the great bulk of the property over which she had testamentary control. If she died intestate, like the rest of her property, it was to go to her heirs. The trust had been created merely with a view to relieve her, when in feeble health, from the trouble of managing and investing her estate, and with a provision that the trust should be terminated whenever, in her opinion and that of the trustees, it might be expedient. The rest of her property had been transferred, though not to the legal ownership, yet to the care and custody of the same trustees; had been treated in precisely the same manner

with that included in the trust; and we can see no reason to believe that it was regarded by her in any different light.

The decree will therefore direct the trustees to convey the property held by them in accordance with the devises and bequests of the will.⁸

⁸ In the following cases it was held, on the special context of the appointing instrument and the surrounding circumstances, that the power was well exercised: *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 367, 3 Sup. Ct. 221, 27 L. Ed. 962; *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038.

In *Stone v. Forbes*, 189 Mass. 163, 169, 75 N. E. 141, 142, the court, by Morton, J., said:

"It is settled in this commonwealth that a general power of appointment is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee of the power. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270; *Sewall v. Wilmer*, 132 Mass. 131; *Cumston v. Bartlett*, 149 Mass. 243 [21 N. E. 373]; *Hassam v. Hazen*, 156 Mass. 93 [30 N. E. 469]. And, whatever may have been the case formerly, that is now the law in England. *Airey v. Bower*, 12 App. Cas. 263; *Boyes v. Cook*, 14 Ch. D. 53. And both in this commonwealth and in England the fact that the power is created after the execution of the will does not prevent the will from operating as an execution of the power.—*Willard v. Ware*, 10 Allen, 263; *Osgood v. Bliss*, 141 Mass. 474 [6 N. E. 527, 55 Am. Rep. 488]; *Airey v. Bower*, *ubi supra*. In England these results have been arrived at by means of statutory enactments. But in this commonwealth they have been reached by the application of general principles. In this case, however, the power is a special one, and it is contended that different rules apply. It is conceded that, in regard to special as well as in regard to general powers, the question is one of intention on the part of the donee of the power. But it is contended that those claiming under a special power must show affirmatively that the donee intended to execute it, that it is doubtful whether a special power can be exercised by a will executed before the power was created, and that there is nothing in the case before us which fairly warrants the conclusion that the donee of the power intended to execute it.

"On principle there would seem to be no just ground for a distinction between general and special powers so far as relates to the execution of the power before or after it is created. It may be that by reason of its conditions or limitations the reasons are stronger for holding that a special power cannot be executed by anticipation than for holding that a general power cannot; but they do not seem to us enough stronger to warrant us in saying that in one case the power can be executed by anticipation and in the other that it cannot. A general power of appointment is hardly less within the range of expectation than a special power. Before the Wills Act so called, 1 Vict. c. 26, § 27, it was the law of England that a party claiming under a power must show that the donee intended to execute it, the presumption being that he had not executed it unless the contrary plainly appeared. *Amory v. Meredith*, 7 Allen, 397; *Mills v. Mills*, 34 Ch. D. 186, 194; *Foulkes v. Williams*, 42 Ch. D. 93.

"The wills act changed this with regard to general powers, but, in consequence of the construction given to the act by the courts, left special powers unaffected. *Turnbull v. Hayes*, [1900] 2 Ch. 332; *s. c.* on appeal, [1901] 2 Ch. 529; *Foulkes v. Williams*, *ubi supra*:

"In regard to general powers the rule now is that a general devise of property real or personal is presumed to include a general power of appointment unless the contrary appears from the will. *Jarm. Wills* (6th Ed.) 634, 635. In regard to special powers the rule remains the same as laid down before the passage of the wills act respecting powers generally. If it were necessary to determine the question we should hesitate to follow the rule laid down by the English cases in regard to special powers of appointment. There is certainly less reason for doing so since *Amory v. Meredith* than

before. There would seem to be no good reason why the question whether a special power of appointment had been exercised should not be determined by the same rules that are applied in other cases to the construction or interpretation of wills, or why the distinction between a power and property, which has resulted in many instances, as courts have been compelled to admit, in defeating the intention of the testator should be adhered to in cases where as in the present the donee of the power has the use of the property for his life and may, not unnaturally or unreasonably, have failed to distinguish between property strictly and technically belonging to him and that of which he has the use. But we do not think that it is necessary to determine whether the rule laid down by the English cases in regard to special powers should or should not be followed in this Commonwealth. For we think that it clearly appears that J. Malcolm Forbes intended to exercise the power and that he has done so."

Note.—On the mode of executing a power of sale on a mortgage deed, see *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476 (1875).

CHAPTER VIII

POWERS IN LIFE TENANTS TO DISPOSE OF THE FEE

BRANT v. VIRGINIA COAL & IRON CO.

(Supreme Court of United States, 1876. 93 U. S. 326, 23 L. Ed. 927.)

Appeal from the Circuit Court of the United States for the District of West Virginia.

In April, 1831, Robert Sinclair, of Hampshire County, Va., died, leaving a widow and eight surviving children. He was, at the time of his death, possessed of some personal property, and the real property in controversy, consisting of one hundred and ten acres. By his last will and testament he made the following devise: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal; that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with every thing that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The will was duly probated in the proper county.

In July, 1839, the widow, for the consideration of \$1,100, executed a deed to the Union Potomac Company, a corporation created under the laws of Virginia, of the real property thus devised to her, describing it as the tract or parcel on which she then resided, and the same which was conveyed to her "by the last will and testament of her late husband." As security for the payment of the consideration, she took at the time from the company its bond and a mortgage upon the property. The mortgage described the property as the tract of land which had on that day been conveyed by her to the Union Potomac Company.

In 1854 this bond and mortgage were assigned to the complainant and Hector Sinclair, the latter a son of the widow, in consideration of \$100 cash, and the yearly payment of the like sum during her life. Previous to this time, Brant and Hector Sinclair had purchased the interest of all the other heirs, except Jane Sinclair, who was at the time, and still is, an idiot, or an insane person; and such purchase is recited in the assignment, as is also the previous conveyance of a life-interest to the company.

In July, 1857, these parties instituted suit for the foreclosure of the mortgage and sale of the property. The bill described the property

as a tract of valuable coal land which the company had purchased of the widow, and prayed for the sale of the estate purchased. Copies of the deed of the widow and of the mortgage of the company were annexed to the bill. In due course of proceedings a decree was obtained directing a sale, by commissioners appointed for that purpose, of the property, describing it as "the lands in the bill and proceedings mentioned," if certain payments were not made within a designated period. The payments not being made, the commissioners, in December, 1858, sold the mortgaged property to one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company.

The defendant corporation, the Virginia Coal and Iron Company, derive their title and interest in the premises by sundry mesne conveyances from Hammill, and in 1867 went into their possession. Since then it has cut down a large amount of valuable timber, and has engaged in mining and extracting coal from the land, and disposing of it.

Brant, having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal from the land, and to compel an accounting for the timber cut and the coal taken and converted to its use.

The court below dismissed the bill, whereupon Brant brought the case here.

FIELD, J. The disposition of the case depends upon the construction given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings as an estoppel upon the complainant from asserting title to the property.

The complainant contends that the widow took a life-estate in the property, with only such power as a life-tenant can have, and that her conveyance, therefore, carried no greater interest to the Union Potomac Company. The defendant corporation, on the other hand, insists that, with the life-estate, the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life-estate. The language used admits of no other conclusion; and the accompanying words, "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected.

In the case of *Bradley v. Westcott*, reported in the 13th of Vesey,

the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free, and absolute disposal and disposition during life; and the court held, that, as the testator had given in express terms an interest for life, the ambiguous words afterwards thrown in could not extend that interest to the absolute property. "I must construe," said the Master of the Rolls, "the subsequent words with reference to the express interest for life previously given, that she is to have as full, free, and absolute disposition as a tenant for life can have."

In *Smith v. Bell*, reported in 6 Pet. 68, 8 L. Ed. 322, the testator gave all his personal estate, after certain payments, to his wife, "to and for her own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former, and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice Marshall, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said, "But suppose the testator had added the words 'during her natural life,' these words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make."

The Chief Justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words, "devising a remainder to the son," were thus equivalent.

In *Boyd v. Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator not otherwise disposed of, "to be at her own disposal, and for her own proper use and benefit during her natural life;" and the court held that the words "during her natural life" so qualified the power of disposal, as to make it mean such disposal as a tenant for life could make.

Numerous other cases to the same purport might be cited. They all show, that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended.

The position that the complainant is estopped, by the proceedings for the foreclosure of the mortgage, from asserting title to the property, has less plausibility than the one already considered. [The balance of the opinion on this point is omitted.]

The decree of the Circuit Court must be reversed and the case remanded for further proceedings in accordance with this opinion; and it is so ordered.

SWAYNE and DAVIS, JJ., dissented.

WOODBIDGE v. JONES.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 549, 67 N. E. 878.)

Petition, filed February 25, 1901, for registration of title under the land registration act, St. 1898, c. 562, R. L. c. 128, to a parcel of land on the corner of Denver and Central Streets in the town of Saugus, known as the Salmon Snow place and being a portion of the real estate formerly owned by William H. Twiss, late of Saugus, deceased. The respondents in their answer denied that the petitioners were seised in fee simple of the premises described in the petition, for the reason that as a matter of law the second clause of the will of William H. Twiss did not empower Sarepta Twiss, grantor of the petitioners, to give a good and valid deed of the premises.

The case was tried before Davis, J. The second clause of the will of William H. Twiss is quoted by the court.

The property in question, together with other land, had been conveyed to the testator in January, 1881, by Nancy Snow, the mother of the testator's first wife, and the great grandmother of the defendant Dora S. Jones. The testator and his second wife, Sarepta Twiss, were married in 1858. In 1878 Nancy Snow, then a widow, who had for some years lived alone and had received much care from the testator and Sarepta, having become old and feeble was brought by the testator to his own home and there cared for by the testator and Sarepta until 1887, when she died at the age of eighty-seven years, devising all her property, to the appraised value of \$1,526, to William H. Twiss, with the exception of a legacy of \$50 to her grandson, the father of Dora S. Jones.

The probate inventory of the estate of William H. Twiss showed real estate to an appraised value of \$5,985, and personal estate to an appraised value of \$12,793, the premises in question being appraised at \$1,900.

On January 30, 1901, the premises were conveyed to the petitioners by Sarepta Twiss by a full warranty deed in common form.

On the foregoing facts the judge ruled as matter of law, first, that under the second clause of the will of William H. Twiss, his widow, Sarepta Twiss, took a life estate in the premises in suit, with a power of disposing of the same in fee simple; and second, that the deed from her to the petitioners of January 30, 1901, was a valid exercise of such power; and filed a decision ordering a decree for the petition-

ers. At the request of the respondents, he reported the case upon the foregoing facts, rulings, and decision, for determination by this court.

If the rulings were right, a final decree was to be entered for the petitioners as ordered. If the rulings were wrong, a final decree was to be entered dismissing the petition.

HAMMOND, J. Before proceeding to the consideration of this case, we desire to comment upon the form of the report. The report calls for the interpretation of a clause in a will. In such a case, for reasons too obvious to be stated, not only the clause itself, but the whole will, should be placed before us; and, where that is not done, we cannot be entirely free from apprehension that something which, if placed before us, would have thrown light upon the question involved, may have been omitted, and, in a close case, that the thing omitted might have led us to a different conclusion. In the report before us, no part of the will is contained in the report, except the clause upon which the question before us has arisen, and we therefore enter upon the consideration of it with reluctance.

The clause is as follows: "I devise and bequeath all the rest and residue of my estate, both real and personal, to my wife, Sarepta Twiss, during her life, to use and dispose of the same as she may think proper, with remainder thereof on her decease, one-third to the heirs of my brother Isaac Twiss, one-third to the heirs of my brother John G. Twiss, and the balance to Dora S. Jones above mentioned." And the question is whether the life tenant had the power to dispose of any portion of the real estate in fee. It is a narrow and difficult question. If the writer of this will had studied the decisions made in this state and elsewhere, with a view to frame a clause which in that respect should be as ambiguous and obscure as possible, it is doubtful if he could have selected language more appropriate for his purpose than that which he actually used. As to a student in geometry it sometimes happens that a solid angle in a particular figure before him will seem at one moment to point up, and at another moment down, so the interpretation of this clause seems to change according as emphasis is placed on the word "dispose," on the one hand, or on the technical meaning of the word "remainder," on the other. On the one hand, it is urged that by the express language of the will there is devised to the wife a life estate only, with the remainder to the other devisees named in the clause; that the word "remainder" is used in its proper technical sense, namely, as describing an estate limited to take effect and to be enjoyed after the determination of another estate which is created with it, and that in this case the previous estate is a life estate; that, if the testator had meant by the word to indicate only such property as remained undisposed of at the decease of the life tenant, he would have avoided this technical word, and would have used some such phrase as "whatever remains"; that, as against the technical meaning of the word "remainder," the testator, by the

phrase "to use and dispose of the same as she may think proper," meant simply to emphasize in express language the powers over the property which are conferred by law upon the life tenant as such, just as sometimes similar language following a devise in fee has been held to describe expressly only what the law would have implied, and therefore to be of no real legal effect. See *Veeder v. Meader*, 157 Mass. 413, 32 N. E. 358.

On the other hand, it is urged that the word "dispose" is broad enough to include a conveyance in fee, and that to limit its operation to only such power as the law gives to a life tenant strictly as such is to give to it no meaning at all; that the word "same" clearly refers to the property itself, and not merely to the estate in it (see the language of *Chapman, C. J.*, in *Cummings v. Shaw*, 108 Mass. 159, in which case, however, there was no devise over), and that the word "remainder" is not used in its technical sense, but simply means whatever property shall remain undisposed of at the time of the decease of the life tenant (see *Ford v. Ticknor*, 169 Mass. 276, 47 N. E. 877). While we are not aware of any case where the language of the will is precisely like this, still authorities may be found which in their general effect would fairly seem to sustain either of these views; and, as we have said, the question, though narrow, is difficult. The facts respecting the circumstances of the testator and his relation to the objects of his bounty, as set forth in the report, bear some in favor of one interpretation, and some in favor of the other. The testator had no children, and the life tenant was his second wife. His property was not large, and he may have felt that the income would be insufficient for her support. On the whole, we are inclined to the view that the word "same" refers to the property, and not to the life estate; that the word "dispose" includes a conveyance absolute and in fee simple, and that therefore the life tenant had the power during her life to make such a conveyance of a part or the whole of the property; and that the word "remainder," while used in a technical sense, must still be held as subordinate to the power given as above stated to the life tenant, and liable to be defeated as to any part of the estate over which the power was exercised. This construction gives effect to the clause conferring the right to dispose, and is not inconsistent with the technical meaning of the word "remainder," but simply makes the estate described by it, while vesting upon the decease of the testator, yet defeasible by the exercise of the power conferred upon the life tenant. In a word, it gives effect to every clause, and is not inconsistent with what might reasonably be supposed to be the intention of the testator.

For cases where language somewhat similar to that used in this will has been construed in this state, see *Cummings v. Shaw*, *ubi supra*; *Ford v. Ticknor*, *ubi supra*; *Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131, and cases cited; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E.

365; *Sawin v. Cormier*, 179 Mass. 420, 60 N. E. 936; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; *Lewis v. Shattuck*, 173 Mass. 486, 53 N. E. 912; *Burbank v. Sweeney*, 161 Mass. 490, 37 N. E. 669. And for cases decided elsewhere, and which seem somewhat in conflict with each other, see *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200.

Decree for the petitioners as ordered.¹

¹ *Lewis v. Palmer*, 46 Conn. 454; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Security Co. v. Pratt*, 65 Conn. 161, 180, 32 Atl. 396; *Giles v. Little (C. C.)* 13 Fed. 100; *Moyston v. Bacon*, 75 Tenn. (7 Lea) 236.

See, also, *In re Cashman's Estate*, 134 Ill. 88, 24 N. E. 963 (1890); *Vanatta v. Carr*, 223 Ill. 160, 79 N. E. 86 (1906); *Clark v. Middlesworth*, 82 Ind. 240; *Ramsdell v. Ramsdell*, 21 Me. 288.

PART IV
RULE AGAINST PERPETUITIES

CHAPTER I
THE RULE AND ITS COROLLARIES

CHILD v. BAYLIE.

(King's Bench and Exchequer Chamber, 1618. Cro. Jac. 459.)

See ante, p. 150, for a report of the case.

DUKE OF NORFOLK'S CASE.

(Court of Chancery, 1682. 3 Ch. Cas. 1.)

See ante, p. 153, for a report of the case.

LLOYD v. CAREW.

(House of Lords, 1697. Show. Parl. Cas. 137.)

Appeal from a decree of dismissal in chancery. The case was thus: Rice Tannott died seised in fee of several lands in the several counties of Salop, Denbigh and Montgomery, leaving three daughters and co-heirs, Mary, Penelope, and Susan. Susan married Sidney Godolphin, one of the present appellants. In July, 1674, Mary and Penelope, in consideration of £4000 paid to the said Mary by Richard Carew, Esq.; and in consideration of a marriage to be had, and which was afterwards had, between Penelope and the said Richard Carew, by lease and release, convey all those their two parts of the said lands in Denbigh, Salop, and Montgomery, to trustees and their heirs, to the use of Richard Carew for life, then to Penelope for life for her jointure, then to the said trustees and their heirs, during the lives of Richard and Penelope, to preserve contingent remainders; then to the first and other sons of

Richard and Penelope in tail male successively: and in default of issue male, to the daughters of Richard and Penelope in tail: and in default of such issue, as to one moiety of the said two parts, to the first and other sons of the said Penelope by any other husband in tail, the remainder of all and singular the premises to the said Richard Carew and his heirs forever, subject to this proviso, "that if it should happen that no issue of the said Richard, upon the body of the said Penelope, should be living at the decease of the survivor of them, and the heirs of the said Penelope should within twelve months after the decease of the survivor of the said Richard and Penelope dying without issue as aforesaid, pay to the heirs or assigns of the said Richard Carew the sum of £4000, that then the remainder in fee-simple so limited, to the said Richard Carew and his heirs should cease; and that then, and from thenceforth, the premises should remain to the use of the right heirs of the said Penelope forever."

After this Mary intermarried with the appellant Sir Evan Lloyd, and a partition was made of the premises, and the same had been enjoyed accordingly ever since, and Mr. Carew and his lady levied a fine to Mr. Godolphin and his lady of his part; who did thereupon by their deed dated 23 Sept. 1676, covenant to levy a fine of Mr. Carew's two parts, to such uses as he and his lady should limit and appoint, but have not yet levied the said fine.

Richard Carew and Penelope his wife, to avoid all controversies that might happen, whereby the estate of the said Richard Carew, or his heirs, might be questioned or encumbered by the heirs of Penelope; and to the end to extinguish and destroy and bar all such estate, right, title, equitable or other interest, as the said Penelope then had, or her issue and heirs might have or claim to the same, by any power, settlement, or condition, on payment of £4000 or otherwise, to the heirs of Richard Carew, by the heirs of the said Penelope; and for the settling of the same on the said Richard Carew and his heirs, did in Michaelmas Term, 1681, levy a fine of the share and part allotted to them, and by deed of 10 Dec. 1681, declare that the said fine should be to the use of the said Richard for life, remainder to Penelope for life, the remainder to the said Richard Carew, his heirs and assigns forever: and do further declare, that the fine agreed to be levied by the appellants Sidney Godolphin and Susan his wife, by their deed dated the 23 Sept. 1676, should be to the same uses, and then direct the trustees by the first settlement to convey to those uses.

Penelope died without issue in 1690. Richard Carew made his will in August, 1691, and devised the said lands to Sir John Carew, Baronet, his brother, subject to pay all his debts and legacies, and made Sir John Carew his executor.

In December, 1691, Richard Carew died without issue, and Sir John Carew entered, and was seised and possessed of the premises, and paid £4855 for the debts of Richard Carew.

Sir John Carew died, and the respondent, Sir Richard Carew, an infant, is his son, heir, and executor.

The appellants, Mary and Susan claiming the lands as heirs to Penelope, by virtue of the said proviso in the first settlement, upon payment of the £4000 exhibited their bill in Chancery to compel the trustees to convey the estate to them upon such payment.

Upon hearing of this cause on bill and answer, the court ordered a state of the case to be drawn, which was as above; and afterwards the court [SIR JOHN SOMERS, C.], assisted by the Chief Justice of the Common Pleas [SIR GEORGE TREBY] and Mr. Justice ROOKSBY, seeing no cause to relieve the plaintiffs, dismissed their bill.

And now it was argued on behalf of the appellants, that such dismissal ought to be set aside; and amongst other things, it was insisted on in favor of the appeal, that this proviso was not void; that it was within the reason of the contingent limitations allowed by the late Lord Chancellor Nottingham in the case of the Duke of Norfolk, and there were quoted several paragraphs in the argument made by the said Lord Chancellor, as that future interests, springing trusts, or trusts executory, remainders that are to emerge or arise upon contingency, are quite out of the rules and reasons of perpetuities; nay, out of the reason, upon which the policy of the law is founded in those cases, especially if they be not of remote or long consideration, but such as by a natural and easy interpretation will speedily wear out, and so things come to the right channel again: that though there can be no remainders limited after a fee-simple, yet there may be a contingent fee-simple arise out of the first fee; that the *ultimum quod sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined; that though it be impossible to limit a remainder of a fee upon a fee, yet 't is not impossible to limit a contingent fee upon a fee; that no conveyance is ever to be set aside in Chancery, where it can be supported by a reasonable construction, especially where 't is a family settlement. Then these paragraphs were applied; and further urged, that there could not in reason be any difference between a contingency to happen during life or lives, or within one year afterwards; that the true reason of such opinions which allowed them, if happening within the time of the parties' lives, or upon their deceases, was because no inconvenience could be apprehended thereby; and the same reason will hold to one year afterwards; and the true rule is to fix limits and boundaries to such limitations, when so made, as that they prove inconvenient, and not otherwise: that this limitation upon this contingency happening, was the considerate intention of the family, the circumstances whereof required consideration, and this settlement was the result of it, and made by good advice: that the fine could not bar the benefit of this proviso; for that the same never was, nor ever could be in Penelope, who levied the fine.

As to the pretence, that if the appellants were relieved, Richard Carew who married Penelope, would have no portion with her. 'T was answered, that that could not alter the case; the agreement and intention of the parties being the most considerable matter; and besides, Richard enjoyed the estate during his life without impeachment of waste. And as to the debts, 't was answered, that those were no ingredients in the question; however there would be £4000 paid towards it, and the personal estate was more than enough to pay the residue. For which, and other reasons, 't was prayed that the dismissal might be reversed.

On the other side it was insisted on with the decree, 1, that the limitation by the settlement in July, 1674, to the heirs of Penelope, upon payment of £4000 by them to the heirs of Richard Carew, within twelve months after the death of Richard and Penelope, without issue, at the time of the decease of the survivor of them, is a void limitation, the fee-simple being before limited to Richard and his heirs, and so not capable of a further limitation, unless upon a contingency to happen in the life of one or more persons in being, at the time of the settlement; which is the furthest that the judges have ever yet gone, in allowing these contingent limitations upon a fee; and which were the bounds set to these limitations by the late Lord Chancellor Nottingham, in the case of the Duke of Norfolk; that though there were such expressions as had been read on the other side, yet the bounds set by him to these limitations, were only dependent upon life or lives in being, and never as yet went any further: and if they should be extended, and allowed to be good upon contingencies to happen within twelve months after the death of one or more persons, they may be as well allowed upon contingencies to happen within a thousand years; by which all the mischiefs, that are the necessary consequents of perpetuities, which have been so industriously avoided in all ages, will be let in; and the owner of a fee-simple thus clogged, would be no more capable of providing for the necessities and accidents of his family, than a bare tenant for life.

2. If this limitation were good, 't was urged, that the estate limited to the heirs of Penelope was virtually in her, and her heirs must claim by descent from her, and not as purchasers; and by consequence this estate is effectually barred by the fine of Penelope: the design of limiting this power to the heirs, not being to exclude the ancestor; but because the power could not in its nature be executed until after the decease of the ancestor, it being to take effect upon a contingency, that could not happen till after that time; and this bill and appeal was not only to have the said Richard Carew, who married Penelope, to have not one farthing portion with his wife, but to make the now respondent Sir Richard Carew, to lose the £4855 which his father Sir John Carew paid, as charged on the lands in question. For which reasons, and

many others well urged about the mischief and danger of perpetuities, and their increase of late years, to the entangling and ruin of many families, it was prayed that the decree of dismissal might be affirmed, but the same was reversed.

LOW v. BURRON.

(Court of Chancery, 1734. 3 P. Wms. 262.)

The bill was for an account of the rents and profits of divers messuages and lands in Warrington, in Lancashire, on this case: John Casson, seised of an estate for three lives in the premises, by his will dated the 12th of January, 1684, devised them to his daughter Mary Mollineux for life, remainder to her issue male, and for want of such, remainder to one Low, under whom the plaintiff claimed. Mary Mollineux, by lease and release, conveyed the premises, in consideration of her marriage with Edward Burron, to the use of herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her husband Burron. In 1705, Mary died without issue, and the plaintiff claiming under the person in remainder, now brought this bill for an account of the rents and profits.

The questions were, first, One having an estate for three lives, and devising it to A. in tail, remainder to B., whether this remainder was good? 2dly, supposing it to be good, whether A. by such lease and release could bar it?

As to the first it was said, and so agreed by the court, that the limitation of an estate pur autre vie to A. and the heirs of his body, makes no estate-tail in A. for all estates-tail are estates of inheritance, to which dower is incident, and must be within the Statute De Donis; whereas in this kind of estate, which is in no inheritance, there can be no dower, neither is it within the Statute, but a descendible freehold only.

ALSO THE LORD CHANCELLOR [LORD TALBOT] held plainly, that this was a good remainder to B. on A.'s death without issue, it being no more than a description, who should take as special occupants during the lives of these three cestui que vies. As if the grantor had said, "instead of a wandering right of general occupancy, I do appoint, that after the death of A. the grantee, they who shall happen to be heirs of the body of A. shall be special occupants of the premises; and if there shall be no issue of the body of A. then B. and his heirs shall be the special occupants thereof." And that here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So, if instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in effect, it is only for one life, (viz.) that which shall happen to be the survivor. For which reason, it were very im-

proper to call this an estate-tail, since at that rate it would not be liable to a forfeiture, or punishable for waste, the contrary whereof is true.

2dly, the LORD CHANCELLOR said, that though by a lease, or by a lease and release, A. might bar the heirs of his body, as in some respects claiming under him, yet he inclined to think A. could not bar the remainder over to B. who was in the nature of a purchaser, and would be no way subject to the encumbrances of A. any more than if the estate pur autre vie had been limited to A. for life, remainder to B. for life; in which case plainly A. could not bar B. especially by this conveyance of lease and release, which never transfers more than may lawfully pass: whereas the conveying away or barring the remainder limited to B. (admitting it to have been a good remainder) is doing a wrong to B. and depriving him of an estate, which was before lawfully vested in him. Nay, indeed, it seemed to him, as if no act which A. could do, would be capable of barring this limitation over to B. in regard there could be no common recovery suffered thereof, it being only an estate for lives; and his Lordship said, that this (as he remembered) was determined in the case of Sir Hardolph Wasteneys in the House of Lords, upon an appeal from this court.

But notwithstanding all this, yet, it appearing that the right of the plaintiff, and of those under whom he claimed, had accrued so long since as the year 1705, now near thirty years ago, during all which time the defendant's possession had been unmolested, and the Statute of Limitations being pleaded, (though it was urged, that the plaintiff had not the lease in his possession, and that the defendant in his plea had set forth, that the lease had been renewed: and though it was moreover insisted, that however the plaintiff might be disabled from bringing an ejectment, he might yet bring a bill in equity;) the LORD CHANCELLOR declared, he would grant no relief in the case of so stale a demand, and therefore allowed the plea.

JEE v. AUDLEY.

(Court of Chancery, 1787. 1 Cox, 324.)

Edward Audley, by his will, bequeathed as follows, "Also my will is that £1000 shall be placed out at interest during the life of my wife, which interest I give her during her life, and at her death I give the said £1000 unto my niece Mary Hall and the issue of her body lawfully begotten, and to be begotten, and in default of such issue I give the said £1000 to be equally divided between the daughters then living of my kinsman John Jee and his wife Elizabeth Jee."

It appeared that John Jee and Elizabeth Jee were living at the time of the death of the testator, had four daughters and no son, and were

of a very advanced age. Mary Hall was unmarried and of the age of about 40; the wife was dead. The present bill was filed by the four daughters of John and Elizabeth Jee to have the £1000 secured for their benefit upon the event of the said Mary Hall dying without leaving children. And the question was, whether the limitation to the daughters of John and Elizabeth Jee was not void as being too remote; and to prove it so, it was said that this was to take effect on a general failure of issue of Mary Hall; and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and consequently it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and 21 years afterwards, beyond which time an executory devise is void.

On the other side it was said, that though the late cases had decided that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly, as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee having children after the testator's death, they being then 70 years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases, which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give an effect to words which would totally defeat such intention.

The cases mentioned were Pleydell v. Pleydell, 1 P. W. 748. Forth v. Chapman, 1 P. W. 663. Lamb v. Archer, Salk. 225. Rachel's Case, cited 2 Vern. 60. Smith v. Cleaver, 2 Vern. 38, 59. Pollex. 38. Atkinson v. Hutchinson, 3 P. W. 258. Wood v. Saunders, Pollex. 35. Hughes v. Sayer, 1 P. W. 534. Cook v. Cook, 2 Vern. 545. Horsley v. Chaloner, 2 Vez. 83. Coleman v. Seymour, 1 Vez. 209. Ellison v. Airy, 1 Vez. 111.

MASTER OF THE ROLLS [SIR LLOYD KENYON]. Several cases determined by Lord Northington, Lord Camden, and the present Chancellor, have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder: in the former case the children living at the testator's death only shall take: in the latter those who are living at the time the interest vests in possession; and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the landmarks of the law; it is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and 21 years or 9 or 10 months afterwards. This has been

sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's Case to the present: it is grown reverend by age, and is not now to be broken in upon; I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductory of the greatest inconvenience to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, necessarily take place within the limits prescribed by law? The words are "in default of such issue I give the said £1000 to be equally divided between the daughters then living of John Jee and Elizabeth his wife." If it had been to "daughters now living," or "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison v. Airy*, and the effect of law on such limitation cannot make any difference in construing such intention. If then this will extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue 50 years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This therefore not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void. Therefore dismiss the bill, but without costs.¹

¹ Observe, however, that in *Leng v. Hodges*, Jac. 585 (1822), M. was entitled to the dividends of the sum standing in the name of the Accountant General, which in the event of her dying without leaving any child or children who should arrive at the age of twenty-one was to devolve upon the plaintiffs. M., having no children and being of the age of sixty-nine years, agreed to sell her interest to the plaintiffs, who now petitioned for a transfer of the fund in question to them. Held, the prayer of the petition was granted upon the recognizance of the plaintiffs.

LONG v. BLACKALL.

(Court of King's Bench, 1797. 7 T. R. 100.)

A case sent from the Court of Chancery for the opinion of the judges of this court stated that George Blackall being possessed of a certain messuage and premises in Great Hazeley in the county of Oxford, held by lease for years under the Dean and Canons of Windsor, by will dated 23d April 1709 directed that his wife should possess the mansion house during her widowhood, and receive the rents and profits of the residue of the premises until she should marry or die, or until one of his sons should attain the age of twenty-one years, which should first happen; and from and after the death or marriage of his said wife, which should first happen, as for and concerning the said mansion house, and as for and concerning the residue of the premises from and after the death or marriage of his said wife, or the time that one of his sons should attain the age of twenty-one, which should first happen, he bequeathed the same to his son Thomas for life, and after his decease then to such issue male or the descendants of such issue male of Thomas as at the time of his death should be his heir at law; and in case at the time of the death of Thomas there should be no such issue male nor any descendants of such issue male then living, then he bequeathed the same in trust to his (the testator's) son George Sawbridge for life, and after his decease then to such issue male or the descendants of such issue male of his said son as at the time of his death should be his heir at law; and in case at the time of the death of the said George Sawbridge there should be no such issue male nor any descendants of such issue male then living, then he bequeathed the said premises, &c. to the child with which his (the testator's) wife was then ensient, in case it should be a son, during his life, and after his decease then to such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then he bequeathed the same to Philippa Long, her executors, &c. The testator died on the 1st of June 1709, leaving his wife Martha and two sons, Thomas and George Sawbridge Blackall, him surviving; the executors named in the will proved the same in the proper Ecclesiastical Court and assented to the above bequest. Martha Blackall, the wife of the testator, at the time of making his will and of his death, was ensient with a son, who was afterwards born and called John Blackall; and Martha Blackall afterwards died on the 16th September 1768. George Sawbridge Blackall died on the 14th of April 1753, without issue. John Blackall died on the 5th March 1754, without issue; and Thomas Blackall died on the 2d March 1786, without issue.

The question directed to be made by the Lord Chancellor for the opinion of the Court of King's Bench was, "Whether the limitation to Philippa Long were good in the events that have happened?"

LORD KENYON, C. J. The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is unalienable. In conformity to that rule the courts have said so far we will allow executory devises to be good. To support this position I could refer to many decisions: but it is sufficient to refer to the Duke of Norfolk's Case, 3 Ch. Cas. 1; Pollexf. 223, in which all the learning on this head was gone into; and from that time to the present every judge has acquiesced in that decision. It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation.

LAWRENCE, J. The devise over in this case must take effect, if at all, after a life which must be in being nine months after the devisor's death.

The following certificate was afterwards sent to the Lord Chancellor.

This case has been argued before us by counsel. We have considered it, and are of opinion that the limitation to Philippa Long is good in the events that have happened.

KENYON,	N. GROSE.
W. H. ASHHURST,	S. LAWRENCE.

February 27, 1797.²

² In *Goodtitle d. Gurnall v. Wood*, 23d of June, 1740, C. B., Ld. Ch. J. Willes, in delivering the opinion of the court, said, "they (namely, executory devises) have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities; as, first, it was held that the contingency must happen within the compass of a life or lives in being or a reasonable number of years; at length it was extended a little farther, namely, to a child in ventre sa mere at the time of the father's death, because as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity." MS.—*Rep.*

See, also, *In re Wilmer's Trusts*, [1903] 2 Ch. 411, where the child in ventre sa mere was treated as a life in being in applying the rule against perpetuities, although it was in that child's interest when born not to be so treated.

THELLUSSON v. WOODFORD.

(House of Lords, 1805. 11 Ves. 112.)³

This case was argued on several days at the bar of the House by Mr. Mansfield and Mr. Romilly, for the appellants, and by the Attorney-General [Hon. Spencer Perceval], the Solicitor-General [Sir T. M. Sutton], Mr. Piggott, Mr. Richards, Mr. Alexander, and Mr. Cox, for the respondents. After the argument the following questions were proposed to the judges on the motion of the Lord Chancellor [Eldon]:

1st, A testator by his will, being seised in fee of the real estate, therein mentioned, made the following devise: "I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth in the county of York after the death of my sons Peter Isaac Thellusson George Woodford Thellusson and Charles Thellusson and of my grandson John Thellusson son of my son Peter Isaac Thellusson and of such other sons as my said son Peter Isaac Thellusson may have and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have and of such issue as such sons may have as shall be living at the time of my decease or born in due time afterwards and after the deaths of the survivors and survivor of the several persons aforesaid to such person as at the time of the death of the survivor of the said several persons shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson and his heirs forever." At the time of the testator's death there were seven persons actually born, answering the description mentioned in the testator's will; and there were two en ventre sa mere answering the description; if children en ventre sa mere do answer that description. All the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only. Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words, in which the same is expressed, to the said manors, messuages, tenements, and hereditaments, at Brodsworth?

2d, If at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was en ventre sa mere, would such lineal descendant, when actually born, be so entitled?

June 25th. The unanimous opinion of the judges was pronounced by the LORD CHIEF BARON MACDONALD. The other judges present were LORD ELLENBOROUGH, GROSE, LE BLANC, HEATH, ROOKE, CHAMBRE; BARONS THOMSON and GRAHAM. Since the argument LORD ALVANLEY had died; and BARON HOTHAM resigned; the former

³ Statement of facts omitted.

being succeeded by SIR JAMES MANSFIELD; the latter by SIR T. M. SUTTON.

SIR A. MACDONALD, Chief Baron. The first objection to the will is, that the testator has exceeded that portion of time, within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law; for three reasons: First, because so great a number of lives cannot be taken as in the present instance, to protract the time, during which the vesting is suspended, and consequently the power of alienation is suspended: Secondly, that the testator has added to the lives of persons, who should be born at the time of his death, the lives of persons who might not be born: Thirdly, that after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at the time of my decease or born in due time afterwards;" and that, as these words appertain only to the last class in the enumeration, the words, which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and their issue; and so make this executory devise void in its creation, as being too remote. With respect to the first ground, namely, the number of lives taken, which in the present instance is nine, I apprehend, that no case or dictum has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases, in which this subject has been considered, by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life; and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by Twisden in *Love v. Wyndham*, 1 Mod. 50, twenty years before the determination of the Duke of Norfolk's Case; who says, that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham as to the time, within which the contingency must happen, he thus expresses himself: "If a term be devised, or the trust of a term limited, to one for life with twenty remainders for life successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time." With an easy interpretation we find from Lord Nottingham, what that tendency to a perpetuity is, which the policy of

the law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time, which is allowed in legal limitations; that is, beyond the time, at which one in remainder would attain his age of twenty-one; if he were not born, when the limitations were executed. When he declares, that he will stop, where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean, where judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, where inconvenience begins; namely, by an attempt to suspend the vesting longer than can be done by legal limitation. I understand him to mean, that, wherever courts perceive, that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater, latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted. In Scatterwood v. Edge, 1 Salk. 229, the court held, that an executory estate, to arise within the compass of a reasonable time, is good; as twenty or thirty years: so is the compass of a life or lives: for let the lives be never so many, there must be a survivor; and so it is but the length of that life. In Humberston v. Humberston, 1 P. Wms. 332, where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord Cowper restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those, who were living (at the death of the testator), and estates tail to those, who were unborn; considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His lordship was in the situation alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded: the excess was cut off; and the devise confined within those limits. Lord Hardwicke repeats the same doctrine in Sheffield v. Lord Orrery, 3 Atk. 282; using the words "life or lives" without any restriction as to number. Many other cases might be cited to the like effect: but I shall only add what is laid down in two very modern cases. In Gurnall v. Wood, Willes, 211, Lord Chief Justice Willes speaks of a life or lives without any qualification; and Lord Thurlow, in Robinson v. Hardcastle, 2 Bro. C. C. 30, says, that a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate. It appears then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It

may be answered, that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly. But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to the person, in whom the property was first to vest, when the suspension should be at an end. I am unable to find any authority for considering this as a sine qua non in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families; in almost all instances looking at the existing members of the family of the testator and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with, or immediately leading to that person in whom the property is first to vest: terms, to which it is difficult to annex any precise meaning. The policy of the law, which, I apprehend, looks merely to duration of time, can in no way be affected by those circumstances. This could not be the opinion of Lord Thurlow in *Robinson v. Harcastle*: nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice Willes, (*Willes*, 215,) with his usual accuracy and perspicuity:

“Executory devises have not been considered as mere possibilities, but as certain interests and estates; and have been resembled to contingent remainders in all other respects: only they have been put under some restraints, to prevent perpetuities. As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little farther, namely, to a child en ventre sa mere at the time of the father’s death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-one years after the death of a person in being; as in that case likewise there is no danger of a perpetuity.”

Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done.⁴

2. The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. It becomes, therefore, necessary to discover, in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation. What is to be intended by these words in his will, must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born, during whose lives the trust might legally continue; or in other words, whom the law would consider as born at the time of his decease. These could only be such children of the several persons named as their respective mothers were enceinte with at the time of his death. He may have meant to use the word "due" as denoting that period of time, which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time, during which the presentation to the living of Marr might be suspended without incurring a lapse. That a child en ventre sa mere was considered as in existence, so as to be capable of taking by executory devise, was maintained by Powell in the case of *Loddington v. Kime*, 1 Lord Raym. 207, upon this ground; that the space of time between the death of the father and the birth of the posthumous son was so short, that no inconvenience could ensue. So in *Northey v. Strange*, 1 P. Wms. 340, Sir J. Trevor held, that by a devise to

⁴ In *Pownall v. Graham*, 33 Beav. 242, there was a devise in trust for the testator's brothers for life, and on the death of the survivor, to applying the income for the benefit of such of their children as should appear to the trustees to "stand most in need of the same, and that regularly, from year to year, as the law in such cases admits," and, "after the law, as mentioned before, admits of no further division among such of my brothers' children," then over. Held, that the trust for division among the children of the brothers ceased twenty-one years after the decease of the surviving brother.

In *re Moore*, L. R. [1901] 1 Ch. 436, a testator bequeathed personal property in trust to apply the income in keeping in repair her brother's tomb in Africa, "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death." Held, the legacy was void for uncertainty.

In *Fitchie v. Brown*, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202, the testator directed that the residue of his estate should be "placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it." He appointed a trustee and directed the payment of annuities to a considerable number of named persons for life, and on their death, to their heirs (with the exception of three who were given only life interests). "On the final ending and distribution of the trust, the trust fund to be divided equally among those persons entitled at that time to the aforementioned annuities." Held, that the trust continued for twenty-one years after the death of all the persons named as annuitants and that the gift for distribution at the end of the trust was valid.

children and grandchildren an unborn grandchild should take. Two years after, Lord Macclesfield in *Burdet v. Hopegood*, 1 P. Wms. 486, held, that, where a devise was to a cousin if the testator should leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In *Wallace v. Hodgson*, 2 Atk. 117, Lord Hardwicke, held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. "The principal reason (says he) that I go upon is, that the plaintiff was en ventre sa mere at the time of her brother's death, and consequently a person in rerum natura: so that by the rules of the common and civil law she was, to all intents and purposes, a child, as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living: *Beale v. Beale*, 1 P. Wms. 244, and so in a variety of other cases. In *Basset v. Basset*, 3 Atk. 203, Lord Hardwicke decreed rents and profits, which had accrued at a rent-day preceding his birth, to a posthumous child; and since the Stat. 10 and 11 W. III, c. 16, such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe v. Quartley*, 1 Term Rep. 634, the devise was to Hester Read for life, daughter of Walter Read, and to the heirs of her body; and for default of such issue to such child as the wife of Walter Read is now enceinte with, and the heirs of the body of such child, then to the right heirs of Walter Read and Mary his wife. It was contended, that the last limitation was too remote; as coming after a devise to one not in being, and his issue. But the court said, that since the Statute of King William, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver v. Wickett*, 1 Wils. 105, the devise was to the wife or life, then to the child, with which she was supposed to be enceinte, in fee, provided, that, if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child en ventre sa mere, being in futuro, would have been a good executory devise. In *Doe v. Lancashire*, 5 Term Rep. 49, the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe v. Clarke*, 2 H. Black. 399, Lord Chief Justice Eyre holds, that independent of intention an infant en ventre sa mere by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where

the testator has been supposed to mark a personal affection for children, who happened to be actually born at the time of his death. The most recent case is that of *Long v. Blackall*, 3 Ves. Jr. 486; 7 Term Rep. 100. There the Court of King's Bench had no doubt, that a devise to a child en ventre sa mere in the first instance was good, and a limitation over was good also, on the contingency of there being no issue male or descendant of issue male living at the death of such posthumous child. It seems then, that if estates for life had been given to the several cestuvs que vie in this will, and after their deaths to their children, either born or en ventre sa mere at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch as the circulation of real property is no more fettered in one case than in the other. It is, however, observable, that this question may never arise, if it shall so happen, that the children in ventre matris at the death of the testator shall not survive those, who were then born.

The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons, during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was to prevent alienation as long as by law he could. If then it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons which immediately preceded this 7th class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted, which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent, which is disclosed in the context; namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage. If words admit of more constructions than one, that, which will support the legal intention of the testator, is in all cases to be adopted. I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question; either as it now stands, or may hereafter stand; or as to the motives, which may have influenced this testator,

or his neglect of those considerations, by which I or any other individual may or ought to have been moved. That would be to suppose, that such topics can in any way affect the judicial mind. For these imperfect reasons I concur with the rest of the judges in offering this answer to your Lordships' first question.

With respect to your Lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled, that an estate may be limited in the first instance to a child unborn, and, I apprehend, to the first and other sons in fee, as purchasers. The case of *Long v. Blackall*, 3 Ves. Jr. 486; 7 Term Rep. 100, seems to have decided, that an infant in ventre matris is a life in being. The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termination, of the suspension, and if such children are considered by the construction of the Statute of 10 & 11 W. III, c. 16, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases, where it has been allowed at the commencement and particularly in *Long v. Blackall*, it must have been obvious to the court, that it might be wanting at the termination: yet that was never made an objection. In *Gulliver v. Wickett*, 1 Wils. 105, the child, who was supposed to be en ventre sa mere, might have married and died before twenty-one, and have left his wife enceinte. In that case a double allowance would have been required: yet that possibility was never made an objection; although it was obvious. In *Long v. Blackall*, according to the printed report, the precise point was not gone into. But it is plain, that the intention of the court must have been drawn to it; for the learned judge,⁵ who argued that case in support of the devise, expressly stated, that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the devisee for life may die leaving his wife enceinte: and the only difference is, that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable, that it might possibly occur at both ends. Every reason then for allowing the period of gestation in the one case, seems to apply with equal force to the other; and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But natural justice, in several cases, having considered children en ventre sa mere as living at the death of the father, it should seem, that no distinction can properly be made;

⁵ Mr. Justice Chambre, then at the bar.

but that in the singular event of both periods being required they should be allowed; as there can be no tendency to a perpetuity.

THE LORD CHANCELLOR [LORD ELDON]. The learned judges having given their opinion upon the points of law, referred to them, no question remains, to which the attention of the House should be particularly called, except the point, arising out of this will, and which could not be referred to the judges; with regard to the accumulation of the rents and profits. When this cause was decided in the Court of Chancery, it was decided by Lord Rosslyn, with the assistance of Lord Alvanley, Mr. Justice Buller, and Mr. Justice Lawrence; and it is well known, that the late Chief Justice [Lord Kenyon] of the Court of King's Bench could hardly be brought to think any of the questions in this case fit for argument; conceiving it dangerous to give so much of serious agitation to them, as has been had; considering what had been settled with respect to executory devise and accumulation. Some of your Lordships have had the advantage of hearing the opinion of Lord Thurlow; which cannot be doubted upon this point; after his Lordship has laid down, in *Robinson v. Hardcastle*, 2 Bro. C. C. 22 (see page 30), what is unquestionable law, that it is competent to a testator to give a life-estate, to be appointed by the survivor of 1000 persons. That estate would be to commence at the death of the last of those 1000 persons. Upon the questions of law your Lordships have had the unanimous opinion of the several learned judges. As far as judicial opinion can be collected, there is, therefore, the testimony of all the judicial opinion I have detailed, concurrent upon this great case: great, with reference, not to the questions arising out of it, but to that circumstance, of which, whatever attention your Lordships may think proper to give it in your legislative capacity, you cannot, exercising the function of judges, take notice; for the question of law is the same upon a property of £100 or a million. If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret, that such a will should be maintained. But that goes no farther than as a motive to see, whether it contains anything, resting upon which we may as judges say it is an attempt to make an illegal disposition.

When this was put originally as a case, representing, that it was monstrous to tie up property for nine lives, it seemed to me a proposition, that is incapable of argument as lawyers; for the length of time must depend, not upon the number, but upon the nature of the lives. If we are to argue upon probability, two lives may be selected, affording much more probability of accumulation and postponement of the time of vesting, than nine or ninety-nine lives. Look at the obituary of this House since the year 1796; when this will was made. Suppose, the testator had taken the lives of so many of the peers as have died since that time: that would have been between twenty and

thirty lives; and yet that number has expired in a very short period. It cannot therefore depend upon the magnitude of the property, or the number of lives: but the question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops.

If the law is so as to postponing alienation, another question arises out of this will; which is a pure question of equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; and, that he can do so, is most clear law. A familiar case may be put. If this testator had given the residue of his personal estate to such person as should be the eldest male descendant of Peter Isaac Thellusson at the death of the survivor of all the lives, mentioned in this will, without more, that simple bequest would in effect have directed accumulation, until it should be seen, what individual would answer the description of that male descendant; and the effect of the ordinary rule of law, as applied in equity, would have supplied everything, that is contained in this will, as to accumulation; for the first question would be, is the executory devise of the personal estate to the future individual, so described, good? If it is, wherever a residue of personal estate is given, the interest goes with the bulk; and there is no more objection to giving that person, that, which is only forming another capital, than to giving the capital itself. But the constant course of a court of equity is to accumulate interest from time to time without a direction, and to hand over the accumulation to that person, who is to take the capital. Take another instance of accumulation: suppose, the nine persons, named in this will, had been lunatics: without any direction there would have been an accumulation of the interest and profits of all these estates. In truth there is no objection to accumulation upon the policy of the law, applying to perpetuities; for the rents and profits are not to be locked up, and made no use of, for the individuals, or the public. The effect is only to invest them from time to time in land: so that the fund is, not only in a constant course of accumulation, but also in a constant course of circulation. To that application what possible objection can there be in law?

But this is not new; for in the case upon Lady Denison's will⁶ Lord Kenyon, who saw great danger in permitting argument to go too far against settled rules, held most clearly, that the testatrix had well given her property to such second son of her infant niece as should first attain the age of twenty-one; and directed accumulation

⁶ Harrison v. Harrison, 21st July, 1786, stated from the Register's Book, 4 Ves. 338.—*Rep.*

through the whole of that period; following Lord Hardwicke and his predecessors; and taking the rule to be perfectly clear, that, so long as the property may be rendered unalienable, so long there may be accumulation; that in common sense it is only giving the accumulation to the person, who is to take the fund itself; if it could be foreseen, who that person would be. Therefore, as to giving the property at the expiration of nine lives and the accumulation, I never could doubt upon these points. The latter could not be a subject of dispute before the late Act of Parliament (Stat. 39 & 40 Geo. III, c. 98); which has been sometimes, though without foundation, attributed to me; and which in some respects I would have corrected, if it had not come upon me rather by surprise. That Act however expressly alters what it takes to have been the former law upon the subject; admitting the right to direct accumulation; and reducing that right in given cases to the period of twenty-one years. The amount of accumulation, even through the provisions of that Act, though only to endure for twenty-one years, might in many instances, by giving the son a scanty allowance, be enormous. I do not think, it was intended: but the accumulation directed by this will must under that Act have gone on for twenty-one years. In the construction of that Act it has been held, that it only makes void so much of the disposition as exceeds twenty-one years; leaving it good for that period. Upon the old rule also accumulation for particular purposes might have gone on for nine lives, or more.

The only points, that appear to me fairly to bear argument, are the critical discussion upon the word "as," as a relative term, and that with reference to the double period of gestation. As to the former, if your Lordships could from dislike to such a will refuse that construction, which will consider that word as a word of reference to each preceding description of persons, grounding that construction upon the manifest intention of the testator upon the whole will to make the property unalienable, as long as he could, you would gratify that inclination at the expense of overturning all the rules of construction, that have been settled, and applied for ages to support wills. If your Lordships will give any relief by legislative interference against this will, that is a very bold proposition; but not so bold as, that, because you dislike the effect of the will, you will give a judgment wrong in point of law.

As to the other point, upon the words "born in due time afterwards," I observe in the report, the Judges Lawrence and Buller afford each a construction of these words: the one, that they mean children en ventre sa mere: the other held them a declaration of the testator's will, that the property shall be unalienable, and the accumulation go on, during the lives of all the persons, born or unborn, whom the law would authorize him to take as the lives for restraint of alienation, and for the purpose of accumulation. In my opinion either of those constructions may be taken to be the intention consistently with the

rules of law: but consistently with the rules of law your Lordships cannot reject both; but must give the words such a construction as will support the manifest intention of the testator. It is therefore beside the point to ask, what child shall take, or, when a child shall take; for the testator is describing, not the object to take, but the lives of persons; in order to define the period, during which the power of alienation shall not exist, and the accumulation shall go on. But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of law has been properly laid down, that the time of gestation may be taken both at the beginning and the end; and that is what was meant in Gulliver v. Wickett, 1 Wils. 105, in which case the devise was to a child en ventre sa mere; and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child en ventre sa mere, suppose that child had at the age of twenty married, and died six months afterwards leaving his wife enceinte: that property, absolutely given to him, would not be divested, merely because the child was not born till three months after his death. In fair reasoning therefore that is the construction of the words.

Of the case of Long v. Blackall, 3 Ves. 486; 7 Term Rep. 100, in which I was counsel, I can give a faithful history. It was my duty to submit to the Lord Chancellor the point, that the allowance was claimed at both ends of the period. His Lordship treated the point not with much respect: but I prevailed with him against his inclination to send it to the Court of King's Bench. Upon the report of the case in that court the point did not appear to have been discussed. I therefore pressed the Lord Chancellor to send the case back. His answer was as rough, as his nature, which was very gentle, would permit: and shows the clear opinion he had upon the point. He said distinctly, he was ashamed of having once sent it to a court of law; and would not send it there again. I know, Lord Kenyon's opinion upon the subject was clear: so were those of Mr. Justice Buller and Mr. Justice Lawrence; as may be collected from the report of these causes. (4 Ves. 314, 315, 321.) This case therefore comes to this, and this only. The legal and equitable doctrine is clear; and then the question is, with whatever regret we may come to the determination, is it not our duty to determine according to the rules of law and equity? Upon the question, whether this judgment ought to be reversed, I am bound to say, it ought not; but that it ought to be affirmed.

Upon the motion of the Lord Chancellor the decree was affirmed.⁷

⁷ See Pownall v. Graham, 33 Beav. 242 (1863); In re Moore, [1901] 1 Ch. 936. On the Thellusson Act, see Gray's Rule Against Perpetuities (2d and 3d Editions) § 686 to § 727.

CADELL v. PALMER.

(House of Lords, 1833. 1 Clark & F. 372.)

Henry Bengough, Esq., by his will, dated the 9th of April, 1818, gave and devised, from and after the decease of his wife, Joanna Bengough, his messuage with the gardens, stables, and other appurtenances belonging thereto, situate in St. James's Square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge, and George Wright, their heirs and assigns forever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of £300 to his nephew, George Bengough, for life, and an annuity of £200 to his nephew, Henry Bengough, for life; and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's Square); and from time to time during the continuance of the said term to lay out the moneys to arise from such rents and profits in the purchase of freehold estates of inheritance in England, when and as often as there should be a surplus in hand amounting to the sum of £1500. And he directed the estates so to be purchased to be conveyed to the trustees, upon the same trusts and conditions as were thereafter^s limited concerning his estates thereinbefore devised; and that the trustees should not permit more than £500 to remain in bankers' hands, but should invest the same in the three per cent. consolidated bank annuities until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estate were before directed to accumulate; and as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's Square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of one hundred and twenty years, to commence from his death, if his said nephews, George Bengough and Henry Bengough, his nephew, James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his great niece, Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge (for whose names a blank was left in the will), and the

^s See the report of this case under the title of Bengough v. Edridge, 1 Sim. 273, where the Vice-Chancellor ordered "hereinbefore" to be substituted for "hereinafter." That part of the decree is not appealed from.—*Rep.*

eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of one hundred and twenty years determinable as aforesaid, nevertheless upon trust for his said nephew, George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births: and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live; and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or who, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of one hundred and twenty years and twenty years, in favor of his nephews, Henry Bengough and James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, and his great niece, Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favor of the said George Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of

the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies; and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law; and if there should be more than one, in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the income of all or any part of the said trust estates, under the limitations thereinbefore contained; and that in case the said limitations in favor of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her, or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of one hundred and twenty years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for ^{life}, in tail, or

in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of one hundred and twenty years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before mentioned, and that, in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of one hundred and twenty years and twenty years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of free-

hold for the life of the same person, so as to give him or her an estate of freehold instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust, that they should either continue his moneys upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money, or securities for money. And he directed that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest, and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest, and income, and the accumulations of the same, in their names, either in the three per cent. consolidated bank annuities, or upon mortgages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate during such term of twenty-one years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee-simple, in England or Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts, and under and subject to the same and the like powers, provisos, and limitations as were by him thereinbefore declared, concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests, and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate, and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell, and George Lunell executors thereof; and they proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Lucas Edridge (since deceased), and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed his bill in Chancery in the

year 1821 (amended in 1823) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough, and Ann Ricketts, the younger, and also against the said personal representatives of Joanna Bengough, the widow, and of Ann Ricketts, the sister, of the testator; and after stating the said will and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses, and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken of the testator's real estate, and of the rents received by the trustees; and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law; and that the court would be pleased to declare how far the trusts of the real and personal estate were good; and as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate; but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of £1500 arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to £1500, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to £1500, until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for de-

clarifying and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the Vice-Chancellor in 1823, when an order of reference was made to the master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator, and that the said Ann Ricketts, deceased, the sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell, and George Lunell, were then her legal personal representatives, and the only persons, who, together with the plaintiff, and the said Henry Bengough, James Bengough, and Ann Elizabeth Bengough (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would in case of intestacy have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Okely, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard, on further directions, before the Vice-Chancellor, his Honor, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being."

From this part of the decree the personal representative of the testator's widow appealed to the House of Lords, and the appeal came on for hearing in February, 1832.

The learned judges who attended were J. A. PARK, LITTLEDALE, GASELEE, BOSANQUET, ALDERSON, J. PARKE, and TAUNTON, JJ.; BAYLEY, VAUGHAN, BOLLAND, and GURNEY, BB.; and the following were the questions submitted to them:

First, whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the

determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with a number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or en ventre sa mere.

Thirdly, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or en ventre sa mere.

The learned judges attended again on a subsequent day (June 25th), and Mr. BARON BAYLEY delivered their opinion as follows: First, in answer to the first question: I am to return to your lordships the unanimous opinion of the judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of Lloyd v. Carew, 1 Show. P. C. 137, in the year 1696, and Marks v. Marks, 10 Mod. 419, in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. Taylor v. Biddal, 2 Mod. 289 (1677), is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest: and that limitation

was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in Stephens v. Stephens, Cas. temp. Talb. 232. That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns forever;" and the judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to Taylor v. Biddal, and says, "that however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and, considering that the power of alienation would not be restrained longer than the law would restrain it, viz., during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for twenty-one years, without any reference to infancy, after a life or lives in esse, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In Goodtitle v. Wood, Willes, 213; s. c. 7 T. R. 103 n., Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says: "The doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz., to a child en ventre sa mere, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of

a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in Thellusson v. Woodford, 1 N. R. 388, Lord Chief Baron Macdonald prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity." He does, indeed, afterwards say, 1 N. R. 393, after noticing Long v. Blackall, "the established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of Willes, C. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person in esse, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In Goodman v. Goodright, 2 Burr. 879, is this passage: "Lord C. J. Mansfield says, 'it is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after,' which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice Mansfield or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In Buckworth v. Thirkell, 3 Bos. & Pul. 654 n.; s. c. 10 B. Moore, 238 n., Lord Mansfield says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards." In Jee v. Audley, 1 Cox, 325, Lord Kenyon (Master of the Rolls) says, "The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the Duke of Norfolk's Case, 3 Chan. Ca. 1, to the present time; it is grown reverend by age, and is not now to be broken in upon." In Long v. Blackall, 7 T. R. 102, the same learned judge says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person, to whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the courts have said, so far we will allow executory devises to be good." And, after referring to the Duke of Norfolk's Case, he concludes, "It is an established rule,

that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson v. South*, 7 T. R. 558, Lord Kenyon says, "The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, must) take place after a life or lives in being, and within twenty-one years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not expressions in other cases about the same period, from which it might clearly be collected, that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule, as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (2 Bl. Com. [16th Ed.] 174), puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and twenty-one years afterwards; as, when lands are devised to such unborn son of a feme covert as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way: "An executory devise, to vest within a short time after the period of a life in being, is good;" as in *Lloyd v. Carew*, which he states, and *Marks v. Marks*; and he says, "The courts, indeed, have gone so far as to admit of executory devises, limited to vest within twenty-one years after the period of a life in being;" as in *Stephens v. Stephens*, *Taylor v. Biddal*, *Sabbarton v. Sabbarton*, Cas. temp. Talb. 55, 245, all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, "That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest with-

in twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne's understanding, may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises, (9th Ed. 399, 401), where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises." And in his third chapter (page 470), he begins his eighth division with this position: "It is the same (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of twenty-one years after the period of a life in being." And in the eighth division of the fourth chapter (page 517) he says, "It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson v. Woodford*, 4 Ves. 337, showing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard v. Westcott*, 5 Taunt. 393, the question, whether an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of a testator, with-

out reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that court. The first certificate was in November, 1812; the next in November, 1813; and the judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in Beard v. Westcott, and the dicta by L. C. Justice Willes, Lord Mansfield, and Lord Kenyon, and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that the limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the dicta or text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of

twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or en ventre sa mère, the unanimous opinion of the judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists.

THE LORD CHANCELLOR. I shall move your Lordships to concur in the opinions expressed by the learned baron, as the unanimous resolutions of the judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the dicta of the judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew*, 1 Show. P. C. 137, settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned baron from Mr. *Fearne's* book, without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice Buller's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearne had done. The opinion of Lord Mansfield was the same, and the doctrine is not weakened by what Lord Kenyon is stated to have said in *Long v. Blackall*, 7 T. R. 100. In the opinion of all, the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, to which the learned judges also applied themselves, and they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if the vesting be suspended for twenty-one years beyond a life or lives in being; but that beyond that period it would.

The judgment of the court below was affirmed.

ASHLEY v. ASHLEY.

(Court of Chancery, 1833. 6 Sim. 358.)

By an order ⁹ in this cause the master was directed to inquire what interest the testator had in a certain estate in London. The master found that James Lewer, being seised in fee of said estate, died in 1773, and by his will devised said estate to his wife for life, remainder to preserve contingent remainders, remainder to his daughter, Sarah Chandler, for life, remainder to trustee to preserve &c., and after her death to "all and every the child or children" of Sarah Chandler "equally to be divided between them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and for want of such issue of Sarah Chandler" then to his daughter Mary H. and for life with like remainders to her children, remainder to Thomas Chandler in fee. The residue of his estate, real and personal, he gave to his wife in fee and absolutely.

Sarah Chandler had eight children living at the death of James Lewer or born afterwards. Five of them had died without issue, but three were living.

The master reported that all the limitations in the will failed, subsequent to the devise to the child or children of Sarah Chandler, as being only to take effect in case there never was any such child; and that the children of Sarah Chandler took life estates only without cross remainders between them; and that, subject thereto, the fee simple of the houses passed, by the general residuary devise, to the widow of James Lewer, the testator.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL]. My opinion is directly against the finding of the master. [His Honor here read the devise, and then proceeded thus:] Now but one subject is given throughout. The expression, "for want of such issue," means want of issue whenever that event may happen, either by there being no children originally, or by the children ceasing to exist. Those words seem to me to create cross remainders by implication.

Declare that the children of Mrs. Chandler took estates for life, as tenants in common, with cross remainders between them for life, with remainder to Mrs. Hand for life, with remainder to her children, as tenants in common for life, with cross remainders between them for life, with remainder to Thomas Chandler in fee: and refer it back to the master to review his report.¹⁰

⁹ The following statement is substituted for that in the report.

¹⁰ See, also, *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 682. But see *Fosdick v. Fosdick*, 6 Allen (Mass.) 41.

SOUTHERN v. WOLLASTON.

(Court of Chancery, 1852. 16 Beav. 276.)

The testator, by his will dated in 1835, bequeathed £400 Consols to trustees, upon trust for his cousin Edward Wollaston for life; and after his decease, upon trust to assign and transfer, or pay, distribute and divide the same unto and equally between all and every the children and child of Edward Wollaston who shall be living at his decease, and who should then be of or afterwards live to attain the age of twenty-five years; if more than one, in equal shares.

There was a gift over, in case there should be no child living at his death, or of their all dying under twenty-five. And the testator directed, that after the decease of Edward Wollaston, and while any of the persons presumptively entitled thereto should be under the age of twenty-five years, the dividends of the shares of the persons so, for the time being, under that age in the £400, should be applied towards the maintenance and education of the person to whom the said stock moneys should, for the time being, under his will presumptively belong.

The testator died in 1845. Previous thereto, and in 1837, the legatee Edward Wollaston had died, leaving eleven children; four only survived the testator, and the youngest attained twenty-five in 1848.

A question was raised, at a former hearing (16 Beav. 166), whether this gift to the class of children was or was not void for remoteness; and the point not having been fully argued, the impression of the court then was, that it was void, but permission was obtained to argue the point.

Mr. Lloyd and Mr. Bilton now appeared for the children. They argued as follows: The will speaks as at the testator's death. This legacy is therefore free from all objection in regard to remoteness, for the tenant for life was then dead, and his children ascertained; and as they were all more than four years of age the legacy of necessity vested within due limits, that is, within twenty-one years from the testator's death. In *Williams v. Teale*, 6 Hare, p. 251, Sir James Wigram expressed his opinion on the very point. He says, "A third point, upon which my mind is also made up, is this: that, in considering the validity of the limitations in this will, with reference to the state of the testator's family, the state of the family must be looked at, as it existed at the time of the death of the testator, and not as it existed at the date of the will. If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt but that the limitations over to the children of A. would be void, *Leake v. Robinson*, 2 Mer. 363; but if, in that case, A. had died living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice would exclude them from the

benefit of the bequest, on the ground only, that if A. had survived the testator, the legacy would have been void, because the class in that state of things could not have been ascertained."¹¹

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] said he should follow the case of *Williams v. Teale*, and declare that the gift to the children was not void for remoteness.

AVERN v. LLOYD.

(Court of Chancery, 1868. L. R. 5 Eq. 383.)

This cause came on to be heard on further consideration and on a petition.

Joseph Wright, by will, in March, 1780, after directing his executors, as soon after his decease as might be convenient, to sell all his effects, and to invest the proceeds in some of the public funds, directed them to pay one moiety of the dividends to arise from such funds to his brother Francis for life, and after his decease to the issue male of his brother Francis equally, share and share alike, for their lives and the life of the longer liver, and after the decease of the survivor, or in case there should be no such male issue of his brother Francis, to pay such moiety of the dividends to his brother John Wright for life, and after his decease to his issue male equally, share and share alike, for their respective lives and the life of the longer liver; and after the decease of the survivor, or in case there should be no such issue male of his brother John, then to all and every the daughters and daughter of his brother Francis equally, share and share alike, for their respective lives, and to the survivors and survivor; and after the decease of the survivor of such daughters and daughter of his brother Francis, he bequeathed the moiety of the funds and the dividends thereof to the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who should happen to be such survivor. The testator directed his executors to pay the other moiety of such funds to his brother John for life, and after his decease to pay the dividends of such moiety to his issue male for their lives and the life of the longer liver; and after the decease of the

¹¹ The rest of the remarks of Wigram, V. C., in *Williams v. Teale*, 6 Hare, 239, 251 (1847), on this point is as follows: "I have noticed this point because I find that an intelligent writer (I allude to Mr. Lewis, in his book of *Perpetuities*) has expressed a contrary opinion in his observations on the case of *Vanderplank v. King*, 3 Hare, 1, and has upon that ground doubted the correctness of my decision in that case. In another part of the same book, the cases upon which he founds his opinion are collected and commented upon; but upon examining those cases, it appears to me that none of them (as it is in terms admitted) is inconsistent with the opinion I have expressed. I have considered the point with much attention, and I am clear that the question to be considered is, How the family stood at the death of the testator, and not how it stood at any earlier date."

survivor, or in case there should be no such issue male of his brother John, to his brother Francis for life, and after his decease to his issue male equally, for their lives and the life of the longest liver; and after the decease of the survivor, or in case there should be no such issue male of his brother Francis, then to all and every the daughters and daughter of his brother Francis equally, for their lives and the lives of the survivors and survivor, and after the decease of the survivors and survivor of such daughters and daughter of his brother Francis, he bequeathed the last-mentioned moiety of such funds and the dividends to the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who should happen to be such survivor.

The testator died in 1785.

Francis Wright died in 1801, leaving three sons, Joseph, John, and Francis, and five daughters, of whom Ann intermarried with the defendant Robert Lloyd.

In March, 1815, in a suit instituted by the three sons against their uncle John and others, for the purpose of having their rights under the will declared, Sir W. Grant ordered the transfer into court by the uncle John of £1100 £3 per Cent Stock, and of £950 New South Sea Annuities, in trust in the cause "the account of the legatees for life;" that the costs should be taxed and paid out of a sale of sufficient of such stock; that one moiety of the dividends accruing on the residue of such stock until such sale, and on the residue after such sale, and one moiety of the dividends accruing on the annuities, should be paid to the three plaintiffs in equal shares during their joint lives, and after the death of them, or either of them, that the whole of the dividends of the last-mentioned money should be paid to the survivor during his life; and that the dividends accruing on the other moiety of the annuities should be paid to the uncle, John Wright, during his life, and that on his death and that of the survivor of the three plaintiffs, any persons entitled to the moieties of the stock and annuities were to be at liberty to apply to the court.

The funds were transferred into court, and by the payment of costs the stock was reduced to £764 13s. 8d.

The uncle, John Wright, died in 1818 without issue. In January, 1819, it was ordered in the cause that the whole of the dividends on the stock and annuities should be paid to the plaintiffs, Joseph, John, and Francis Wright equally. Joseph Wright died in 1820, and, on petition, it was ordered that the dividends should be paid to John and Francis in moieties. John and Francis sold their interests in the stock and annuities, and it was ordered that the dividends should be paid to their assignee during their lives and the life of the survivor. John Wright died in 1849. Ann Lloyd was the survivor of the five daughters of Francis, the brother of the testator. She died in 1842, and the defendant, her husband, became her legal personal representative.

Francis Wright, the survivor of the three plaintiffs above mentioned.

died in April, 1856, and since that date no dividends had been paid to any person. Letters of administration to the effects of the said Francis were granted to his daughter, the plaintiff, Emma M. Avern, and she and her husband, in April, 1863, filed their bill praying for a declaration that she, as administratrix, was entitled to the funds in court, or, if not, that the rights of all parties under the will might be declared.

SIR JOHN STUART, V. C. In this case there is no question as to the validity of the limitation of the life estates in remainder to the unborn issue, male and female, of the testator's brothers, John and Francis. The unborn issue clearly take life estates, share and share alike. But it has been contended that the ultimate limitation to the executors, administrators, and assigns of the survivor of these tenants for life is too remote. The limitation is in these terms: "To the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who shall happen to be such survivor." Considering that this limitation to the executors, administrators, and assigns must take effect in the lifetime of one of the unborn issue to whom a good estate for life is given, so as to give him an absolute estate in possession when he becomes survivor, it is not easy to see on what ground it can be considered as too remote. The gift to the executors, administrators, and assigns of the surviving tenant for life attaches to the life estate, so as to give a contingent absolute interest to each tenant for life. This contingent absolute interest vests in possession in the surviving tenant for life as soon as he is ascertained. It attaches the absolute interest as much to the life estate in the case of personal property as the rule in Shelley's Case, 1 Rep. 219, attaches the inheritance to the life estate in the case of a contingent limitation to the heirs or the heirs of the body of the tenant for life of a freehold estate, so as to make the heir take by descent when the contingency happens. Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for life, be entitled to the possession and enjoyment as absolute owner. It seems obvious that such a case is not within the principle on which the law against perpetuity rests, and that the limitation in question of the absolute interest does not fail as being too remote.

EVANS v. WALKER.

(Chancery Division, 1876. 3 Ch. Div. 211.)

See ante, p. 172, for a report of the case.

ABBISS v. BURNEY.

(Court of Appeal, 1881. 17 Ch. Div. 211.)

JESSEL, M. R.¹² This is an appeal from a decision of Vice-Chancellor Malins upon an important point of real property law. The first question is whether the rules as to remoteness apply to what has been termed an equitable remainder, where the legal estate has been vested in trustees under the same instrument which creates the equitable estate. The second question is, whether the limitation with which we have to deal in this case is an equitable remainder or an executory devise.

The gifts in the will, so far as relates to the real estate, may be stated very shortly. There was a devise of freehold estate to trustees and their heirs, vesting in them the legal fee upon trust to pay the rents to the testator's wife, Maria Finch, for her life, then upon trust that the trustees should, during the life of one Henry Mayer, who was then living, retain the rents for their own use, and after his death upon trust to convey the freehold estates of the testator unto such son of William Macdonald as should first attain the age of twenty-five years, his heirs and assigns, absolutely forever, subject to a condition as to taking the name and arms of the testator, and in the mean time he directed that the rents should accumulate for his and their benefit.

The only facts necessary to be stated are that William Macdonald was living at the death of the testator, and no son of his had then attained the age of twenty-five, but he had a son who, after the testator's death but during the lifetime of Maria Finch, attained the age of twenty-five. Maria Finch and Henry Mayer being both dead, the question now arises whether the limitation to the son of William Macdonald who should first attain the age of twenty-five years is or is not void for remoteness. The Vice-Chancellor decided that it is not void for remoteness on certain technical grounds which I will proceed to consider.

Of course, if this is a limitation by way of executory devise it is void for remoteness, the rule as to remoteness being that an executory devise, in order to be valid, must be such as necessarily to take effect within a life or lives in being at the death of the testator and twenty-one years afterwards. Now it is obvious that the limitation to the first

¹² The case is stated in the opinion of Jessel, M. R.

son of William Macdonald who attains the age of twenty-five years is not confined within the period of any life in being and twenty-one years afterwards.

The ground on which it was endeavored to support the gift was this: it was said that the gift to the son of William Macdonald was an equitable contingent remainder, and that according to the law of contingent remainders the estate could not take effect at all unless it was vested at the death of the survivor of Maria Finch and Henry Mayer, and that, therefore, it could not be void for remoteness, as it must take effect at the expiration of lives in being or not at all. The argument proceeded on the footing that the same rules which govern devises of legal estates in freeholds govern also devises of equitable estates, using the term equitable in the sense I have mentioned, and the Vice-Chancellor gave effect to that argument.

The first observation to be made upon that is, that these contingent equitable remainders, as they are sometimes called, do not stand upon the same footing as legal remainders. The reason why a contingent remainder under a legal devise failed, if at the death of the previous holder of the estate of freehold there was no person who answered the description of the remainder-man next to take, was the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all. This result of feudal rules was never held to apply to equitable estates, and it was sometimes said that the legal estate in the trustee supported the remainder. That was not the best mode of expressing the doctrine, the principle really being that as the legal estate in the trustees fulfilled all feudal necessities, there being always an estate of freehold in existing persons who could render the services to the lord, there was no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator. If at the time of the determination of the prior equitable estate of freehold there was no person capable of taking, a person afterwards coming into existence within the limits of the rule of remoteness, and answering the terms of the gift, was allowed to take. So that the doctrine of ascertaining once for all at the death of the tenant for life what persons were to take under the subsequent contingent limitations, had no application to equitable estates. Equity has not on this subject followed the law. According to my experience it has always been assumed, without argument, that where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as being sons shall attain twenty-one, or being daughters shall attain that age or marry under that age, and at the death of the tenant for life there are some children adult and some minors, the minors, if they live to attain twenty-one, will take along with the others; but if equity had followed the law, then, inasmuch as there were persons capable of taking at the

death of the tenant for life, namely, the adult children, they would have taken to the exclusion of the children who were minors, as was the case where the limitations were legal. It appears to me, therefore, that where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent Statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think this appeal should be allowed.

On the second point also I must differ from the conclusion arrived at by the learned judge of the court below. I cannot find that there is any equitable remainder to any child of William Macdonald. There is a gift to the trustees upon trust for the widow for life; then there is a direction to them to retain the rents for their own benefit during the life of Henry Mayer, which is not an equitable remainder, because they, having the legal ownership, cannot have a separate equitable estate. Then, on the death of Henry Mayer, there is a direction to them to convey the legal estate to the first son of William Macdonald who attains twenty-five. That direction to convey does not give the son of William Macdonald an equitable remainder expectant on a prior equitable life estate. There is no equitable life estate after the death of the widow, and the direction to the trustees to convey is nothing like a remainder. In my opinion, therefore, the gift to the son of William Macdonald is an executory limitation, and subject to all the rules with regard to executory limitations, and on this ground also I am of opinion that the decision appealed from ought to be reversed.

COTTON, L. J. I am of the same opinion. One point argued by Mr. Williams was that the attaining twenty-five years was not part of the description of the person to take, but that the gift was to be construed as a gift to the first son, with a gift over if he did not attain that age, and he referred to cases in which a violent construction of that kind has been put by the court upon devises of real estate so as to give effect to what was considered by the court to be the intention of the testator. I asked Mr. Williams whether that violent construction had ever been put upon a gift which included both real and personal estate, and he was not able to refer me to any such case. But, independently of that, how can it be said that in a gift to such son of William Macdonald as shall first attain the age of twenty-five years, the attaining that age is not part of the original gift and part of the description of the devisee. Where that violent construction has been put upon the words there has generally been some obscurity or ambiguity in the original gift, or there has been a gift over on the person not attaining the prescribed age. In the latter case, as Vice-Chancellor Wigram said, in the case of *Bull v. Pritchard*, 5 Hare, 567, 591, the court construed the testator as giving all he had to the first taker, except what he had given to the devisee over. But here there is no gift

over of that kind, and the attaining of the age of twenty-five is an essential part of the description of the person who is to take.

Then, assuming this is not to be a vested interest before the son attains twenty-five, is the devise bad or not for remoteness? The Vice-Chancellor, as I understand him, proceeded on this ground. He said if there is a legal contingent remainder that remainder of necessity must be vested at the ceasing of the particular estate upon which it is limited or not take effect at all, and therefore, even although it is to a person if he attains twenty-five, yet, as it must vest at or before the determination of the prior life estate, there can be no question of remoteness, for if it ever comes into effect at all it must come into effect on the expiration of a life or lives in being. That no doubt is so, but how can that apply to limitations of this kind, where the testator, by his will, dealing with the legal estate and vesting it in trustees, has directed that they are to hold it in certain events and at certain times on particular trusts? The rule does not apply in equity, because in equity the feudal rules of tenure will not be allowed to defeat the trusts which the testator has declared by his will, and, even although at the termination of the particular estate the persons cannot be ascertained, yet the court will afterwards enforce the trusts in favor of persons who subsequently come into esse and answer the description of the objects of gift. It follows that the objection on the ground of perpetuity is not removed.

I quite agree with the Master of the Rolls that the question really does not arise here, because there is no limitation by way of remainder. The estate being given by the testator to trustees, he has directed that at a particular time their estate shall be put an end to by their conveying it away to somebody else. They are not directed to hold it upon trust for somebody else during his or her life and afterwards in trust for a remainder-man, but they, having the fee absolutely in themselves, are directed after a particular time to convey that estate from themselves, and to give the person then to be entitled the legal estate. Of course, if there be no objection on the ground of remoteness, equity would compel them to hold it after that particular time for the benefit of the person to whom they ought to convey, but as a matter of limitation in the will it is not a limitation of an equitable estate in remainder, it is merely a direction at a future time to convey the estate to somebody else. I am therefore of opinion that the question of contingent remainders really does not arise, and that the trust to arise here at a period beyond that allowed by the rules of perpetuity must be dealt with as an executory trust and not as an equitable remainder. In my opinion, therefore, the decision of the Vice-Chancellor is erroneous, and must be reversed.

LUSH, L. J. I am of the same opinion. It is somewhat remarkable that there is no decision to be found expressly upon this point, but I may observe that it has been published as the opinion of very eminent text-book writers, and was assumed in *Blagrove v. Hancock*, 16 Sim.

371, as well by the counsel on both sides as by the learned Vice-Chancellor himself, that the doctrine as to excepting contingent remainders from the rule as to remoteness is not applicable to equitable estates. The reason appears to be a very obvious one. The doctrine in question was founded entirely upon the requirements of the feudal law which necessitated that there should always be somebody in possession as tenant of the land to render service to the lord, and therefore if the contingent estate did not take effect at the time when the preceding estate ended, then it could not take effect at all; so that remoteness was out of the question. The courts of equity never interfered with that doctrine, but when they came to deal with the equitable limitations of real property, where the legal fee was given to trustees by the same instrument, so that there were persons always at hand to fulfil the requirements of the feudal law, the courts of equity dealt with those equitable limitations according to their own principles, and, disregarding the feudal law, to which there was no necessity to pay any attention, as its requirements were already satisfied, they carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will. But then came in another doctrine, founded on principles of public policy, that an estate cannot be tied up longer than for a life or lives in being, and for twenty-one years afterwards.

In this particular case the testator directed that the estate should be, after the death of Henry Mayer, conveyed by the trustees unto such son of William Macdonald as should first attain the age of twenty-five years, and the rents and profits of the estate were to be accumulated until he attained the age of twenty-five years. If, therefore, the eldest son of William Macdonald had been born in the year in which Henry Mayer died, the rents and profits of the estate might have been left to accumulate, and the vesting of the estate might have been postponed beyond the period of twenty-one years from the expiration of any life in being. I am therefore of opinion that the limitation to the son of William Macdonald is void for remoteness.

In re HARGREAVES.

(Court of Appeal, 1890. 43 Ch. Div. 401.)

Hannah Hargreaves, by will dated the 24th of November, 1838, devised to John Townsend and Henry King certain specified freeholds, "To have and to hold the same unto and to the use of them, the said John Townsend and Henry King, and the survivor of them, and the heirs and assigns of such survivor upon the trusts, nevertheless, and to and for the several uses, ends, intents, and purposes thereafter mentioned, expressed, and contained of and concerning the same." The trusts were to receive the rents and pay the residue, after deducting expenses, to her sister Mary for life, for her separate use, as there-

in mentioned, and after her decease “upon further trust to pay the residue of such rents to her oldest child during his or her life, and after the decease of such oldest child to the next oldest child during his or her life, and so on in succession to the next oldest child during his or her life, till all the children of my said sister Mary shall depart this life, and from and after the decease of my said sister Mary and all her children upon further trusts to pay the residue of such rents, issues, and profits” to the testatrix’s sister Eliza for life for her separate use as therein mentioned, and after her decease to pay the residue to her children successively in the same way as to Mary’s children. “And from and after the decease of my said sisters Mary and Eliza and all their children, upon further trusts that they, my said trustees, or the survivors of them, or the heirs or assigns of such survivor do and shall stand seised of the said freehold hereditaments and premises, in trust for such person or persons, in such parts, shares, and proportions, and in such manner and form, and under and subject to such powers, provisions, directions, limitations, and appointments as the longest liver of them, my said sisters Mary and Eliza and their children, shall, notwithstanding coverture, by any deed or deeds, instrument or instruments in writing, or by his or her last will and testament in writing, or any codicil or codicils thereto to be respectively duly executed and attested, direct, limit, or appoint, give, or devise the same, and in default of any such direction, limitation, or appointment, gift or devise then upon further trust of the same freehold hereditaments and premises for my own heir-at-law absolutely.”

The testatrix died in December, 1838. Her sister Mary died in 1864, leaving two children surviving her, one of whom died in 1871; the other, Hannah Tatley, lived till 1889, when she died, leaving a will, made in 1885, by which she appointed this property to a trustee in trust for her children. The testatrix’s sister Eliza had died childless in 1873.

The persons on whom the legal estate vested in the trustees of the will of Hannah Hargreaves had devolved took out an originating summons to have it decided whether the trust limitations, to take effect after the deaths of the testatrix’s sisters Mary and Eliza and all their children, were valid, and who in the events which had happened was entitled to the property. The defendants were the trustee under the will of Hannah Tatley and the person who claimed under the heir-at-law of the testatrix.

KAY, J., said that he should decline to hear an equitable ejectment upon an originating summons. The plaintiffs appealed.

Upjohn, for the person claiming under the heir-at-law. The objection was not taken by me, but by Mr. Justice Kay, and I submit that the court had jurisdiction. The property being very small, I should be glad for the case to be disposed of here, without incurring further expense.

F. Thompson, for the appointee, concurred in this. The case then proceeded on the merits.

COTTON, L. J. This is a case where trustees of a will in whom the legal estate in fee is vested, and who are in possession of the property, come asking to have a decision, to whom, according to the true construction of the will, they ought to hand over the property. It would be construing Order LV., rule 3, too narrowly if we were to say that they cannot raise this question by originating summons. The question to whom the beneficial interest in the property now belongs turns upon the point whether the power of appointment given by the will of the testatrix is void for remoteness. The limitation to the sisters for life and to their children for their lives are perfectly good, but in my opinion the power to appoint is void for remoteness. This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascertained within the period allowed by the rule against perpetuities. On the death of the last surviving child the equitable estate devolved on the heir-at-law of the testatrix, not under the trusts declared by her will, but as on a partial intestacy, occasioned by the failure of the ulterior trust.

I must say a few words as to Avern v. Lloyd, Law Rep. 5 Eq. 383, which is very like the present case. The Vice-Chancellor there says that as there may be a limitation of valid life estates to the unborn children, why may there not be this ultimate limitation after their determination? No doubt there may, if it is limited to a person who is necessarily ascertainable within the prescribed period. It is very true that after the decease of the tenants for life the children could have disposed of their interests, vested and contingent, so that (apart from the question of the validity of the limitations) the estate might have been disposed of as soon as the tenants for life were dead, and it may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being and twenty-one years, is not made valid by the fact that the person in whose favor it is made can release it.

LINDLEY, L. J. I am of the same opinion. Mr. Justice Kay could not have decided the question of jurisdiction as he did if there had not been some misapprehension as to the nature of the case. A trustee has got the estate in his hands, and asks the court to tell him what he is to do with it. There may be complicated cases where a judge may say: "I cannot safely decide such a question as this in a summary way; you must proceed by action," but there is clear jurisdiction to decide such a question on summons.

As to the merits, the person who is to exercise this power is not

necessarily ascertainable within the period allowed by the rule against perpetuities, and the power therefore is void. If *Avern v. Lloyd*, Law Rep. 5 Eq. 383, had been followed in other cases there would have been a difficulty, but that case had not been followed, and I do not think that it was rightly decided.

LOPES, L. J. I also am of opinion that this case comes within the words and the spirit of Order LV., rule 3, and that Mr. Justice Kay had jurisdiction to decide the question on originating summons. As regards the construction of the will, I am also of opinion that the ulterior limitations are void because the person to exercise the power would not necessarily be ascertained within a life in being and twenty-one years.

WHITBY v. MITCHELL.

(Court of Appeal, 1890. 44 Ch. Div. 85.)

By articles dated the 4th of November, 1821, made shortly before the marriage of Charles Dennis and Mary Elizabeth Maddy, it was agreed that upon the marriage a settlement should be made of certain lands to which Charles Dennis was entitled in fee simple.¹³

By a settlement made in pursuance of the articles, and dated the 7th of May, 1840, the lands were conveyed to the trustees and their heirs to the use of Charles Dennis for life, with a limitation to trustees to support contingent remainders, with remainder to the use of Mary Elizabeth Dennis for her life, with a like limitation to support contingent remainders, with remainder after the decease of the survivor of Charles and Mary Elizabeth Dennis, "to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the said Charles Dennis by the said Mary Elizabeth his wife, such child, grandchild, or more remote issue being born before any such appointment as hereinafter is mentioned shall be made to him, her, or them respectively, for such estate or estates, interest or interests, and in such parts, shares and proportions (if more than one), and with such limitations over, such limitations over being for the benefit of some or one of the objects of this present power, and in such manner and form, as the said Charles Dennis and Mary Elizabeth his wife" should by deed appoint, and in default of appointment, to the use of the child or children of Charles and Mary Elizabeth Dennis equally as tenants in common, and the heirs and assigns of the same child or children respectively, with a limitation over in case any of such children should die under twenty-one without leaving issue. The settlement contained the usual power of sale, and directions for investment of the proceeds

¹³ The statement of facts is taken mainly from the report of the case before Kay, J., 42 Ch. D. 494.

in the purchase of land, and for interim investment thereof until a purchaser could be found.

Charles and Mary Elizabeth Dennis had only two children, viz., Emily Hyde Dennis (who afterwards married one Burlton) and another daughter. Both children were born before the date of the settlement of 1840.

By an indenture dated the 15th of March, 1865, Charles and Mary Elizabeth Dennis appointed that one moiety of the lands comprised in the indenture of the 7th of May, 1840, or the proceeds of sale thereof, should, after the decease of the survivor of them, go and remain to the use of Emily Hyde Burlton for life, for her sole and separate use, without power of anticipation, and after her decease, to the use of such person or persons as she should by will or codicil appoint, and in default of appointment to the use of the children of Emily Hyde Burlton living at the date of that indenture and their heirs equally as tenants in common, with a gift over in case all such children should die under twenty-one without leaving issue.

A similar appointment was also made by Mr. and Mrs. Dennis in favor of their other daughter, her children and appointees.

KAY, J., held that the appointment was invalid so far as it affected to restrain Emily Hyde Burlton from anticipation, and to give her a testamentary power of appointment, and to give the property in default of appointment to her children.

The three children of Emily Hyde Burlton appealed.

COTTON, L. J. This is an appeal from a decision of Mr. Justice Kay declaring that certain limitations treated as introduced into an antenuptial settlement by virtue of a post-nuptial appointment under a power contained in the settlement, being limitations of legal estates, were void, not on the ground that they were void for remoteness, but that they were limitations which the law does not allow of legal estates. Now, what are these limitations? First, there is a limitation of a legal estate to an unborn child of the marriage for life, and then, after that, there is a limitation to the children of that unborn child. It is said that this latter limitation does not come within the rule against perpetuities, and that there is no other rule preventing this limitation from being good. Mr. Justice Kay has decided, and in my opinion rightly, that there is a rule in existence which does prevent the limitation from being good, namely, that you cannot have a possibility upon a possibility; or, to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers. That is the same thing as what has been called "a possibility upon a possibility."

But it is said that, although there is such a rule in existence, that is superseded by the more modern rule against perpetuities. In my opinion the old rule with regard to a possibility on a possibility has

not been done away with by this modern rule. It is conceded that the rule against a possibility upon a possibility existed long before the rule prohibiting the limitations of estates tending to a perpetuity existed. Can we say that the old rule has been put an end to or superseded? Mr. Joshua Williams lays it down that the rule still exists; while other text-writers say it does not exist. In this difference of opinion we must see what aid we can obtain from judges and others in high position. First of all, we have Butler's note to Fearne—and the same thing is expressed in the works of other writers—to the effect that the rule of law against double possibilities is a rule still existing, prohibiting limitations of estates in such a way as that, although they may not offend against the rule of perpetuities, they are bad as being objectionable to the law. Then Lord Kenyon, referring to that point in *Hay v. Earl of Coventry*, says (3 T. R. 86): “It is not necessary for me to say what effect that would have had in the present case, if that point”—that is, whether an estate for life could be given to unborn issue—“had remained undecided; because the law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue.” It is said that only meant that a limitation to the children of unborn issue generally, without any limit as to the time within which such children should be born, would offend against the rule of perpetuities; but in my opinion Lord Kenyon was referring to the old rule against double possibilities. It is clear, in my opinion, that the rule under which Mr. Justice Kay has decided this case is a rule which judges treated as still subsisting long after the rule against perpetuities had been crystallized and laid down in definite and distinct terms.

Then, again, in *Monypenny v. Dering*, 2 D. M. & G. 145, Lord St. Leonards says (p. 170): “Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon.” According to the argument addressed to us on behalf of the appellants that old rule has been superseded by the modern rule against perpetuities; but here we have Lord St. Leonards treating it as still subsisting in 1852.

Then we have besides, Butler's note to Fearne (10th ed. vol. i. p. 565, n.), in which he lays down what he takes to be the law—that there was no decision superseding the old rule. He says this: “The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue.” He there quite treats it as the true rule still subsisting. And then we have a statement by Burton,

in his Compendium (7th ed. p. 255), showing that he did recognize clearly that the old rule was still subsisting. He says: "Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn. * * * But no remainder can be given to the child of a person who is not in existence."

Therefore, although very ingenious and learned arguments have been addressed to us to show that the old rule has been superseded and put an end to, it is, in my opinion, well established that the rule is still in existence.

There is a passage in Lord St. Leonards' judgment in *Cole v. Sewell*, 4 D. & War. 1, 32, in which he speaks of the rule as being obsolete, but he nowhere lays down that the rule is no longer existing. He only means that the rule is no longer necessary to be referred to because, through the introduction of shifting uses and executory devises, the law is now governed rather by the rule against perpetuities. When Mr. Marten referred us to Sugden on Powers, I referred him to the opinion expressed by the learned author, when sitting as Lord Chancellor, in *Monypenny v. Dering*, 2 D. M. & G. 145, 170, in the passage which I have read, and which shows he did not consider the old rule to have been abrogated. In my opinion the decision of Mr. Justice Kay is right.

LINDLEY, L. J. I entertain no doubt myself that Mr. Joshua Williams' observations on this subject are correct from beginning to end, and I do not know that I could express my views better than he did. I do not know, any more than he seems to have done, the exact meaning of the old rule as to a possibility upon a possibility; and if any one turns to the passage in Coke upon Littleton where it is discussed, I hope he will understand it better than I do. I confess I do not understand it now, and never did. But, at all events, it gave rise to the rule which everyone can understand, and which is expressed by Butler in the note to Fearn, where he says that "the cases of a possibility upon a possibility * * * gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue." That is intelligible; and there are other passages on pages 502 and 503 showing this was the author's settled opinion.

I have always understood that to be the settled rule of law, and I am not aware of any decision or dictum which in any way impugns it. But it is said that the old rule became obsolete, or merged or confused in the more modern law of perpetuities. Butler, however, shows that this is a mistake. The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. When shifting uses and executory devises were invented it became necessary to impose some limit upon them, and the doctrine of perpetuities has arisen from that necessity. The old rule against double

possibilities is a rule that has not been abrogated, and it is founded on very good sense; because it is not desirable that land should be tied up to a greater extent than that allowed by the rule. So far from supporting ingenious devises for tying up land longer, the time has long gone by for that; and, as the law is against the appellant's contention, in my opinion the appeal should be dismissed.

LOPES, L. J. That there was an old rule that an estate could not be limited to an unborn child of an unborn person has been admitted, and, in fact, cannot be denied. It was an old rule originating out of the feudal system. But it is said that, although this old rule did once exist, it has been superseded by the rule against perpetuities. No direct authority has been cited for any such contention, nor can any such authority be found. Counsel have referred to certain dicta by text-writers of more or less doubtful import; but as early as the year 1789 that old rule was recognized as existing by Lord Kenyon in *Hay v. Earl of Coventry*, 3 T. R. 83; and again, in 1852, it was recognized, in *Monypenny v. Dering*, by so great an authority as Lord St. Leonards. Thus, in 1789 and 1852, that rule was recognized,—that is to say, at a time when the rule against perpetuities was in existence.

I have no doubt, therefore, that these are two independent and co-existing rules. The rule against perpetuities originated and was rendered necessary on account of the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection.

I am clearly of opinion that the decision of Mr. Justice Kay was right, and that the appeal should be dismissed.¹⁴

¹⁴ The rule of *Whitby v. Mitchell* does not, however, apply to limitations of personal property. *In re Bowles*, L. R. [1902] 2 Ch. 650.

CHAPTER II

INTERESTS SUBJECT TO THE RULE

LONDON & S. W. RY. CO. v. GOMM.

(Chancery Division and Court of Appeal, 1882. 20 Ch. Div. 562.)

By an indenture, dated the 10th of August, 1865, made between the plaintiffs, the London and South-Western Railway Company, of the one part, and George Powell of the other part, after reciting that the plaintiffs were seised of the fee simple and inheritance of the piece or parcel of land and hereditaments intended to be thereby conveyed, "which being no longer required for the purposes of their railway," they had contracted to sell to the said George Powell (who was the adjoining owner thereto), at the sum of £100, subject to the conditions thereafter contained, the company conveyed to Powell in fee the piece of land in question, being a small piece of land situate near their Brentford Station. And Powell thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs, their successors, and assigns, that he, the said G. Powell, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter (whenever the said land might be required for the railway or works of the company) whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing, to be left as therein mentioned, and upon receiving from the company, their successors or assigns, the said sum of £100 without interest, make and execute to the company, their successors and assigns, at the expense of the company, a reconveyance of the said hereditaments free from any encumbrances created by the said G. Powell, his heirs or assigns, or any persons claiming under or in trust for him or them.

The ten years limited by the 127th section of the Lands Clauses Consolidation Act, 1845, had expired in 1862, but the company had still power of purchasing land in this neighborhood by agreement.

The premises comprised in the above indenture were in the year 1879 sold and conveyed along with other property, by the son of George Powell to the defendant, who had full notice of the provisions of the deed of August, 1865. Uninterrupted possession of the land had been had by George Powell and his successors in title ever since the purchase in 1865.

On the 12th of March, 1880, the company gave notice in writing to the defendant claiming to repurchase the property under the provision in the deed of August, 1865. The defendant refused to reconvey, upon which the company commenced their action, alleging that the land in question was required for the purposes of their undertaking, and for the improvement of their railway and works, and claimed specific performance of the covenant in the deed of 1865.

The defendant by his defence alleged that he had purchased this land in the year 1879 after the death of G. Powell, and long after the period limited by the Lands Clauses Consolidation Act and other Acts under which the plaintiffs were incorporated for the absolute sale and disposal by them of all superfluous lands had expired, and that all estate and interest of the plaintiffs in the said lands had become vested in the adjoining owner when the defendant so purchased. That the condition or covenant in the deed of August, 1865, if and so far as the same purported to bind the land in the hands of succeeding owners, or to bind succeeding owners, was invalid, but if valid had ceased, and was at an end before the defendant purchased.

At the time when the company gave their notice to purchase this land from the defendant they had no compulsory power of purchasing land in that neighborhood, but under the London and South-Western Railway Act, 1863 (26 & 27 Vict. c. xc.), § 94, and the London and South-Western Railway (General) Act, 1868 (31 & 32 Vict. c. lxxix.), § 23, and others of their Acts, they still had power to purchase lands by agreement, under which this land might have been purchased if the defendant had been willing to sell it.

The action now came on for trial, and several engineers of the plaintiffs were examined as witnesses, who proved that the land in question was now required by the company for the purpose of extending the works connected with the station at Brentford, and, further, that in the year 1865, when the land was conveyed to G. Powell, there was a great probability that at some future period it would be so required.

The action came on to be heard before Mr. Justice Kay on the 28th of November, 1881.

1881, Dec. 2. KAY, J., after stating the effect of the deed of the 10th of August, 1865, continued:

The defendant is an assignee of Powell with notice of the covenant. On the 12th of March, 1880, notice was given that the railway company required the land. The defendant refusing to convey, this action was commenced on the 22d of November, 1880, for specific performance of the covenant.

In opposition to the claim it is insisted:

1. That the arrangement was ultra vires and void.
2. That the covenant to reconvey is void as tending to a perpetuity.
3. That the land is not required for the purposes of the railway.

On the last point I am satisfied by the evidence of the company's engineers, which according to Stockton and Darlington Railway Com-

pany v. Brown, 9 H. L. C. 246, and Kemp v. South-Eastern Railway Company, Law Rep. 7 Ch. 364, is conclusive, that the land is bona fide required for purposes within sect. 45 of the Railways Clauses Consolidation Act.

By their special Act of 1863, the company had in 1865 power to purchase this land for such purposes, and that power still exists under an Act obtained by them in 1868.

But it is argued that this was in 1865 superfluous land, and ought then to have been sold absolutely to Powell as the adjoining owner, and that this being a conditional sale was void. I am satisfied by the evidence that though not wanted at the time, there was in 1865 a strong probability that this land, which immediately adjoins the company's station at Brentford, would be required eventually, and therefore a prospective contract to purchase was I think within the powers of the company: Kemp v. South-Eastern Railway Company; Hooper v. Bourne, 5 App. Cas. 1. And it seems to me that the true effect of the transaction in 1865 was not a conditional sale, but a sale out and out to Powell, with a personal contract by him to reconvey when called on at a certain price. Probably the price he had to pay was considerably less by reason of this covenant, and if the transaction was ultra vires, the proper thing to do would be to set the sale aside altogether, in which case the land ought to be reconveyed on payment back of the purchase-money. But I do not think it was a transaction beyond the powers of the company.

The remaining question is, whether this covenant is void as tending to a perpetuity.

Upon this branch of the argument two cases were referred to. The first of these is Gilbertson v. Richards, 4 H. & N. 277; 5 H. & N. 453.

In that case one Billings, being entitled to the fee simple of certain lands, agreed to sell them subject to the payment by the purchaser to him of £40 a year, for which he was to have a power of distress. Then he and the purchaser mortgaged the property by a deed which contained a proviso that if the mortgagee, or any one claiming under him, should ever enter into possession the premises should thenceforth be charged with the payment to Billings, his heirs and assigns, of the annual sum of £40. It was argued that this was void for remoteness. That argument was answered by Baron Martin, thus: "The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it or release it at their pleasure. A

rent in fee simple may be granted to a man and heirs to continue forever. Why, therefore, may not one be granted to commence at any time, however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed, but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant. For these reasons we think the rent was well created, and that the distress for it was lawful." In the Exchequer Chamber the same objection having been passed, was thus answered by Mr. Justice Wightman, who delivered the judgment of the court: "The only question which remained for consideration was whether the second objection, founded on the law against perpetuities, was available in this case, and we are of opinion that it is not. We think that this rent is not liable to the objection as to perpetuity. The real effect of the limitations in the deed before us is, that the mortgagees are to take possession or sell, subject to the payment of this rent to Billings. It is a restriction on the amount of the estate of the mortgagees, and seems within the cases as to the power of sale in a mortgagee which, as incidental to his estate, is held not to be within the rule as to perpetuities. There may be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party who or whose heirs are to take, is ascertained, and who can dispose of, release, or alienate the estate either at common law, or at all events, since the passing of the 8 & 9 Vict. c. 106, § 6."

The section of the Act referred to is that which enables a contingent executory and a future right and a possibility coupled with an interest in any hereditaments, whether the object be ascertained or not, to be disposed of by deed. Before that Act such interest could be released when the person contingently entitled was ascertained.

Lord St. Leonards, in the 8th edition of his treatise on Powers, at page 16, thus comments on that decision. He cites the language of Baron Martin thus: "A rent in fee simple, the court said, may be granted to a man and his heirs to continue forever. Why therefore may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be in esse until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person, and his heirs in fee simple, who may deal with it at his or their pleasure, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time, however distant. This," said Lord St. Leonards, "is an im-

portant distinction in the law of perpetuity, but it was not necessary for the decision of the case. No perpetuity was created by the power of sale in the mortgagees or by the right of them or their heirs to take possession of the land, but in exercising that right they took, subject to a perpetual rent of £40 a year in favor of the mortgagor. It was a charge on the estate and had no tendency to a perpetuity."

From this it seems to me that Lord St. Leonards did not agree with the reason for the decision, but thought it could be supported upon the ground that the exercise of the powers of sale and entry by a mortgagee not being obnoxious to the rule against perpetuities, neither could a condition appended to the exercise of these powers be so.

The dictum at the end of the judgment in the Exchequer Chamber he does not seem to notice.

The other case cited to me is Birmingham Canal Company v. Cartwright, 11 Ch. D. 421. There a right of pre-emption, unlimited in point of time, was contracted to be given. The learned judge in that case cited the passages from the judgments in Gilbertson v. Richards, 4 H. & N. 277, which I have referred to, and stated his own opinion thus: "The next question arises upon the terms of the covenant giving the right of pre-emption—whether or not that right is obnoxious to the rule against perpetuities. In my opinion the covenant is not in any way liable to that objection. I think that wherever a right or interest is presently vested in A. and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that Gilbertson v. Richards is a distinct authority in favor of that conclusion."

I need not say that after quoting such authorities I should distrust my own judgment where it differs from them if I did not find ample authority to support me. But I am unable to agree with these dicta. In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it.

It would be a great extension of the power of tying up property to hold otherwise. If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not

arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not the law. From the report of *Gilbertson v. Richards* the dictum there, which I have read, seems to be founded upon a short extract from *Sanders on Uses*, thus cited in the report of the argument. In *Washborn v. Downs*, 1 Cas. C. 213, cited in *Sanders on Uses*, it is said "a perpetuity is where, if all that have interest join, and yet they cannot bar or pass the estate." The whole passage in *Sanders* is this: "It is said in the case of *Washborn v. Downs* that a perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate, and in the case of *Scattergood v. Edge*, 1 Salk. 229, that every executory devise is a perpetuity so far as it goes, i. e., an estate inalienable, though all mankind join in the conveyance. But," says *Sanders*, "these definitions of a perpetuity are not accurate. If an estate be limited to the use of A. and his heirs, but if B. should die without heirs of his body, then to the use of C. and his heirs, the limitation to C. and his heirs would be void as tending to a perpetuity. Yet C. might no doubt release or pass his future estate, and with the concurrence of the necessary parties the fee simple might be disposed of before there was a failure of issue to B. A perpetuity may with greater propriety be defined to be a future limitation restraining the owner of the estate from alienating the fee simple of the property discharged of such future use or estate before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity."

This was written before the passing of the Act 8 & 9 Vict. c. 106, which only gives the power to alienate certain contingent interests then inalienable. But many cases besides that given by *Sanders* might be put in which a contingent interest which might be alienated or released before that Act would nevertheless be void if so limited that it might not arise within a life or lives in being and twenty-one years afterwards. It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can together make a good title, or one can release to the other, the rule of perpetuities does not apply.

But it is very singular that the case of *Washborn v. Downs*, which seems to be the foundation of these dicta, hardly seems to justify the short report of it given by *Sanders*. In that case an equitable tenant in tail sought to suffer a recovery, and it seems to have been argued that unless he could do so there would be a perpetuity. The answer appears to have been No, because with the concurrence of the trustee, the owner of the legal estate, he could do so. The passage quoted re-

fers to some such argument as this. The words of the report are these: "The court in the principal case took time to advise, and advised the parties to agree. And in the debate of this case it was said that a perpetuity is where if all that have interest join and yet cannot bar or pass the estate. But if by the concurrence of all having the estate tail it may be barred, it is no perpetuity." This does not mean that if a person presently entitled to the benefit of a springing use or executory devise void for perpetuity can release it, the power of doing so would prevent its being void. The question whether a cestui que trust could suffer a valid recovery was much discussed in the reign of Charles II, as appears by the cases of *Goodrick v. Brown*, 1 Cas. C. 49; *Lord Digby v. Langworth*, 1 Cas. C. 68; and it was afterwards held in *North v. Champernoon*, 2 Cas. C. 78, by Lord Nottingham, C., that the recovery of the cestuis que trust in tail was good, and the trustee would be compelled to convey accordingly. But if I am right in this view thus far, it does not by any means follow that the contract in this case is void.

The rule against perpetuities is a branch not of the law of contract but of property. This is clearly enough stated in page 5 of the Introduction to Mr. Lewis's well-known work on Perpetuities, in passages cited from Butler's notes to Fearne on Contingent Remainders and from Jarman on Wills. Mr. Lewis, at page 164, adopts the definition of a perpetuity which I have read from Sanders, and adds one of his own, which runs thus: "In other words, a perpetuity is 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 the future limitation, except with the concurrence of the individual interested under that limitation."

A contract not creating any estate or interest properly so called in property, at law or equity, is not, in my opinion, obnoxious to the rule. For instance, a covenant to pay £1000 when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time. A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not, properly speaking, estates or interests in land, and are therefore not within the rule. I think that this is the true test to apply to this case, and am of opinion that this covenant does not create any interest in land. A purchaser without notice from Powell would not be bound by it. It is not, I think, within the rule against perpetuities at all. Consequently I hold that objection to fail; and as the defendant took the land with notice, I hold that he is

bound in equity by the covenant, on the principle of *Tulk v. Moxhay*, 2 Ph. 774.

I therefore make the usual decree for specific performance, with costs. I suppose the title is accepted, if not, there must be the usual reference as to title.

The defendant appealed. The appeal was heard on the 6th of March, 1882.

[In the course of the argument, counsel said, "A covenant to renew a lease at the end of forty or fifty years has always been considered good, and a covenant to grant a renewed lease containing a similar covenant for renewal: *Hare v. Burges*, 4 K. & J. 45."¹ To which Jessel, M. R., replied: "That is an exception from the general rule."²

[Davey in reply said: "Covenants to renew leases are distinguishable, for they run with the land at law."

JESSEL, M. R. This is an appeal from a decision of Mr. Justice Kay, and it raises two points: first, whether an option of repurchase given to the London and South-Western Railway Company by a deed of sale entered into between the company and one Powell, the predecessor in title of the defendant Gomm, is obnoxious to the rule against remoteness; and secondly, whether the deed itself is or is not void, having regard to the 127th section of the Lands Clauses Consolidation Act, 1845.

The deed was made in 1865 after the compulsory powers of the railway company had expired, and it recited that the company was seised of the land which was no longer required for the purposes of their railway and had contracted to sell it to Powell, who was the adjoining owner, at the sum of £100, subject to the condition thereafter contained. The company then conveyed the land to Powell in fee for £100, and the deed contained this covenant by Powell: [His Lordship read the covenant giving the option of repurchase to the company.]

Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time," or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time, but it is obviously intended so to be. The railway company do not want the land now, and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the company the owners or owner for the

¹ See, also, on the general validity of covenants for the perpetual renewal of leases in addition to the case cited, *Pollock v. Booth*, 11 R. 9 Eq. 229; *In re Garde Browne*, L. R. [1911] 1 Ir. 205; *Blackmore v. Boardman*, 28 Mo. 420; *Diffenderfer v. Board of Public Schools*, 120 Mo. 448, 25 S. W. 542; *Banks v. Haskie*, 45 Md. 207.

² In *Woodall v. Clifton*, L. R. [1905] 2 Ch. 257, 265, Warrington, J., said in regard to covenants for the perpetual renewal of leases: "I think I must treat these covenants to renew as exceptions to the general rule—exceptions for which it is very difficult to find a logical justification, but exceptions which have been probably recognized because they were in existence long before the rule had been developed."

time being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time. You cannot, as in *Kemp v. South-Eastern Railway Company*, Law Rep. 7 Ch. 364, insert by indentment the limitation that the land is to be taken before the time for executing the works had expired, for in this case the time for the execution of the works had already expired. It appears to me therefore plain (and indeed it was admitted in argument by the respondents) that the option is unlimited in point of time.

If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest, or equitable estate. In the ordinary case of a "contract for purchase there is no doubt about this, and an "option for repurchase" is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities), between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.

It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, What is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well-known book on Perpetuities at page 164. He cites with approbation this passage from Mr. Sanders' *Essay on Uses and Trusts*: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity."

Then Mr. Lewis adds these words: "In other words, a perpetuity is 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 the future limitation, except with the concurrence of the individual interested under that limitation."

Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that whenever such notice is given and such payment made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other.

That appears to me to dispose of the case, unless we agree with the conclusion of Mr. Justice Kay on the last point considered by him. Down to that point I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the Birmingham Canal Company v. Cartwright, 11 Ch. D. 421, which must be treated as overruled. But Mr. Justice Kay, having, as I think he has most correctly and accurately defined the law thinks that this case is not within it, because he comes to the conclusion that "this covenant does not create any interest in the land." But he had forgotten that if that were so he could not make a decree against Mr. Gomm. If it were a mere contract it was not Gomm's contract, and if it did not in equity run with the land so as to give an interest in the land, it could not have been enforced against him. It is clear from his Lordship's judgment that if he had been of opinion that this covenant gave the company an interest in the land (which, I think, is the correct view), he would have decided the case the other way.

With regard to the argument founded on Tulk v. Moxhay, 2 Ph. 774, that case was very much considered by the Court of Appeal at Westminster in Haywood v. The Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403, and the court there decided that they would not extend the doctrine of Tulk v. Moxhay to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we

ought not to extend the doctrine of Tulk v. Moxhay in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case, 5 Co. Rep. 16a, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk v. Moxhay was affirmative in its terms but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden the court interferes on one or other of the above grounds. This is an equitable doctrine establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. It is, if I may say so, another exception to the rules against remoteness, exceptions which had previously been thoroughly established in many cases at law as regards easements and in equity as regards charities. That being so, it does not appear to me that Tulk v. Moxhay has any direct bearing on the case which we have to decide.

There is another important point which alone would enable us to decide this case in favor of the appellant. Was the conveyance of 1865 ultra vires? When we look at the provisions of the Lands Clauses Consolidation Act, § 127 et seq., I think we must consider them to mean that at the expiration of the statutory period, if the land is then superfluous, that is, if it is not wanted for the purpose of the railway, the company must sell it under the penalty of losing it by its reversion in the adjoining owner. There is no doubt that the company can, before the expiration of the statutory period, determine that the land is superfluous and sell it, and it is equally clear that if at the end of the statutory period they think that the land may be required for the purpose of their railway it is not then superfluous. When I say "they think," I mean if their proper advisers have fairly and reasonably come to that conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the company, or it may be delayed after the expiration of the statutory period without the land being actually used, but whenever it is determined, either

before or after the expiration of that period, that the land is superfluous, it becomes salable or vests in the adjoining owner.

That being so, it is plain that when land is sold as superfluous, no interest in it can be retained by the company. Now, if I am right in the conclusion at which I have arrived as to the nature of this option of repurchase an interest was retained by the company. The form of the conveyance is plain. It recites a contract for sale subject to the condition thereafter mentioned. That is not an absolute sale but a conditional sale. Now the Statute in terms requires an absolute sale, and that being so, the company could not sell, reserving an option of repurchase. The sale itself therefore was beyond their power, and was a void sale, and we must recollect that this is a Statute which governs the legal estate as much as the equitable estate. Then what follows? The land if superfluous vested in Mr. Powell under sect. 127 at the end of the ten years, free from any restriction, which would give him a title; but if it was not superfluous, then as the statutory period of limitation had elapsed before the commencement of this action, the appellant would have obtained a title under the Statute of Limitations. In either case, therefore, the appellant's title must be valid as against the title of the company.

On these grounds it seems to me that the present appeal ought to be allowed.

SIR JAMES HANNEN. The first question in this case is as to the effect of the deed of the 10th of August, 1865.

It appears to me that the company are estopped from denying that this land was superfluous land at the time of the sale to Powell. It is expressly recited that the land is no longer required, and that they thereupon propose to sell it at a particular price.

It is perfectly plain that the company has only the right to sell subject to the terms imposed by the legislature in the Lands Clauses Consolidation Act. That Act requires the company to sell absolutely, and looking to the history of legislation on this subject I think there is no doubt that particular stress was laid upon the word "absolutely." It was inserted, in my opinion, in order to prevent the company having acquired lands which it was found afterwards were not required for the purpose of the undertaking, from still retaining indirectly a hold upon those lands. It appears to me, therefore, that as this was not an absolute sale, but a conditional sale, it was void, and that the effect would be that at the end of the ten years, there being no sale, the land would vest in Powell. At the same time I do not think that every contract made by a railway company for the purpose of settling at the present time what should be the price of land to be acquired by them at some future time would be bad in itself. I think that if there had been a separate contract limited to the time within which the company would have authority to take lands, there would not have been anything illegal in their entering into an arrangement with the owner that they should have a right to purchase at a particular price to save the trouble

and inconvenience of having the value settled in some other manner, and *Kemp v. South-Eastern Railway Company*, Law Rep. 7 Ch. 364, is an authority to that effect.

The next question is, does this covenant create an interest or estate in the property at law, or in equity. Upon that point I have nothing to add to what has been said by the Master of the Rolls. It is not a subject with which I have been frequently called upon to deal, and therefore, any opinion that I may express on the subject has not the value it would have if it came from one of my learned colleagues; but I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from *Sanders*, "a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined." Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option.

The last question is, supposing this covenant does not create any estate or interest, what is the effect of it as a covenant? It is clear that it is not a covenant which would run with the land at law. *Spencer's Case* and the notes to it in *Smith's Leading Cases*, vol. i. 8th ed. p. 90, seem to me to point very clearly to that conclusion. It has been said, however, and in fact the judgment with which we are dealing lays down, that although this is only a personal covenant, yet *Tulk v. Moxhay* is an authority for the proposition that such a covenant if known to the purchaser of the estate binds him. This argument is disposed of by the decision of the Court of Appeal in *Haywood v. The Brunswick Permanent Benefit Building Society*, which seems to me to put a wholesome restriction upon the application of *Tulk v. Moxhay* by laying down this rule, that it only applies to restrictive covenants, and does not apply to an affirmative covenant, such as a covenant binding the owner of the land at some future time to convey it.

For these reasons I am of opinion that the judgment of the court below cannot be supported, and that the appeal must be allowed.

LINDLEY, L. J. I am of the same opinion. This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must show is, upon what legal principle the defendant is bound by a contract into which he did not enter.

It is not contended that he is bound by it on the ground that the covenant entered into by *Powell* runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity.

Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in *Haywood v. Brunswick Permanent Benefit Building Society*, and because it was sought there to extend the doctrine of *Tulk v. Moxhay* to a degree which was thought dangerous, considerable pains were taken by the court to point out the limits of that doctrine. In that case an owner in fee had granted a rent, and in order better to secure it, he covenanted for himself, his heirs and assigns, to build some houses on the land out of which the rent issued and to keep them in repair forever. It was sought to enforce that covenant by bringing an action for damages against the mortgagee in possession of the land, because the houses had been allowed to get out of repair. It was of course seen that an action would not lie at law; but it was contended, on the authority of *Tulk v. Moxhay*, that inasmuch as the defendants took the land with notice of the covenants they were bound by them in equity. The Court of Appeal declined so to extend the doctrine of *Tulk v. Moxhay*, and their reasons will be found very carefully stated by Lord Justice Cotton in his judgment. The conclusion arrived at by the court was that *Tulk v. Moxhay*, when properly understood, did not apply to any but restrictive covenants. The case of *Cooke v. Chilcott*, 3 Ch. D. 694, before Vice-Chancellor Malins was very much considered, but it was not followed by the Court of Appeal. Here we are asked to extend the doctrine of *Tulk v. Moxhay*, and to apply it to a covenant to sell land at any time for a specified sum of money. That this is an extension of the doctrine cannot, I think, be denied; and for the reasons which were given by the Court of Appeal in the case to which I have referred I think we ought to decline to extend that doctrine. If so, how is Gomm to be held to be bound by this covenant? He did not enter into it, he is not bound at law, and *Tulk v. Moxhay* is no authority for saying that he is bound in equity. That appears to me to dispose of this case.

I agree with the observations made by the other members of the court, that this covenant creates an interest in land and is void for remoteness. On the question of remoteness one view was taken by Mr. Justice Kay in this case, and the other view by Mr. Justice Fry in *Birmingham Canal Company v. Cartwright*. My own view is that the observations made by Mr. Justice Kay on that case and on *Gilbertson v. Richards*, are sound. The error in his judgment appears to me to be, that he has applied *Tulk v. Moxhay* to this case without sufficiently considering the extent to which he was carrying it.

As regards the observations upon sect. 127 of the Lands Clauses Consolidation Act, I also concur with the other members of the court.

It appears to me that inasmuch as the company could only sell by virtue of that section, which requires an absolute sale, and as the sale which they made was not an absolute sale within the true meaning of that clause, the logical consequence is that the whole transaction is void, and on this ground, if there had been no other, the court must have declined specifically to perform the contract.

I am therefore of opinion that the appeal must be allowed, and judgment must be for the defendant.³

* Mr. Davey asked that the costs of the short-hand notes of Mr. Justice Kay's judgment might be allowed.

JESSEL, M. R. We have not used them, but have read Mr. Justice Kay's judgment in the Law Journal. If that report had appeared a sufficient length of time before your brief was delivered, we should not have allowed the costs of a short-hand note; but as it was published so late as the 3d of March, we think the costs ought to be allowed.

In re 'TRUSTEES OF HOLLIS' HOSPITAL.

(Chancery Division. L. R. [1899] 2 Ch. 540.)

By an agreement dated October 3, 1898, a contract was entered into by an agent acting on behalf of a majority of the trustees of Hollis' Hospital to sell to Ernest Hague certain freehold property belonging to the hospital, situate at Castle Dyke, near Sheffield, containing 25 a. 1 r. 17 p., for £5,750.

Matters had proceeded so far that the purchaser was satisfied to accept the title, and the draft conveyance had been approved by the trustees' solicitor, when a letter dated November 16, 1898, was received by the purchaser's solicitors written by William Henry Anthony, one of the trustees who had not concurred in the sale, to the effect that as the heir-at-law of Thomas and John Hollis he thought it his duty to intimate to them that he was no party to the sale of the property, and to call their attention to a clause in the title-deeds as to the property reverting to the heir-at-law in case of its being devoted to any other purpose than that intended by the settlor; and a summons was taken out under the Vendor and Purchaser Act by Ernest Hague for the purpose of determining whether or not a good title had been shown.

William H. Anthony declined to appear with his co-trustees upon the summons or to take any part in the argument. His counsel appeared simply to state that he was no party to the contract, and declined to be bound in any way by the present proceedings.

The purchaser, on the other hand, warned him that in the event of

³ Accord: In re Tyrrell's Estate, [1907] 1 Ir. 194, 292 (covenant to extinguish a rent charge); Starcher Bros. v. Duty, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990; Woodall v. Bruen, 85 S. E. 170 (W. Va. 1915); Barton v. Thaw, 246 Pa. 348, 92 Atl. 312, Ann. Cas. 1916D, 570.

the title being held good and of the contract being completed it would hereafter be insisted that he was bound by the decision in his presence of the question of title raised.

The history and title of the property appeared from the recitals and documents to be as follows:

By indentures of lease and release dated August 26 and 27, 1703, Thomas Hollis (father of Thomas Hollis, Senr.) of his charitable mind and disposition to the intent to find and provide habitations for sixteen poor persons from time to time and for ever to be elected of the poor of Sheffield, or within two miles round as thereby directed, and to raise moneys necessary for keeping the fabric in which such other habitations were made at all times thereafter in repair, conveyed certain hereditaments in Sheffield then converted into sixteen small apartments or habitations with other hereditaments to certain persons therein named, their heirs and assigns for ever, to their use and behoof upon trust and subject to the powers, declarations, and agreements therein mentioned and expressed.

By an indenture of assignment dated January 24, 1704, the same Thomas Hollis assigned to Thomas Hollis, Senr., his executors, administrators, and assigns, certain Government terminable annuities amounting to £90 per annum; and by deed-poll dated January 26, 1704, Thomas Hollis, Senr., declared that the same annuities were so assigned to him upon trust that he should pay the same towards maintaining the said almshouses, and for several other purposes in the said deed mentioned.

By a writing or codicil under his hand and seal dated February 21, 1715, annexed to the deed of assignment of January 24, 1704, Thomas Hollis, the father, revoked several payments in that deed contained, and left his son, Thomas Hollis, Senr., liberty to continue or discontinue them as he, his executors or assigns, should think fit without being accountable to any.

Thomas Hollis (father of Thomas Hollis, Senr.) died, and the before-mentioned annuities were turned into South Sea annuities and South Sea Stock, which annuities and stock were sold by Thomas Hollis, Senr., for £1,500.

Thomas Hollis, Senr., for the augmentation of the said charities and for the better settlement thereof, added to the £1,500 the sum of £610, and with those two sums purchased certain messuages, lands, and tenements from Sir John Statham and Thomas Turner.

At the date of the next-mentioned indentures the hereditaments originally conveyed by the indentures of lease and release of August, 1703, had become legally vested in Thomas Hollis, Senr., and ten other persons (including Thomas Hollis the younger) by way of survivorship or otherwise.

By indenture of lease for a year dated May 17, 1726, and made between Thomas Hollis, Senr., of the one part and John Williams of the other part, Thomas Hollis, Senr., in consideration of 5s. bargained and

sold the hereditaments so purchased by him from Sir John Statham and Thomas Turner (which included the property comprised in the contract the subject of the present application) unto the said John Williams. To have and to hold unto the said John Williams, his executors, administrators, and assigns, from the day next before the day of the date of that indenture for a year at a peppercorn rent if demanded, to the intent and purpose that by virtue of that deed and of the statute for transferring of uses into possession, the said John Williams might be in the actual possession of all and singular the premises aforesaid, and be thereby enabled to accept a grant and release of the reversion and inheritance thereof to him, his heirs and assigns for ever, to and for such uses, trusts, intents, and purposes as in and by such release should be limited, expressed, and declared concerning the same.

There was a similar indenture of lease to John Williams, *mutatis mutandis*, by the then trustees of the almshouses and premises comprised in the release of 1703.

By an indenture dated May 18, 1726, and made between the said Thomas Hollis, Senr., of the first part, the ten named persons (including Thomas Hollis, younger) therein mentioned (being the ten persons in whom, jointly with Thomas Hollis, Senr., the property originally devoted to charity by the father of Thomas Hollis, Senr., was then legally vested), of the second part, the said John Williams of the third part, and Isaac Hollis, William Steed, Daniel Bridges, and John Crooks of the fourth part, after reciting the deeds and matters before referred to, it was witnessed that for the support and maintenance of the said charity and for the better accomplishment and performance of the trusts and powers in them reposed by former conveyances, the said Thomas Hollis, Senr., and the ten persons parties of the second part, nominated, elected, and chose the four persons parties of the fourth part to be trustees, to be added to the surviving trustees in the room of such others of the said trustees as were dead; and it was further witnessed that in consideration of 5s. apiece to the old trustees, paid by the said John Williams, the old trustees granted, aliened, released, and confirmed unto the said John Williams in his actual possession of the tenements and hereditaments next hereinafter mentioned then being by force and virtue of the indenture of bargain and sale for one year bearing date the day before the date of this indenture, in consideration of money and by force of the statute for transferring of uses into possession, and to his heirs the hereditaments by the indenture of release of August, 1703, conveyed by Thomas Hollis (father of Thomas Hollis, Senr.), to hold unto the said John Williams, his heirs and assigns for ever, to the use and behoof of Thomas Hollis, Senr., and the fourteen other persons, the old and new trustees, their heirs and assigns for ever, upon the trusts and to and for the several and respective uses, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same; and it was thereby fur-

ther witnessed that the said Thomas Hollis, Senr., for the better support and maintenance of the said charity and for the augmentation thereof and in consideration of 5s. paid by the said John Williams, granted, aliened, released, and confirmed to the said John Williams (in his actual possession of the hereditaments thereafter mentioned then being by force and virtue of the indenture of bargain and sale for one year bearing date the day next before the date of this indenture, in consideration of money and by force of the statute for transferring of uses into possession), and to his heirs, all the hereditaments purchased by the said Thomas Hollis, Senr., from Sir John Statham and Thomas Turner. To have and to hold unto the said John Williams, his heirs and assigns for ever, to the use and behoof of the said Thomas Hollis, Senr., and the other old and new trustees, their heirs and assigns for ever. Nevertheless, upon the several and respective trusts and to and for the several and respective intents and purposes thereafter limited, expressed, and declared of and concerning the same. Then follows a declaration of the trusts of all the hereditaments conveyed to the effect that the old and new trustees and the survivors and survivor of them, their heirs and assigns, or the heirs and assigns of such survivor, should place and put sixteen poor persons that should be of the ages of fifty years at least and single, of the town of Sheffield or within two miles round, in the sixteen apartments or dwellings (being the hereditaments originally conveyed by Thomas Hollis, the father of Thomas Hollis, Senr.), with divers provisions for the government of the charity and filling up vacancies. And upon this further trust that they the said old and new trustees, their heirs and assigns, or the major part of them, their heirs and assigns, should pay, apply, employ, and lay out the rents, issues, and profits of all and singular the premises thereinbefore granted and released as therein mentioned for the benefit of the objects of the charity, including paying a schoolmaster and schoolmistress for the teaching of fifty poor artificers' and tradesmen's children, and that they the said trustees should lay out and expend such part or parts of the rents, issues, and profits that should or might arise or grow out of the thereby granted and released premises in the necessary support and reparations of the tenements and apartments, and what could be spared thereof (if any) to be kept in store against any extraordinary occasion for repairing, or to be laid out in such other manner as the trustees or the major part of them, their heirs and assigns, should think fit. Then follow provisions for the appointment of new trustees, for keeping accounts for laying out the balance, with power to deduct out of the rents, issues, and profits £5 to defray charges of keeping and settling accounts, and to eat and drink in commemoration of the benefactors of the charity; and then follows this provision, upon which the question in the present case arises:

"Provided always and it is hereby declared and agreed by and between the said parties to these presents, that if at any time hereafter

the premises hereby conveyed or any part thereof, or the rents, issues, and profits of the same or of any part thereof, shall be employed or converted to or for any other use, or uses, intents, or purposes than as are hereinbefore mentioned and specified. Then and from thenceforth all and every the buildings, lands, and premises hereinbefore conveyed to the uses and upon the trusts hereinbefore mentioned shall revert to the right heirs of the said Thomas Hollis, Senr., party hereto, anything herein contained to the contrary thereof in anywise notwithstanding."

Then follow certain powers for Thomas Hollis, Senr., during his life, and after his decease for John Hollis, Newman Hollis, Junr., Isaac Hollis, and Richard Solley, four of the trustees, and the survivors and survivor of them, at any time or times during their lives or the life of the survivors or survivor of them, to nominate the persons to receive the benefit of the almshouses and to appoint schoolmasters and schoolmistresses, and a power for Thomas Hollis, Senr., in his lifetime to revoke, add, alter, or diminish all or any of the charities or sums thereinbefore appointed in such manner as he should see fit, and a power for the trustees to pay their costs, charges, and expenses, and to lease for terms not exceeding twenty-one years, and to lease certain closes, purchased of Thomas Turner, for eight hundred years or any less term to build on, and a covenant with John Williams, his heirs and assigns, against incumbrances.

BYRNE, J., after stating the facts as set out above, proceeded: It is contended on behalf of the purchaser that a good title cannot be made by reason of the clause in the deed of May 18, 1726, providing for the reverter to the right heirs of Thomas Hollis, Senr., inasmuch as the sale will be a breach of the condition and, alternatively, that the title shown is not one which ought to be forced upon a purchaser.

It is contended on behalf of the vendors—that is, the trustees other than W. H. Anthony—that the condition is void as tending to a perpetuity, and that whether the clause in question be construed as operating by way of shifting use, as they say it should be, or by way of condition subsequent.

The effect of the method of conveyance adopted was as follows: the lease for a year operated, and the bargainee John Williams was in possession by the Statute of Uses. The release operated by enlarging the estate or possession of the bargainee to a fee—this was at the common law—and the use being declared in favor of persons other than the bargainee the statute intervened and annexed or transferred the possession of the releasee to the use of the trustees to whom the use was declared: see Butler's notes to Coke upon Littleton (18th Ed.) p. 272 a, note vi. 2.

I think the clause about which the contest arises is in terms and form a true common law condition subsequent, being aptly worded and being in favor of the heirs of Thomas Hollis, Senr.

It is true that words of an express condition may in certain cases be

intended as a limitation, but the rule is that it shall not ordinarily be so construed, and there does not appear to be any reason in the present case why it should be construed as a limitation rather than as a condition: see Sheppard's Touchstone (7th Ed.) p. 124, note 16.

It was conceded in argument that if the clause in question ought to be construed as a limitation or as creating a shifting use it would be void as infringing the rule against perpetuities; and it was argued that the clause ought to be construed as one intended to shift the use which was vested by virtue of the release in the trustees, upon the happening of the contemplated event, in the heirs of the original bargainor, and that it was not possible for it to operate otherwise, having regard to the fact that the estate to be defeated was one existing only by virtue of the statute. I do not think that this argument can prevail.

It is laid down in terms in Sheppard's Touchstone, p. 120, that a condition may be annexed to a limitation of uses, and thereby the same—namely, the uses or the estates arising from the uses—may be made void. To which statement a note is appended by Mr. Preston: "and shall be executed by Statute 27 Hen. 8, so that the donor and his heirs may take advantage of the condition. Sav. 77. See further in Vin. Abr. Condition (N)."

In Serjeant Rudhall's Case, Savile, Case clv., p. 76, the serjeant, "being cestui que use in fee, and therefore being entitled to devise the use, devised certain lands before the Statute of Uses by his will in writing to Charles his younger son and the heirs male of his body, with remainder to John his eldest son in fee, with this condition: that neither the said Charles nor any of his heirs of his body should aliene or discontinue any of the said lands but only to the jointure of his wife for the time being, and for the use of the said jointures of the said wives of the said heirs for term of lives of the said wives. And after the said William Rudhall died and Charles his son entered, and after the year 4 Edw. 6 (that is, after the Statute of Uses), by his indenture leased the land to the defendants for term of their lives, rendering the ancient rent to him, his heirs and assigns. Then, 1 Eliz., the said Charles levied a fine to certain persons and their heirs with proclamations, which was to the use of the said Charles and Alice his wife and the heirs male of the body of Alice by him begotten, and for default of such issue to the use of the heirs of the said Charles begotten, and for default of such issue to the use of the right heirs of the said William Rudhall the father. And it was averred that the use of this fine was for the jointure of the said Alice for term of her life. And the plaintiff, as heir of Serjeant Rudhall, entered for the condition broken. And in this case three doubts arising: one, if it was condition or limitation of estate in use; another, if the condition was broken; and the third, if the heir of the cestui que use should take advantage of condition broken by the Statute of Uses. And it appears that this is condition, because condition destroys the estate and returns the land to the donor and his heirs; a limitation of estate is when the first estate

is destroyed and new estate limited by way of remainder or otherwise. And here is condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed. And then arises for consideration if the condition is broken: and it appears that lease for lives of the defendants reserving the ancient rent being made according to the statute is not a discontinuance. For the statute has given power to make such estates that they are legal, and legal estates cannot make injurious discontinuances. Therefore the condition in this respect is not broken: but the limitation of other uses by which other heirs are inheritable than were at first is to break the condition. For the limitation of use on fine in special tail is contrary to the will of Serjeant Rudhall. And the limitation of the fee to the heirs of Serjeant Rudhall is other limitation to heirs than as he himself limits: for he limits the fee to John Rudhall, his eldest son, and his heirs; and it might be that John Rudhall and his heirs are heirs of the half-blood to the direct heirs of Serjeant Rudhall, whence it is other inheritance than as was in the first limitation, which is breach of the condition. And as to the taking advantage of condition annexed to the use, it appears that the Statute of Uses has given this advantage when the uses and possession are united, that the heir of the father enter, by which it appears, by the opinion of all the justices, that the entry was allowable and the plaintiff shall recover. And it was adjudged that his entry was allowable, for the condition was broken by limitation of use in special tail and of the other remainder in fee in the heirs of the father; but lease for life, according to the statute, is not discontinuance, and, therefore, no breach of condition. Also, this entry for condition is warranted by the Statute of Uses, and, also, it was agreed that this was condition and not limitation."

I have translated the report out of the law French, and I think that the case, which is also reported in other books (Moore, 212; 1 Leon. 298), is an authority for the statement in Sheppard's Touchstone, p. 120.

The next question is, whether or not the condition, being an express common law condition subsequent, is void for perpetuity. I have not been referred to any case deciding the question, nor have I since the argument, after a considerable search, been able to find any authority in the reports enabling me to say that the point has been judicially decided.

For the exposition of our very complicated real property law, it is proper in the absence of judicial authority to resort to text-books which have been recognized by the courts as representing the views and practice of conveyancers of repute. Except in the comparatively recent although most valuable book of the late Mr. Challis (whose loss we all regret), to which I shall have to refer more fully later on, I cannot find any definite statement of opinion adverse to the views expressed by Mr. Sanders and Mr. Lewis in their well-known treatises, and I

will first refer to Sanders on Uses and Trusts (5th Ed.) vol. 1, pp. 206, 207, 213. [His Lordship read the passages, and continued:]

I find in Lewis on Perpetuity (Ed. 1843) pp. 615, 616, the opinion of the learned author expressed in clear and unambiguous language. [His Lordship read the passages, and continued:]

Amongst quite modern text-writers I find a similar expression of opinion. See the work of the learned American author Mr. Gray, who has written on the law of Perpetuity, at p. 215, where he states his view, in spite of the fact that there are American authorities tending the other way, the point not having been taken or argued in such authorities; see also Marsden on Perpetuities, p. 4.

I have purposely avoided referring to certain dicta in recent cases until I come to examine Mr. Challis' argument, which was in fact the basis of the argument put forward on the part of the purchaser in the present case. That argument and the learned author's expression of opinion are to be found in Challis' Law of Real Property (2d Ed.) pp. 174-177. [His Lordship read the passages he referred to, and continued:]

Pausing at the introductory paragraphs, I do not propose to embark upon a consideration of the origin and development of the rule or rules against perpetuities, about which there have been and will continue to be grave differences of opinion amongst real property lawyers. I find a clear and well-recognized rule certainly applicable to all ordinary methods of disposition in vogue since the Statute of Uses, and what I have to do is to see whether or not that rule applies to prevent the effectuating by means of a common law condition what is forbidden by the law in the case of all other methods of disposition of property.

Mr. Challis is right of course when he says that "when any part of the common law is found to require amendment, the Legislature alone is competent to apply the remedy." But the courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and to apply it to new and ever-varying states of fact and circumstances. The common law is to be sought in the expositions and declarations of it in the decisions of the Courts and in the writings of lawyers. New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation. I may give by way of illustration what was said by Lord Macnaghten in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 564, 565. [His Lordship read the passage, and continued:]

Might it not be said from Mr. Challis' point of view that if it was the common law in the reign of Queen Elizabeth that all restraints of trade, general or partial, were void, that they must still be void? The

answer appears to me to be that the principle was that restraints of trade are contrary to public policy, and that is the principle still; it is the application of it that has varied.

An illustration of a void condition because impossible of fulfilment is given in Sheppard's Touchstone, p. 133—namely, if one give or grant land on condition that a man will go to Rome in three days. That which was impossible at the time when the illustration was given has now become possible owing to a change of circumstances, and though the old principle stands the application of it has changed. In reference to the suggestion as to devising “a novel restriction to be applied to novel forms of limiting, or otherwise conferring, an estate or interest unknown to the common law” (Challis, p. 175), I may point out that in the present case the object of the grantor could not have been obtained without adopting a novel form of assurance unless in a very roundabout and circuitous fashion. He wanted to vest the estate in himself jointly with others.

It is right to mention here that this case being one of a gift for charitable purposes, the question could not have arisen had the deed been dated ten years later than it was, having regard to the provisions of the Mortmain Act (9 Geo. 2, c. 36), which provides that the gift or conveyance must be without any power of revocation, reservation, trust, condition, limitation clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him.

I think that some of Mr. Challis' criticisms of the dicta of Jessel, M. R., in the case of In re Macleay, L. R. 20 Eq. 186, are not quite reasonable. The use of the expression “tenant in tail” at p. 190 of the report is an obvious slip, either verbal or clerical, for “tenant in fee,” as is clear by reference to p. 187, where the learned judge says: “Looking at the will, I have no doubt that there is a condition annexed to the gift in fee,” and this is followed in the next sentence by the remark: “First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness.”

This being so, I find in the passage I have read, coupled with the passage at p. 190, referred to by Mr. Challis, a clear expression of opinion by Jessel, M. R., that had the condition in question not been limited in point of time, as it was, it would have been void for remoteness.

The decision of North, J., in Dunn v. Flood, 25 Ch. D. 629, as to the remoteness of the power of re-entry in that case was obiter, in the sense that it was unnecessary for the purposes of the decision to determine it, although it was a question raised and argued; but I think that Mr. Challis, in saying that nothing was said on appeal (1885), 28 Ch. D. 586, to support the obiter dictum, appears to have overlooked the observation of Baggallay, L. J., 28 Ch. D. 592, where he says:

"This right of re-entry was held by Mr. Justice North to be void for remoteness. We have not heard the counsel for the defendant, but as at present advised I concur with Mr. Justice North that this right could not be enforced being void under the rule against perpetuities."

I must also notice that Mr. Challis makes no reference whatever to the opinions of Sanders and Lewis which I have quoted.

The result appears to be that there are expressions of opinion by Jessel, M. R., North, J., and Baggallay, L. J., and the opinions of two great real property lawyers and text-writers, in favor of the invalidity of such a condition as the one in question; besides the opinions of modern text-writers; while on the other side there is nothing definite except the opinion and reasoning of the late Mr. Challis in his work on real property. It is to be noticed that Mr. Challis put forward the surmise that at the present day the courts would not acquiesce in the conclusion he draws without great reluctance; and in reference to his appeal to arguments to be derived from history, I may refer to his own observations: Challis, p. 394. [His Lordship read them, and continued:]

I am of opinion that the condition in question is obnoxious to the rule against perpetuities.⁴

But this still leaves another question for consideration, namely, is the title one which ought to be forced upon a purchaser? The rule which should be followed in such cases is thus stated by Chitty, J., in the case of *In re Thackwray and Young's Contract*, 40 Ch. D. 34, 38, 39, 40. [His Lordship read the observations, and proceeded:]

I have not in the present case any decisions or dicta of judges to lead me to a contrary conclusion to that to which I have come, and the question is one of general law, upon which I have dicta of eminent judges and opinions of text-writers of authority which I consider justify the view I have expressed.

At the same time, the point is one of some obscurity and difficulty, and one which cannot be said to have been the subject of direct judicial decision. Moreover, regard must be had to the fact that the person claiming to be heir-at-law of Thomas Hollis, Senr., has given a notice which must be taken to be notice of his intention to claim the benefit of the breach of condition, if broken, and he has declined to argue, or to be bound by the present decision; so that the purchaser if he completes will be in danger of immediate litigation—an element which must have very great weight in considering whether or not the title ought to be forced upon him: see *Pegler v. White* (1864) 33 Beav. 403, and *Fry on Specific Performance* (3d Ed.) p. 408.

Upon a consideration of all the circumstances I do not think I ought to say that such a title has been shown as ought to be forced upon the purchaser if he is unwilling to complete.

⁴ For the American cases contra, see Gray's Rule against Perpetuities, §§ 304-311. Cf. *Cooper v. Stuart*, L. R. 14 App. Cas. 286.

- In re ASHFORTH.

(Chancery Division. L. R. [1905] 1 Ch. 535.)

FARWELL, J., delivered the following written judgment:⁵ Martha Sarah Ashforth made her will on February 21, 1863, and thereby devised her real estate to trustees and their heirs upon trust to receive the rents and profits and divide the same as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts, and pay the same as therein mentioned to her three children and the survivors or survivor of them during their lives and the life of the survivor, and she then proceeded as follows: "And from and immediately after the decease of the longest liver of my said three children, John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, I direct my said trustees for the time being, subject nevertheless to the payment of the said annuity to Miss Eliza Robinson, if she should be then living, to pay and divide the said rents and profits of the said farm half-yearly, as soon as conveniently can be after the days hereinbefore appointed, unto and equally amongst all such of the children born in my lifetime, or within twenty-one years after my death of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, except one, I devise my said farm and all my said real estate to such surviving child and the heirs of his or her body in tail, with remainder to the right heir of John Morris, son of my grandfather Thomas Morris." The testatrix died on July 7, 1864. Of her three children, George died in 1870, having had issue three children only, the present plaintiffs; Martha died without issue in 1877; and John died without issue in 1897. The question for decision is whether the limitation in tail is or is not too remote.

1864.

Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities. In re Hargreaves, 43 Ch. D. 401; Evans v. Walker (1876) 3 Ch. D. 211. Mr. Wood did not dispute this, but argued that inasmuch as one of the three plaintiffs must necessarily be the survivor, they could combine to release or destroy the right of survivorship and take the property at once. But this assumes the existence of a present estate after the life estates, which will remain when the obnoxious contingency is destroyed, and there is none such; the only estates of inheritance are contingent interests in remainder.

⁵ The opinion only is given.

The court has first to construe the will, and is driven to conclude that these interests are void for perpetuity. There is, therefore, no estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing is left but the three life estates. The fallacy lies in the lack of appropriate definition. No release or destruction of the contingent interest would be of any avail. What is required is a dealing by way of conveyance of all the three contingent interests, and this is impossible, because they have been declared void, and three void contingent remainders will not make one good vested remainder. Mr. Wood relied on a passage in Lewis on Perpetuity, p. 164: "A perpetuity is a future limitation, whether executory or by way of remainder * * * 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 the future limitation, except with the concurrence of the individual interested under that limitation." It is to my mind plain that the learned author, in speaking of destructibility, is referring to remainders after an estate tail; but in any case the passage does not help Mr. Wood, because the validity of the estate which he wishes to create must depend on the conveyance of the ultimate remainders; the persons entitled subject to that limitation are entitled for life only. Mr. Wood also pressed on me a dictum of Lord Cranworth's in *Gooch v. Gooch*, 3 D., M. & G. 366, 383. I think that if the whole of that passage is read it is plain that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to three with a contingent limitation to the survivor of them. But, however that may be, it is only a dictum; and the reasons given are not easy to reconcile with the judgments of the Court of Appeal in *In re Hargreaves*, 43 Ch. D. 401, and *London and South Western Ry. Co. v. Gomm*, 20 Ch. D. 562. The case before me is really undistinguishable from *Garland v. Brown*, 10 L. T. 292, before Wood, V. C., where there was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common with remainder to the survivor of those children in fee, and the remainder in fee was held void for remoteness.

Then it is said that this is a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren and of the survivor of them, and this was not disputed. But the plaintiffs argue further that such a remainder is not affected by any doctrine of remoteness, except the rule that estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons. I might have contented myself with following Kay, J.'s decision in *In re Frost*, 43 Ch. D. 246, 253; but it is said that this was only the second or alternative reason for his judgment, and I have accordingly considered the point for myself.

It is very difficult to say when the conception of perpetuity in its

modern meaning first appeared in our courts. There is no doubt that the common law regarded all attempts to restrict the free alienation of property with extreme disfavor. As is stated in Mr. Butler's note to Coke on Littleton, 342 b, i., although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible, and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: "The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders." There was also the rule that an estate by purchase cannot be limited to the unborn child of an unborn child. *Whitby v. Mitchell* (1890) 44 Ch. D. 85. With all respect to Kay, J., I do not think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility. See Gray on Perpetuities, p. 86, and Williams on Real Property, 6th ed. p. 245. The phrase seems due to Lord Coke's unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness. See *Blamford v. Blamford* (1615) 3 Bulst. 98, 108; s. c. 1 Roll. Rep. 318, 321, cited in Gray at p. 86. "Coke moves another matter in this case on Popham's opinion, Coke I., Rector de Chedington, that a possibility on a possibility * * * yet it seems that it is good, for if Popham's opinion should be law, it would shake the common assurances of the land. * * * But I agree that in divers cases there shall not be a possibility upon a possibility, and he puts the diversities in *Lampet's Case* (1612) 10 Rep. 46 b, 50 b." It seems probable that contingent remainders could not anciently have been created at all: see Williams on Seisin, p. 190; and that down to the time of the Commonwealth the usual mode of settlement on marriage was by giving vested estates tail to living persons, and not estates tail to unborn children: *ibid.* 189. Although, therefore, there was a general principle that alienation should not be restricted by the creation of estates beyond a particular estate for life with a remainder in fee, or in tail, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established, and as the ingenuity of real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies. Thus in *Cadell v. Palmer* (1833) 1 Cl. & F. 372; 36 R. R. 128, the House of Lords settled the question of the extent to which executory limitations and shifting uses, which had become possible under the Statute

of Uses, could be lawfully carried, and they did this, not by creating any new law, for that would have been legislation, not decision, but by applying the old law to the new circumstances. The judges who advised the House supported their opinion by numerous authorities, and I would refer in particular to the quotation from Lord Kenyon's judgment in *Long v. Blackall* (1796-97) 7 T. R. 100, 102; 4 R. R. 73: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance." Here, then, is an authoritative statement in terms of precision of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied from time to time, as occasion arose, by judges who, without formulating the precise limits of the rule, held, as Lord Nottingham said in the *Duke of Norfolk's Case* (1681) 3 Ch. Cas. 14, 31: "If it tends to a perpetuity, there needs no more to be said, for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement, if it can be proved to tend to a perpetuity." The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and, accordingly, Lord St. Leonards in *Cole v. Sewell*, 4 D. & War. 1, s. c. 2 H. L. C. 186, 65 R. R. 668, points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from *Lewis on Perpetuity*, p. 164. But this reason has no application to contingent remainders not so limited and destructible; nor do I think that Lord St. Leonards so intended. See Sugden's *Law of Property*, pp. 116-121, and Lord Brougham's speech in the same case in the House of Lords, 2 H. L. C. at p. 234, where he puts this ground plainly as the reason for his observations. It would be very strange indeed that Lord St. Leonards should have referred to the "sacred rule" enunciated in *Purefoy v. Rogers* (1669) 2 Wm. Saund. 768, 781, n. 9, that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder—a rule which probably owes its origin to the chance of destruction by the failure of the particular estate incident to the one and not to the other—and should at the same time have affirmed that the rule against perpetuities had no application to such contingent remainders, although they might exceed the limits allowed for executory limitations, because they could not exceed the limits of perpetuity, for the proposition is self-contradictory. Assume that the doctrine of the destructibility of contingent remainders by failure of the particular estate is due to the desire of the courts to avoid remoteness, as Mr. Butler suggests, it does not follow that such remainders should be free from all other bonds. Liability to destruction for a particular

cause at or before a given period is not incompatible with, or any ground for immunity from, destruction at the same period for a cause common to all other interests, executory, equitable, or otherwise, which may lead to remoteness. It is plain, moreover, that the courts have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular estate, it was held that the rule must apply to them. In *Abbiss v. Burney* (1881) 17 Ch. D. 211, the gift was to trustees on trust for A. for life, and, after his death, on trust to convey to such son of his as should first attain twenty-five. Sir George Jessel, M. R., said, *ibid.* 230: "Where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think that this appeal should be allowed." In *In re Trustees of Hollis' Hospital*, [1899] 2 Ch. 540, the late Mr. Justice Byrne held that the rule against perpetuity applied to a common law condition. He says, *ibid.* 552: "The courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and then to apply it to new and ever-varying states of fact and circumstances. * * * New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation." In *Chudleigh's Case* (1589-95) 1 Rep. 120 a (the case of perpetuities), the court defeated an attempt to make the Statute of Uses serve as the means of protecting contingent remainders from destruction, lest lands should remain too long in settlement. In *Abbiss v. Burney*, 17 Ch. D. 211, the Court of Appeal defeated an attempt made by vesting all the legal estate in the property in trustees. The present attempt is made by vesting a legal estate *pur autre vie* in trustees and limiting the contingent remainders as a legal use. In my opinion, the court is equally bound to defeat this; nor can I find any rule of law or decision or principle to the contrary. The opinion of the late Mr. Challis (*Real Property*, 2d Ed., pp. 174-177) is, I think, sufficiently displaced by Byrne, J.'s judgment in the *Hollis' Hospital Case*, [1899] 2 Ch. 540, and that of the late Mr. Joshua Williams by Gray on Perpetuities, pp. 283-298; and the conclusion at which I have arrived is supported by (in addition to the text-writers cited in that case and in *In re Frost*, 43 Ch. D. 246) an argument in the first edition of *Jarman on Wills*, vol. ii. p. 727, and repeated in some of the later editions, by Mr. Serjeant Stephen's note in his *Commentaries*, 8th ed. vol. i. p. 554, and by Mr. Gray's excellent *Treatise on Perpetuities*. The rule against perpetuities applies to all contin-

gent equitable limitations of real estate and all contingent limitations of personalty, including leaseholds. It would certainly be undesirable to add another to the anomalies that adorn our law, as I should succeed in doing if I held that the rule did not apply to legal contingent remainders. I therefore answer the first question, by saying that the limitation in question is void for remoteness, and the second question in the negative.⁶

WORTHING CORPORATION v. HEATHER.

(Chancery Division. L. R. [1906] 2 Ch. 532.)

By a lease dated October 1, 1878, Fanny Heather demised to the local board of health for the district of Worthing some meadow land for a term of thirty years from September 29, 1876, at the yearly rent of £35, and the board for themselves, their successors and assigns, covenanted that they would not during the term use the demised premises or any part thereof for any purpose other than that of a public park or pleasure ground.

The lease contained a proviso as follows: "Provided always And it is hereby agreed and declared that in case the said board their successors or assigns paying the said rent hereby reserved and observing performing and keeping all the covenants on their part herein contained shall be desirous at any time during the said term hereby granted to purchase the fee simple and inheritance of the said premises at the sum of £1,325 and of such their desire shall give to the said Fanny Heather her heirs or assigns six calendar months previous notice in writing expiring at the end of any half year of the said term then and in such case the said Fanny Heather her heirs or assigns shall deliver to the said board their successors or assigns a copy of the abstract of title to the same premises which was delivered to her on the occasion of her purchase thereof such abstract commencing with indenture of 30th May 1832 between Richard Lindup and Jane his wife of the first part George Newland of the second part Frances Lindup of the third part and Richard Newland and James Stubbs of the fourth part and no prior or other title shall be required. And will on payment by the said board their successors or assigns of the said sum of £1,325 together with interest thereon at the rate of £5 per cent. per annum from the expiration of such notice until payment and of all rent then accrued execute a proper conveyance and assurance of the said premises and the inheritance thereof in fee simple unto the said board their successors and assigns or as they shall direct such conveyance or assurance to contain similar covenants on the part of the said board their successors or assigns with the said Fanny Heather her heirs and assigns to those hereinbefore contained relative to the user of the

⁶ In the case of *In re Frost*, 43 Ch. Div. 246, 253, referred to, the will conferring the legal future interests was dated March 19, 1870.

said premises solely as a public park walk or pleasure ground and to the erection thereon of no other erection or building except such lodge and other buildings as are hereinbefore referred to (such covenants being so framed as that the burden thereof shall so far as is possible run with the said premises)."

On August 25, 1890, the plaintiffs were incorporated by Royal charter, and succeeded under section 310 of the Public Health Act 1875, to all the property of the local board of health. They continued to use the land as a public park. Mrs. Heather died in 1902, having by her will devised all her real and residuary personal estate to C. H. Heather and V. J. Heather in equal shares, and appointed J. Goldsmith and E. Sayers executors.

On August 17, 1905, the plaintiffs served on the devisees notice of their desire to exercise the option given to them by the lease by purchasing the fee simple of the demised premises for £1,325 upon the terms and conditions mentioned in the lease.

The devisees repudiated their obligation to comply with the notice, and insisted that the option was void as infringing the rule against perpetuities. The corporation thereupon brought this action against the devisees and the surviving executor, and asked for—(1) a declaration that they were entitled to specific performance of the agreement constituted by the lease and the notice for the sale to them of the fee simple of the premises, and consequential relief on the footing of such declaration; (2) if for any reason the agreement could not be specifically performed, damages against the estate of Mrs. Heather for breach of covenant; (3) in default of admission of assets by the executor, administration of the real and personal estate of Mrs. Heather, and, so far as might be necessary, to follow her assets into the hands of the defendants Heather.

WARRINGTON, J. This is an action for, first, specific performance of a certain contract taken in the form of an option to purchase contained in a lease; secondly, and alternatively, for damages for breach of that contract. The contract is not denied. The defences to it are purely legal. The first defence is that, so far as it is an action for specific performance, it cannot be enforced because in equity, in which court alone specific performance can be granted, it creates an interest in the land, and that interest is void as infringing the rule against perpetuities. The action is defended, so far as it is an action for damages, on the ground that it is a contract which tends to bring about an infringement of the rule against perpetuities, and, therefore, cannot be enforced in a court of law any more than it could be enforced in a Court of Equity in the way of specific performance. [His Lordship stated the facts, and continued:]

Now first with regard to the claim for specific performance: If the covenantee had been an individual, and if the purpose for which the land was to be granted had not been, as it is, a charitable purpose—a point with which I shall have to deal directly—it is admitted that

after the decisions of the Court of Appeal in the case of the London and South Western Ry. Co. v. Gomm, 20 Ch. D. 562, and my own decision in Woodall v. Clifton, [1905] 2 Ch. 257, it would be impossible for this court to hold that that contract could be specifically enforced. It is said, however—and I propose to deal with this point first—on the part of the plaintiffs that the purpose for which this land was to be conveyed was a charitable purpose, and, therefore, notwithstanding the fact that the interest which the deed creates would in an ordinary case be void for remoteness, the object being charity, it would not be so void. In my opinion no distinction can be drawn on that ground between this case and the ordinary case of a contract with an individual. Although the interest of the charity is created by the contract, it does not become effective until the happening of a future event, and it is the very postponement of its effectiveness which renders it obnoxious to the rule against perpetuities. In my judgment the case in this aspect of it is undistinguishable from the case of a limitation to an individual followed by a limitation to a charity, void because it is not to take effect until a time outside the limits of the rule against perpetuity. I think it is clear in that case the limitation would be void notwithstanding that it is a limitation to a charity. In the case of In re Bowen, [1893] 2 Ch. 491, it was decided by Stirling, J.—for this purpose it is enough to read the head-note—that “The principle established by Christ’s Hospital v. Grainger (1849) 1 Mac. & G. 460, and In re Tyler, [1891] 3 Ch. 252, that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another does not extend to cases where (1) an immediate gift in favor of private individuals is followed by an executory gift in favor of charity, or (2) an immediate gift in favor of charity is followed by an executory gift in favor of private individuals.” The same principle is illustrated by a subsequent case of In re Lord Stratheden and Campbell, [1894] 3 Ch. 265. There the testator bequeathed an annuity of £100 to be provided to the Central London Rangers, a volunteer corps, on the appointment of the next lieutenant-colonel. It was held, first, that that bequest was a charitable bequest; and, secondly, that the gift was void because it infringed the rule against perpetuities. There, as in the present case, immediately on the death of the testator, just as here on the execution of the deed, the charity obtained an interest—that is to say, they were entitled if it were not void to this bequest; but the bequest in that case, as the interest in this case, was to become effective only on the happening of a future event, which was too remote. It seems to me that that case is a direct authority against the contention of the plaintiffs, founded on the argument that the covenantee in this case was a charity.⁷

⁷ Contra: Hollander v. Central Metal Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135 (where the lessee’s option to purchase was not even

Now I come to the second aspect of the action, in which it is a mere action at common law for damages for breach of the contract. Would that contract have been void at common law? That is to say, was it such a contract that a court of law would not entertain an action for damages for its breach? It is a contract to convey land to the purchaser upon the happening of an event which might occur at a more remote period than lives in being and twenty-one years afterwards. In the act of making such a conveyance there is nothing illegal—that is to say, if the covenantor chose in the year 1898 to convey this land to the corporation of Worthing she would have been performing a perfectly legal act. The act, therefore, which the covenant binds the covenantor to perform is not an illegal act. What alone is illegal is the limitation of land which is to take effect at a period too remote. How is it that that contract, which is in form a mere personal contract that the covenantor will do such an act, becomes a limitation? In a court of common law it would not have that effect. So far as regards the jurisdiction in a court of common law, the covenantor might convey away the land notwithstanding the covenant. He might devise it; he might allow it to descend, and the covenantee would have no means of getting the land either from the grantee or from the devisee or from the heir-at-law. The only right which the covenantee would have had in a court of common law would have been to recover damages. In a Court of Equity the covenant is held to affect the conscience of the covenantor in such a way that he cannot convey away the land to any person who is in the same position as he is himself, that is to say, to a person who is not a purchaser for value without notice; and by the operation of the doctrine of specific performance the covenantee in a Court of Equity is regarded as having an actual interest in the land to which the covenant applies. In other words, in the contemplation of a Court of Equity, the contract, being for valuable consideration, is executed to the extent to which the interest, which ought under that contract to be created by the subsequent act on the part of the covenantor, is created by the covenant itself.

Now there is no conflict between the doctrines of law and equity in this respect. The relief given in a Court of Equity is merely relief supplemental to, and in most cases more effectual than, the relief given at common law, but there is no conflict between the doctrines of law and equity so as to compel one to regard this covenant merely as creating a limitation upon the equitable doctrines. It remains since the Judicature Act as it did before—it remains a common law contract capable of being enforced in a court of common law without

held by the lessee for charity); Blakeman v. Miller, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120 (where a lessee for 20 years was given an option to purchase at any time within the term after 15 years, but where the statutory rule against perpetuities made no allowance for vesting within any gross term of years).

reference to the laws of equity. Realizing that difficulty, the defendants are compelled to rest their case upon the contention that the contract, though not in a court of common law effecting that which the law regards as against public policy—namely, the tying up of land for a period beyond that allowed by the rule—indirectly tends to bring about the same result. It is there that I join issue with the defendants. It seems to me that, rightly considered, the contract does not tend to bring about that result. It is quite true that the covenantor may if he pleases carry it out, and it may be to his advantage to do so, but he is not compelled to carry it out. It seems to me that that argument depends on this fallacy. It is not in my opinion the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the operation of the doctrines of the Court of Equity, it is the effect of the contract to create, that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the Court of Equity, and it is that alone, which is void. It seems to me, therefore, that in principle there would have been in an old court of common law before the Judicature Act no defence to this action; and further, that in this court also, since the Judicature Act, there is no defence, because for this purpose the court is sitting as a court of common law.

Now, is there any authority which compels me to say that that opinion which I have already formed on principle is not the correct opinion? I have been referred to three cases reported in 2 Vernon—a case of *Freeman v. Freeman*, 2 Vern. 233, a case of *Jervis v. Bruton*, 2 Vern. 251, and the case of *Collins v. Plummer*, 2 Vern. 635. The only one of those three which in any way helps the defendants is *Jervis v. Bruton*. The case is very shortly reported, and the report is in these terms: “John Morris settles land on his daughter and the heirs of her body, remainder to his own right heirs, and takes a bond from the daughter not to commit waste; the daughter having levied a fine, and afterwards committing waste, the bond was put in suit.” The only report of the judgment is this: “Per curiam, An idle bond, and decreed to be delivered up to be cancelled; and like *Poole’s Case*, cited in the case of *Tatton v. Mollineux* (1610) Sir F. Moore, 809, where a recognizance conditioned that the tenant in tail should not suffer a recovery, is decreed to be delivered up, as creating a perpetuity.” It is very difficult to understand that. No reasons are given for the finding that it was an idle bond. There is a note which throws some light on it by the editor of the edition of *Vernon’s Reports* which I have before me. It is edited by John Raithby, and that note states this: “The settlement was on the daughter in fee, and on her marriage with the plaintiff who had survived her were settled in trust to the use of the plaintiff and his wife (the daughter of the said John Morris) for life, to the use of their heirs begotten by the plaintiff, and for default of such issue, to the heirs of the plaintiff; the plaintiff’s wife died without having had any issue, and the decree declared that

the bond in question had been ill-obtained against the said plaintiff's wife, and that the plaintiff was seised in fee; and decreed the bond to be delivered, and the defendants to pay costs at law (they having proceeded on the bond) and in this suit." It seems to me that that note throws some light on the report, and that the reason of the finding was not that which at first sight would appear to be the reason if one were to take the report by itself. But in the case of *Collins v. Plummer*, we have a case on the other side, which may fairly be set against *Jervis v. Bruton*, even if *Jervis v. Bruton* is to be regarded on the point which I have before me. In that case the head-note is this: "A. on his marriage settles land to the use of himself for life, then to the wife for life, remainder to the heirs of his body begotten on the wife, remainder to his own right heirs; and covenants in the settlement not to bar the entail, nor suffer a recovery; and having one daughter, to whom on her marriage he had given a good portion; he suffers a recovery, and by will devises the estate to his daughter for life, and to her first &c. sons in tail, with remainders over. On a bill for a specific performance of the covenant, the court would not decree it, but leave the party to recover damages at law, for breach of the covenant." It is plain, therefore, that the court in that case did not hold the covenant to be void at law, because it is difficult to understand why, if the court had so held, it did not exercise the further equitable jurisdiction of granting an injunction to restrain proceedings at law on the covenant, when it refused specific performance. It seems to me that the court in that case regarded the covenant as a valid covenant at law, although it could not be enforced specifically in equity.

Another authority which has been referred to is the case which I have already mentioned of *London and South Western Ry. Co. v. Gomm*, 20 Ch. D. 562. That was an action in equity only to enforce a somewhat similar contract to the present one. It was an action, not brought against the covenantor or against the legal personal representative of the covenantor, but brought against the person in whom the land affected by it was then vested. It was, therefore, an action which could not have been brought at common law, and was capable only of being founded on the equitable doctrine of specific performance. Kay, J., before whom the matter first came, said this, 20 Ch. D. 576: "A contract to buy or sell land and covenants restricting the use of land though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not properly speaking estates or interest in land, and are therefore not within the rule"; and he held that the contract did not create an interest in the land. On that last finding his decision was reversed by the Court of Appeal; but the Court of Appeal did not for a moment throw any doubt upon this—that the rule against perpetuities is a rule which is applicable to property and not a rule which is applicable to contract,

and that, but for the fact that what was sought to be enforced was an interest in land which had been created by the contract, the rule against perpetuities would not have had any reference to that case. It is quite true that the judges in the Court of Appeal did use expressions to the effect that the contract was void, but such expressions as that must be taken to be used in reference to the facts of the case which was before them; and they had not to consider any such question as that which I have to consider, namely, whether an action for damages at law could have been brought upon the contract. That some such idea was in the mind of the Master of the Rolls I think appears from the passage, where he says this, 20 Ch. D. 580: "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase and to pay the purchase money, but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another the covenant giving the option must give that other an interest in the land." Then he goes on to decide that in that view, giving an interest in land, the contract is void or ineffectual; but the Master of the Rolls in that case distinguishes between the personal contract and that which gives an interest in land, and it is in the latter aspect only that he holds the contract to be void. It seems to me, therefore, that, sitting here in this part of the action to administer the common law, I must hold that the covenant is a valid covenant, and that the plaintiffs are entitled to recover damages for its breach against, of course, the estate of the original covenantor.

It has been agreed on all hands that at the trial evidence should not be given as to the amount of damages, and I must therefore direct an inquiry as to the damages, and in default of admission of assets there must be the usual decree for administration of the real and personal estate of Mrs. Heather.

CHAPTER III

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

In re RIDLEY.

BUCKTON v. HAY.

(Chancery Division, 1879. 11 Ch. Div. 645.)

Francis Ridley, by his will, dated the 8th of January, 1863, directed his trustees to invest a fund in the securities thereby authorized, and to stand possessed of a moiety of such securities upon trust to pay the interest thereof to his niece Alice Ridley for her life, and after her death, in trust for all and every the children or child of the said Alice Ridley as should be living at the time of her death, and the issue then living of such of them as should have died in her lifetime, in equal shares, such issue to take their respective parents' shares; and in case there should be no child of the said Alice Ridley, or no child or issue who should attain a vested interest in the said moiety, then in trust for such person or persons as the said Alice Ridley should, whether covert or sole, by will appoint; and in default of such appointment in trust for her next of kin who should be living at the time of her death and such default or failure of her issue as aforesaid, according to the Statutes of Distribution. And the testator directed that his trustees should invest the sum of £4000 in the securities authorized by his will, and stand possessed thereof in trust to pay the interest thereof to his niece Mary Cooper during her life, and after her death upon the same trusts in favor of the children or issue or parties claiming under any will of the said Mary Cooper in all respects as were thereinbefore declared concerning the securities bequeathed in trust for the children of the said Alice Ridley. And the testator, after making other bequests, proceeded as follows: "Provided, also, and my will further is that the several legacies and bequests whether of income or principal hereby given to or for the benefit of any legatees, being females, shall be for the respective sole and separate use independent of and free from the debts, control, or engagements of any husband or husbands whomsoever, and that the receipts of such

legatees respectively, whether covert or sole, shall be good and sufficient discharges to my trustees, but not so as to enable such legatees respectively to anticipate, charge, sell, and dispose, or otherwise encumber such legacies and bequests, or the annual income thereof, or any part thereof respectively."

The testator died on the 1st of May, 1863.

In 1864 a decree was made for the administration of the testator's estate, the plaintiffs being some of his next of kin, and the defendants the trustees of the will, who transferred into court a sum of £4200 5s. 2d. Consols representing the legacy bequeathed in favor of Mary Cooper, and the income of the fund was paid to her during her life.

Mary Cooper died in 1878, having had eight children, six of whom died in her lifetime without having been married. The remaining two, daughters, survived their mother. They were born in the testator's lifetime and had attained twenty-one and married. Both their husbands were now living.

This was a petition presented by the two married daughters by their next friend, praying that the fund in court might be paid out to them in moieties on their separate receipts.

The husbands were made respondents to the petition.

The question was whether the restraint on anticipation was void as transgressing the law against perpetuities.

Chitty, Q. C., and Oswald, for the petitioners. We submit that the restraint on anticipation is void as infringing the rule against perpetuities though the remainder of the gift is good. The petitioners are, therefore, entitled to the fund absolutely, discharged from the restraint.

[JESSEL, M. R. Why should a restraint on anticipation be void? It is only a mode of enjoyment.]

It has been held that a restraint on anticipation in a gift or appointment which may include unborn children is void, as being too remote: Armitage v. Coates, 35 Beav. 1; In re Cunynghame's Settlement, Law Rep. 11 Eq. 324; In re Michael's Trusts, 46 L. J. (Ch.) 651.

[JESSEL, M. R. The question is, whether a restraint on anticipation is not an exception to the general rule against perpetuities and remoteness, following out the legal principle that property shall not be inalienable.]

No exception has yet been allowed against the rule of perpetuities.

[JESSEL, M. R. The rule against perpetuities is that you shall not make property absolutely inalienable beyond a certain period. It is only a rule in favor of alienation.]

In Thornton v. Bright, 2 My. & Cr. 230, Lord Chancellor Cottenham held that an appointment by a father under his marriage settlement to his married daughter for her separate use, without power of anticipation, was a good appointment to the extent of the separate use, and that decision was followed by Lord Hatherley, when Vice-

Chancellor, in *Fry v. Capper*, Kay, 163, where he held that the restraint on anticipation was void and might be rejected, though the separate use might be sustained.

[JESSEL, M. R. The judges do not seem to have considered the real point. If a restraint on anticipation is an infringement of the rule against perpetuities, a father would be prevented from appointing to his children, under a settlement, in a way most beneficial to his daughters.]

If the rule is broken into at all, it is difficult to see where it is to stop.

[JESSEL, M. R. The question is whether this is not to be the exception to the rule. Why should not a father appoint to his daughters in a way most beneficial to them, that is, appoint in such a way that the daughters and not their husbands, who are not the objects of the settler's bounty at all, shall have the benefit? The restraint on anticipation was thought so beneficial that it broke into the general law against inalienability; that is to say, all property was to be alienable except a married woman's.]

The authorities are certainly against a restraint on anticipation being imposed upon a class of persons some of whom may possibly be unborn.

Whitehorne, for the trustees, referred to *In re Ellis' Trusts*, Law Rep. 17 Eq. 409, and *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627.

JESSEL, M. R. The law upon the present point appears to me to be in an unsatisfactory state, and I hope it may eventually come to be considered by the Court of Appeal.

This gift is, in effect, to a person for life, and then to her children living at her death; daughters who are married women to take with a restraint on anticipation. The question is whether the gift is void, or whether the restraint alone is void and the gift is good.

Now, it is necessary to consider what the meaning of a restraint on anticipation is, for with the exception of a single observation in one of the authorities, to which I will refer presently, the point does not seem to have been discussed at all.

In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it to her without such a restraint would be, practically, to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property.

That ground I must assume to be correct. The result, therefore, was

that the exception to the general law was in favor of married women, to enable them to enjoy their property.

Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favor of alienation and not against it. The law does not recognize dispositions which would practically make property inalienable forever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that the Chancellors established this rule in favor of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favor of alienation: it merely carried out the principle of law that property is alienable. Similarly in the case of executory interests, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way.

The question is, whether the restraint on alienation should not be allowed within certain limits under the one rule as well as under the other. The first exception is a clear and manifest exception to the general law, which says that property shall be alienable; the question is, whether there should not be a similar exception to that branch of the general law which says that property shall not be inalienable beyond a life in being and twenty-one years after. But this question does not appear to me to have been well weighed or considered.

Take the case of an ordinary marriage settlement, where property is settled for the benefit of the husband and wife and then on their children as they shall appoint. They have sons and daughters. If the exception applies to the rule against perpetuities, they may appoint to such daughters with a restraint on anticipation. If, on the other hand, the rule against perpetuities is to prevail, they cannot do so; that is, they cannot appoint the property to the daughters in such a way as to give them the actual benefit of it, though in the case of the sons they can do so. This is one instance of the inconvenience which follows from holding that a daughter in such a case cannot be restrained from anticipation during coverture.

Now it is remarkable that the decision of Lord Cottenham in Thornton v. Bright seems to have been to the other effect. The point, I agree, was not argued, but we cannot imagine that the very eminent counsel who argued the case, and the very eminent judge who decided it, overlooked the point. And in Fry v. Capper, where there was an appointment under a marriage settlement to a daughter for her separate use, without power of anticipation, Lord Hatherley, when

Vice-Chancellor, in referring to *Thornton v. Bright*, said, "The appointment was decided by Lord Chancellor Cottenham to be a valid exercise of the power. Therefore, independently of principle, it would be difficult for me, after that decision, to hold this appointment to be bad." Lord Hatherley accordingly held that the appointment was not void as fettering the property beyond the legal limits, but that the restraint on anticipation might alone be rejected. Since those cases there have been further decisions with which I am not satisfied, but which, nevertheless, sitting here as a judge of first instance, I am not at liberty to disregard. The point came before Vice-Chancellor James in *In re Teague's Settlement*, Law Rep. 10 Eq. 564. There a widow, who had under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving a share of the settlement fund to a married daughter for her separate use, without power of anticipation, and the Vice-Chancellor held that the restraint on anticipation only was void, but that the remainder of the appointment was good. I must say the Vice-Chancellor's judgment is very unsatisfactory to me, because he gives no reasons, and he does not consider what the effect of a restraint on anticipation is.

It was argued by Mr. Hardy that the restraint on anticipation was good, and he says, "It cannot be said that the rule would have been infringed if Mrs. Teague had put this restraint upon her daughter for twenty-one years and no more; then what reasonable ground is there for not extending the protection to the daughter throughout her married life?" He must have meant by that what I have already expressed, that the object of the restraint was to give the daughter the actual benefit of the appointment. Then the Vice-Chancellor, after referring to *Fry v. Capper* as a decision in point, says, "I think it is impossible to hold that the rule against perpetuities can be abrogated in the way which has been suggested."

That is practically the whole of the Vice-Chancellor's judgment. The answer to that is, You do not want to abrogate the rule; the question is, whether the restraint on anticipation is not an exception, not merely to the particular rule, but an exception along the whole line, so to speak. The Vice-Chancellor really gave the go-by to the point.

Then the point came before Vice-Chancellor Malins in *In re Cunyng-hame's Settlement*,—the same point exactly. There, under a marriage settlement, the husband appointed the fund to the separate use of a married daughter, with a restraint on anticipation, and it was held that the appointment to the separate use was valid, but that the restraint on anticipation was void as being too remote.

Now all the Vice-Chancellor says is this: "I am of opinion that, upon principle, this is an invalid exercise of the power so far as it restrains alienation." Then, after referring to the authorities I have already mentioned, he says, "I should have arrived at the same decision in the absence of authority, but the cases I have referred to confirm me in the opinion that the restraint on alienation is not with-

in the power." The whole argument of his judgment was, that it was a restraint which might extend beyond the limit, and was therefore void, but he did not consider whether, though extending beyond the limit, it was not an exception to the general rule. Therefore he really did not consider the point at all.

Then the last case is that of *In re Michael's Trusts*, before Vice-Chancellor Hall, who referred to a dictum of Lord Romilly's in *Armitage v. Coates*, and his only judgment, as reported, was that he thought *Armitage v. Coates* applied to the case before him, and made the order as prayed.

So that not one of the judges appear to me to have considered the real point, namely, whether a restriction on alienation, such as there is in the present case, is valid. I cannot, however, do otherwise than follow their decisions, though but for them my judgment would have been to the opposite effect, but I think the point is open for the Court of Appeal.

The order will, therefore, be as prayed.¹

SLADE v. PATTEN.

(Supreme Judicial Court of Maine, 1878. 68 Me. 380.)

APPLETON, C. J. This is a bill in equity, brought in pursuance of the provisions of R. S., c. 77, § 5, by the complainants claiming under the will of George F. Patten, to obtain the construction of the same. All having an interest in the question to be determined have been made parties to the bill, and have entered an appearance.

The will is in these words: "I give, devise, and bequeath, all and singular, my estate, real and personal, as follows; that is to say, to each and all my children an equal part or proportion of all and singular my property, viz.: To Catherine F. Walker, Hannah T. Slade, wife of Jarvis Slade, James T. Patten, Statira Elliot, wife of John Elliot, Paulina Tappan, wife of Winthrop Tappan, Augusta Whittlesey, wife of Eliphalet Whittlesey, and George M. Patten, one seventh part to each of them and their heirs, with the proviso, that the parts and proportions hereby devised and bequeathed to Catherine F. Walker, Statira Elliot, Paulina Tappan and Augusta Whittlesey and their heirs, instead of passing into their hands, is to go into the hands of James Slade, of New York, and George M. Patten, of Bath, whom I hereby appoint trustees, to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit of said Catherine F. Walker,

¹ Observe, however, that if some of the married women whose separate estates are subject to the restraint on alienation are in esse at the testator's death, the restraint on alienation is valid and enforceable with regard to their interests. *Herbert v. Webster*, 15 Ch. D. 616 (1886); *In re Ferneley's Trusts*, L. R. [1902] 1 Ch. 543; *In re Game*, L. R. [1907] 1 Ch. 276. Compare with *Wilson v. Wilson*, 28 L. J. Ch. (N. S.) 95.

Statira Elliot, Paulina Tappen and Augusta Whittlesey and their heirs, according to the discretion of said trustees."

It is apparent that the testator intended to treat all his children with perfect equality, giving "to each and all his (my) children an equal part and proportion of all and singular his (my) property;" and, while he placed "the parts and proportions" of four of his daughters in the hands of trustees, the trustees were "to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit" of his said daughters and their heirs. True, it was to be according to the discretion of the trustees, but that discretion related solely to the holding, managing and disposing of these parts. There is no provision for the termination of the trust estate. It continues for the heirs of the daughters named, equally as for the daughters.

If the trustees are to hold the estate for the four daughters and the heirs of the daughters, then the trust is void as creating a perpetuity.

But it has been argued that the intention of the testator was that the trust, as to each of his daughters, should cease as to such daughter and vest in the children of such daughter. But this is against the express terms of the will, by which the trustees are to hold the estate "for the use and benefit" of the four daughters named "and their heirs." The trust is as much for the heirs of the daughters as for the daughters. The will makes no provision for the termination of the trust at the death of the daughters or their heirs. It continues as much for the latter as for the former. The devise is one and indivisible to the trustees to hold, manage and dispose of, for the use and benefit of the daughters and their heirs. In no legal sense can the daughters be deemed the first takers, and the trust valid as to them and not as to their heirs.

But assuming it to have been the testator's intention that on the decease of his daughters their respective shares should go to the heirs of such daughters in fee simple, still, this would create a perpetuity, because it was possible, that they might have heirs unborn at the testator's death and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards.

"This rule is imperative and perfectly well established. An executory devise, either of real or personal estate, is good," observes Merrick, J., in *Fosdick v. Fosdick*, 6 Allen (Mass.) 41, "if limited to vest within the compass of a life or lives in being, and twenty-one years afterwards; adding thereto, however, in case of an infant en ventre sa mère, sufficient to cover the ordinary time of gestation of such child. But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." In any view of the trust, therefore, it must be deemed void, as creating a perpetuity. 1 Perry on Trusts, §§ 381, 382, 383.

Here, in the first instance, there was an absolute gift to the daugh-

*Said to be erroneous
p. 515 foot*

ters and their heirs. Upon this gift a limiting or restrictive clause was attempted to be grafted, which, it has been seen, was void. The first gift remains in full force, if the attempted qualification becomes ineffectual. The presumption is that "the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one." 1 Jarman on Wills, § 257. "Whenever there is a limitation over," remarks Merrick, J., in Fosdick v. Fosdick, 6 Allen (Mass.) 41, 43, "which cannot take effect by reason of its being too remote, the will is to be construed as if no such provision or clause were contained in it; and the person or persons otherwise entitled to the estate or property will take it wholly discharged of the devise, bequest and limitation over. Sears v. Russell, 8 Gray [Mass.] 86, 97; Brattle Square Church v. Grant, 3 Gray [Mass.] 142 [63 Am. Dec. 725]."

The conclusion is that the trust for the daughters is void as creating a perpetuity, and the absolute gift remains.

It is obvious that there are no words of inheritance in the trustees. But that cannot be deemed material. Courts of equity do not permit a trust to fail for want of trustees. Their tenure is to be determined by their powers and duties. "The intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts; first, when a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him or his heirs or not; and, second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust requires." 1 Perry on Trusts, § 312. Courts will imply an estate in the trustees, though no estate is given them in words, to carry into effect the intention of the parties. The absence of words of inheritance in the trustees would not be held to limit the duration of the trust to their lives, if the trust were a valid one. But the trust being void, for the reasons already given, the estate of the trustees must cease; as no provision has been made for a trust which could be carried legally out.

The devise to Mrs. Elliot differs from that to the other daughters. The provisions of the will as to her stand thus: First, there is a devise to her and her heirs. Then a trust is interposed, which we have seen is void, followed by the following clause: "In case that Statira Elliot should die before her husband and leave no children, I will that her part, after the expiration of six years, be transferred by the trustees over to the parties of the other six heirs, and to be equally divided between them."

Leaving out of consideration the trust as void, there is first a gift to her and her heirs, but in case she dies before her husband leaving no children, then over. This is as if he had said to Statira Elliot and her children, but in case she dies leaving no children, then over. The doctrine is thus stated: "When a testator in the first instance devises land to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word heirs in the prior devise in the restricted sense of heirs to the body; such devise confers only an estate tail, the effect being the same as if the latter expression had been originally employed." 2 Jarman, 238. "If, therefore," remarks Shaw, C. J., in Nightingale v. Burrell, 15 Pick. (Mass.) 104, "an estate is devised to A. and his heirs, which is a fee; and it is afterwards provided that if A. die without issue, then over, this reduces it to an estate tail by implication. The law implies that by 'heirs' in the first devise, was intended heirs of the body, and it also implies from the proviso, that it was not the intent of the testator to give the estate over and away from the issue of the first devisee, but, on the contrary, that such issue should take after the first devisee." Parkman v. Bowdoin, 1 Sumn. 367, Fed. Cas. No. 10,763. The cases cited by the counsel for Mrs. Elliot lead to the conclusion that she would be entitled to an estate tail in the real estate.

But the words which will create an estate tail when applied to real estate, will give an absolute interest when applied to personalty. "The same limitation under the English law, which would create an estate tail if applied to real estate, would vest the whole interest absolutely in the first taker if applied to chattels." 4 Kent Com. 283. Hall v. Priest, 6 Gray (Mass.) 18, 22.

Such might have been the legal rights of Mrs. Elliot had there been no attempt at creating a trust estate, but this provision cannot be eliminated from the will. It is there. If the trust is void as to one daughter, it is void as to all. Equality among the children is the rule. It was not the intent that three daughters should have an absolute estate in their shares and the fourth to have an interest only for life. Now to set aside the trust as to three of the daughters and giving such a construction to the will as would give Mrs. Elliot a life estate only in case she survived her husband, thus limiting her only to her income, so that the estate may be kept intact to meet the contingency of her dying and leaving no children, would be the making a will the testator never made and defeating his manifest intent of giving "to each and all his (my) children an equal part and proportion of his property."²

If the trust was void from the beginning, then those named as trustees never held any of her property as trustees to be transferred to the heirs.

² See Bigelow v. Cady, 171 Ill. 229, 48 N. E. 974, 63 Am. St. Rep. 230.

The result is that the trust as to the daughters is void as creating a perpetuity; and, as it is the manifest intention of the testator to divide his estate equally among his children, the special clause as to Mrs. Elliot is so connected with and dependent upon the trust clause, that if that fails this fails with it, and, as they hold the estate devised as an absolute gift, so equally does she.

According to the true construction of the will of George F. Patten, it is declared:

I. That the trust attempted by said will to be vested in the complainants is wholly void.

II. That the children of Catherine F. Walker, deceased, are entitled to receive payment, delivery and conveyance of a share, to wit: one fourth of the principal and body of the estate in the hands of the complainants, to the use of themselves, their heirs and assigns forever, absolutely and free of all control from the complainants.

III. That said Statira, Paulina and Augusta are each entitled to receive payment, delivery and assignment of a share, to wit: of one fourth of the principal and body of the said estate in the hands of the complainants, each to the use and behoof of herself, her heirs and assigns forever, free from the control of these complainants.

IV. That these complainants may and shall pay, deliver and assign to said Statira, Paulina and Augusta, and to the children of said deceased Catherine, any and all of the principal and body of the estate in their hands to the use of said Statira, Paulina, Augusta, and to the heirs and assigns of each forever, and to the use of the heirs of said Catherine, their heirs and assigns, their respective and several shares, free from the control of the complainants.

And it is ordered and decreed that the costs of the proceeding be charged upon the estate of Statira, Paulina, Augusta and the heirs of Catherine.

WALTON, BARROWS, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.³

³ Compare *Pennsylvania Co. v. Price*, 7 Phila. (Pa.) 465 (1870); *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352 (1892); *Lawrence v. Lawrence*, 4 W. Austr. L. R. 27 (1901); *Williams v. Herrick*, 19 R. I. 197, 32 Atl. 913 (1895); *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213 (1899).

In the absence of a statute expressly permitting it, a trust for the perpetual care of the testator's cemetery lot has been held void. *Mason v. Bloomington Library Ass'n*, 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603. See, also, cases cited in *Ames' Cases on Trusts* (2d Ed.) p. 201, note 1. On the other hand, where the trust is for the care of a cemetery lot or other object and where there is no cestui que trust, and the trust is limited to continue for not to exist lives in being in 21 years from the creation of the interest, the trust is valid and may be carried out by the trustees. *Mussett v. Bingle*, W. N. (1896), p. 170; *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7; *Pirbright v. Salwey*, W. N. (1896) p. 86. See, also, cases cited in *Ames cases on Trusts* (2d Ed.) p. 201, note 2, and "The Failure of the 'Tilden Trust,'" by J. B. Ames, 5 Harv. Law Rev. 389, 397, et seq.

PULITZER v. LIVINGSTON.

(Supreme Judicial Court of Maine, 1896. 89 Me. 359, 36 Atl. 635.)

Agreed statement. This was an action of covenant broken, submitted to the law court on an agreed statement of facts which are found in the opinion.

FOSTER, J. More than forty years ago certain persons residing in England and France were the owners in fee of large tracts of real estate in America, particularly in the States of Maine, New York, Pennsylvania, and the District of Columbia. These estates had formerly been the property of their ancestor, William Bingham, of Philadelphia, and from whom the title descended, the "Bingham Estate," so-called, embracing two million two hundred thousand acres in the State of Maine alone. These large landed estates were principally wild and unimproved, and required the management in this country of representatives of the owners.

Considering the large and increasing number of persons who jointly owned these estates and the distance of their residence from the same, provisions for the sales and conveyances by letter of attorney were inadequate, because of deaths frequently occurring among those who were the owners, and of the necessity of purchasers inquiring and taking the risk of the correctness of the information as to the continuance of the lives of the parties executing a letter of attorney.

On July 18, 1853, three-fifths undivided of this property were vested in the following named persons: William Bingham Baring (Lord Ashburton), Henry Bingham Baring, Frances Emily (Baring) Simpson, William Frederick Baring, and Anna Maria Helena (Countess de Noailles), and on that day these persons executed a deed of trust of their undivided three-fifths of the property to Joseph Reed Ingersoll and John Craig Miller, as trustees.

The other two-fifths of the property were vested in William Baring de Lotbiniere Bingham, who on the 12th day of August, 1862, executed a like deed of trust of his undivided two-fifths of the property to the same persons, as trustees.

These owners, for the more convenient management of their property in this country, conveyed it to these trustees by the foregoing deeds, and upon substantially the following trusts, as therein expressed:

(1) To let and demise the real estate; (2) to invest and keep invested the moneys and personal estate, with power of sale and reinvestment; (3) to collect and receive the rents and income of the real estate, and the interest and income of the personal estate; (4) to remit the net income to the parties or their legal representatives, according

to their respective rights and interests therein, or otherwise to apply and dispose of the same as the parties or their legal representatives should from time to time direct.

The following powers were therein expressly conferred upon the trustees, viz.: To grant, bargain, sell, exchange, and absolutely dispose of in fee simple, or for life, or lives, or for years, or for any other estate, all or any part of the real estate, and to make in due form of law all such deeds and conveyances as might be necessary to carry the sale into effect; to remit the proceeds of such sales after deducting expenses, to the parties or their legal representatives, according to their respective interests therein, or to otherwise apply and dispose of the same as the parties or their legal representatives should from time to time direct; to raise by mortgage of the premises or any part thereof, such sum or sums of money as should be requested by the parties, or such of them as might be entitled to any beneficial interest in the premises; to appoint by deed successors with all the powers of the trustees originally named; and finally it was expressly provided that it should be lawful for the parties respectively, "and their respective legal representatives, at any time or times hereafter, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to alter, change, revoke, annul and destroy all and every the trusts hereby created as respects their respective shares and interests in the premises, and to declare, direct, and appoint such other uses and trusts, if any, concerning their respective shares and interests in the said trust estate, or any part thereof, as they shall respectively choose or think proper, anything herein contained to the contrary notwithstanding."

New trustees were from time to time nominated in accordance with the provisions of the deeds in relation to successors to the original trustees, and on September 14, 1882, the then trustees, Charles Willing and Phineas Pemberton Morris, conveyed the particular property involved in this action to May W. Bowler, of Cincinnati, Ohio. On October 4, 1886, May W. Bowler conveyed the same to the defendant, and on May 30, 1894, the defendant conveyed the same by warranty deed, with full covenants, to the plaintiff.

The plaintiff has brought this action for a breach of the defendant's covenant contained in her deed to him that the property is "free of all incumbrances," alleging an outstanding title in fee in those persons who executed the trust deeds, or their heirs or assigns, as a breach of that covenant. And as a part of the same transaction with the deed from defendant to the plaintiff, the defendant executed and delivered to the plaintiff a special covenant that those grantors in the trust deeds had no right, title or interest in the property that could be maintained in any proceeding in the courts of this State as against the title conveyed by her to the plaintiff, and a breach of this special covenant is also alleged in this action.

The land involved in this action is situated at Bar Harbor, and comprises about fifteen acres with the buildings thereon. The purchase price between the plaintiff and the defendant was \$90,000, and since the conveyance over \$100,000 more have been expended in improvements.

The rights of the parties depend upon the legal effect to be given to the trust deeds of July 18, 1853, and August 12, 1862, the plaintiff claiming that these deeds are not legally sufficient to divest the grantors of their title in the property; that there were future estates and interests so limited therein that they offend against those rules of law which prescribe and limit the period within which future estates and interests must necessarily vest; and that these deeds being void no title ever passed to the trustees but still remains in the grantors, or their heirs or assigns.

The ground upon which the trust is attacked, and the court asked to declare it void, is that the terms of the trust violate that rule of law known as the Rule against Perpetuities.

It is necessary in order to determine whether the trust is objectionable, to consider just what the rule is, and what is its object and purpose.

The rule against perpetuities was established to prevent post mortem control of property. It forbids the creation of estates which are to vest, or come into being upon a remote contingency, and where the vesting of an estate or interest is thereby unlawfully postponed.

It is contrary to the policy of the law that there should be any outstanding titles, estates, or powers by the existence, operation, or exercise of which at a period of time beyond lives in being, and twenty-one years and a fraction thereafter, the complete and unfettered enjoyment of an estate with all the rights, privileges, and powers incident to ownership should be qualified or impeded. When this is the case, as the court say in *Philadelphia v. Girard's Heirs*, 45 Pa. 26, 84 Am. Dec. 470, they are called perpetuities, not because the grant or devise as written would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants or devises that tend to a perpetual suspension of the title or of its vesting, or, as is sometimes with less accuracy expressed, to a perpetual prevention or restraint upon alienation.

This rule of restraint upon alienation has frequently been confounded with the rule against perpetuities. They are, however, separate and distinct rules, although their object is one and the same,—the prevention of property being taken out of commerce, locked up, or so held that it cannot be conveyed. It is important therefore in the consideration of cases to bear in mind that the two rules are independent and distinct. Gray on Perpetuities, § 236, thus speaks of the two rules: "There are two distinct rules of law by the joint action of which the tying up of estates is prevented: (1) Estates cannot be made inalienable.

(2) Future estates cannot be created beyond the limits fixed by the rule against perpetuities."

The rule against perpetuities concerns only remote future and contingent estates and interests. It applies equally to legal and equitable estates, to instruments executing powers, as well as to other instruments. *Duke of Norfolk's Case*, 1 Vern. 164 (3 Ch. Cas. 48); *Gray on Rule against Perpetuities*, § 411. A limitation that is valid in the case of a legal estate is valid in the case of an equitable estate. If an equitable estate, as for instance a trust, is so limited that it creates a perpetuity, a similar limitation of a legal estate equally creates a perpetuity. *Goddard v. Whitney*, 140 Mass. 100, 3 N. E. 30; *Kimball v. Crocker*, 53 Me. 266; *Ould v. Wash. Hosp.*, 95 U. S. 303, 312, 24 L. Ed. 450.

What then is a perpetuity?

It is a grant of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void, and estates or interests which are dependent on them are void. Nothing is denounced as a perpetuity that does not transgress this rule, and equity follows this rule by way of analogy in dealing with executory trusts; and those trusts which transgress the rule are called "transgressive trusts," being in equity the substantial equivalent of what in law are called perpetuities. *Fearne on Rem.* 538 n. "But the limitation, in order to be valid, must be so made that the estate or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." *Fosdick v. Fosdick*, 6 Allen (Mass.) 41; *Brattle Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725. *Lewis* in his work on Perpetuities gives the following as an accurate definition of a perpetuity: "A perpetuity is 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 the future limitation, except with the concurrence of the individual interested under that limitation."

The rule against perpetuities has no application to vested estates or interests. *Gray on Perpetuities*, § 205. It concerns itself only with the vesting, the commencing of estates, and not at all with their termination. It makes no difference when such a vested estate or interest limited terminates. *Routledge v. Dorril*, 2 Ves. jr. 366; *Evans v. Walker*, 3 Ch. Div. 211; *Hampton v. Holman*, 5 Ch. Div. 183; see 14

Am. Law Review, 237. When an estate or interest vests in a person he is the owner and can alienate it. *Fosdick v. Fosdick*, 6 Allen (Mass.) 41; *Kimball v. Crocker*, 53 Me. 266; *Merritt v. Bucknam*, 77 Me. 258; *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73.

Examined in the light of the foregoing rules and principles, we are unable to discover wherein the deeds in question offend the rule against perpetuities. The trustees took the legal estate. The beneficial or equitable estate was reserved to the grantors and their representatives. All interests legal and equitable were vested. Nothing was postponed. The beneficial enjoyment of the estate absolutely and unqualifiedly vested in the persons who, prior to the delivery of the deeds, held the legal title. Each of these persons as the owners of the equitable estate, after the deeds were delivered, possessed over his own equitable interest the same power of sale, conveyance, devise, and disposition, as prior to the deeds he had over his undivided interest in the legal estate. Upon the exercise of any of these powers, the person in whose favor it might be exercised would become fully possessed of such equitable and beneficial interest. The trustees as the holders of the legal title, during the continuance of the trust, have the fullest powers of sale and conveyance, so that the alienation of the property is absolutely unfettered. The owners of an equitable estate, like the owners of a legal estate, can alienate or assign their interest. There is nothing in these deeds that prohibits this. By an examination of the deeds of trust it will be perceived that neither the rules, nor the reason of the rules, have been transgressed. The land is as alienable, in legal contemplation, as if the deeds had never been executed. No provision is disclosed looking to any future, contingent or remote estate, which, springing into being in future would hinder free alienation by imposing a clog on the title which those now vested with the present title and possession could not remove.

But there is another point which is fatal to the plaintiff's contention that these trust deeds are obnoxious to the rule against perpetuities. This rule does not apply to interests which though future are destructible at the mere will and pleasure of the present owner of the property. "A future estate which at all times until it vests is in the control of the owner of the preceding estate, is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the rule against perpetuities." Gray on Perpetuities, § 443. The author clearly points out in sections 140 and those that follow, that a perpetuity is an indestructible interest, and while he shows that it has another artificial meaning, or "an interest which will not vest till a remote period," yet in all his illustrations he shows clearly that interests which are destructible are not perpetuities. This doctrine is laid down by Chief Justice Gibson in *Hillyard v. Miller*, 10 Pa. 334, wherein he cites with approval the definition of a perpetuity as given by Lewis, and also in *Mifflin v. Mifflin*, 121 Pa. 205, 15 Atl. 525. In the latter case, the court, in

considering the provisions of certain deeds which were claimed to be inoperative because of the rule against perpetuities, uses this language: "But the estate of Mrs. Mifflin was neither inalienable nor indestructible. It was entirely within her power to become the owner in fee of the estates granted and to totally defeat any ulterior limitations. It proved nothing to say she did not exercise her power and that therefore the situation is the same as though she never had the power. For certain purposes and in certain cases that, of course, is true. But in considering merely the application of the rule against perpetuities, it is not true, because that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible."

So in another recent case in Pennsylvania the court say: "Aside from this it was competent for all the parties in interest at any time to defeat the power and to take the property discharged thereof; under these circumstances, we cannot say that the trust created a perpetuity." Cooper's Estate, 150 Pa. 576, 24 Atl. 1057, 30 Am. St. Rep. 829; Lovering v. Worthington, 106 Mass. 86, 88; Bowditch v. Andrew, 8 Allen (Mass.) 339; Goesele v. Bimeler, 14 How. 589, 14 L. Ed. 554.

The very definition of a perpetuity as given by Lewis has its application to a future limitation "which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." The deeds in question contain certain express powers of revocation. The equitable owners of the estate have therein expressly reserved the right at any and all times "to alter, change, revoke, annul and destroy all and every the trusts hereby created as respects their respective shares and interests in the premises, and to declare, direct and appoint such other uses and trusts, if any concerning their respective shares and interests in the said trust estate or any part thereof, as they shall respectively choose or think proper, anything herein contained to the contrary notwithstanding."

These powers clearly provide for a complete revocation of the trusts at any time, and thereby remove the case from the rule against perpetuities.

But it is argued for the plaintiff that, admitting the interest of the beneficial owners to be vested, and alienable, the existence of the legal estate in the trustees with a power of sale of indefinite duration, which may be exercised after the expiration of lives in being and twenty-one years, tends to a perpetuity; and that, under the authorities, a power of sale conferred upon one not the owner of the beneficial interest in land, if it may be exercised at an indefinite or too remote period is void.

It is true that if an unlimited indestructible power exists, it does restrain free alienation by the one, who, subject to that power, is the owner of the fee. "A power of sale suspended indefinitely over the

fee is open to the same objection as an executory devise or springing use to take effect whenever A. or his heirs shall do a given act." Lewis on Perpetuities, 547. Thus in Tullett v. Colville, 2 L. R. Ch. (1894) 310, a devise of certain property was made to trustees, and the trustees were directed to carry on the business of the testator as a gravel contractor "until my gravel pits are worked out, and then sell the said gravel pits and the freehold land on which the same is situated." The court held that this power of sale was too remote and that the rule was violated, because, while the gravel pits might be worked within the prescribed limits of the rule, yet they might not be so worked out, and the power of sale might not go into operation until an uncertain and possibly too remote time in the future. "The true reason for holding such powers good," says Gray in his work on Perpetuities, "is that the trusts to which they are attached must come to an end, or can be destroyed, within the limits fixed by the rule against perpetuities." Speaking further in relation to powers, he says, § 506: "To sum up the law as to powers in connection with settled property: (1) Sometimes the power ceases as soon as the equitable fee or absolute interest vests in possession. (2) Sometimes the power can be exercised until the owner of the equitable fee or absolute interest calls for the legal estate. (3) Sometimes the power can be exercised within a reasonable time after the fee or absolute interest has vested in possession, such reasonable time being not over twenty-one years after lives in being. (4) Sometimes the power is created to be exercised on a contingency which may happen after the legal fee or absolute interest has vested in possession, and which may be more than twenty-one years after a life in being. In the first three cases the power is not void for remoteness; in the last case it is."

In the case at bar the powers of sale in the trust deeds are within the second class. The owners of the equitable fee are by the express terms of the deeds entitled to call for a conveyance of the legal estate from the trustees and thereby to destroy and finally determine the trust. The power, therefore, does not hang suspended over the fee like an unbarable executory devise, but is subject to be barred and destroyed by the cestuis que trustent, or any one of them. Biddle v. Perkins, 4 Simons, 135; Wallis v. Thurston, 10 Simons, 225. True, here is a trust to sell for all time, but revocable at pleasure. What is there in these deeds that tends to a perpetuity if we clearly observe what that means? There is in these deeds that which it is settled makes the power valid although in terms perpetual,—and that is the power of revocation. 2 Sug. Pow. 472. A trust and a power of sale that continue only at the pleasure of the beneficial owner cannot possibly be said to be an illegal restraint on alienation. The purpose of the trust was lawful and in harmony with the policy of the law. It was created to secure a more convenient management of these large landed estates, and less trouble and delay

in passing title to the grantees who might from time to time purchase portions of these distant and unsettled tracts.

A recent case in Illinois involved a conveyance to three trustees in trust for an unincorporated company, the property being conveyed to the trustees and their heirs and assigns forever. They were given power to sub-divide, improve, sell and convey. The court, after noting several definitions of the rule against perpetuities, makes use of the following language: "The mere creation of a trust does not ipso facto suspend the power of alienation. It is only suspended by such trust when a trust-term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust; where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended although the alienation is in fact postponed by the non-action of the trustee or in consequence of a discretion reposed in him by the creator of the trust. * * * There is nothing in the trust agreement in this case having the slightest tendency to create a perpetuity. The land was to be conveyed to the trustees to be sub-divided and improved and then sold, and the time of the sale was left wholly to their discretion; indeed the whole scheme of the association was to purchase, sub-divide and improve suburban property for the purpose of placing it at once upon the market for sale. No trust-term was created and a conveyance of the land, or any part of it, at any time was no violation of the trust. Where there are persons in being at the creation of an estate capable of conveying an immediate and absolute estate in fee in possession, there is no suspension of the power of alienation, and no question as to perpetuities can arise." *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

There is nothing whatever done by the terms of these deeds, in the case before us, but to create an agency to sell land; an agency, to be sure, that is to continue after death and to be exercised for heirs, devisees, grantees, etc., until, and only until, any one sees fit to put an end to it. But an agency to continue after death being impossible, the mode of doing it was by a trust with powers by which the ownership is vested in trustees, and the beneficial interest dealt with under these powers.

When the position of the parties and of the property is considered, it becomes apparent that this was the object of the arrangement. The property was land bought in the last century. The owners lived in England and France. A sale required that all should join, and agencies were always liable to be revoked, or become impracticable by settlements, so that there would be no delegation of authority. The remedy was an agency that would continue, and there could be none unless the title was transferred, the legal title thus being vested in trustees, and the equitable title in the beneficial owners. The parties by executing these deeds attempted to accelerate alienation and avoid any retarding of it. The purpose of these deeds was to make property more readily

marketable, more conveniently alienable,—the very object which the rule against perpetuities was adopted to subserve. When the reason of the rule fails, the rule itself has no application.

It may be proper to state that we have carefully examined the decisions to which our attention has been called by the learned counsel for the plaintiff, and which, perhaps, are not in complete harmony with some of the views enunciated in this opinion.

The case of *Slade v. Patten*, 68 Me. 380, is one of those cases. There the testator devised to his four daughters certain portions of his estate with the proviso that the parts and proportions devised and bequeathed to his four daughters, and their heirs, instead of passing into their hands, were to go into the hands of two trustees, "to hold, manage and dispose of said parts and the property received therefor, for the use and benefit of said [four daughters] and their heirs, according to the discretion of said trustees."

This devise is distinguishable from the Bingham trust in the important respect that the will contained no clause giving to the cestuis que trustent the right to revoke or annul the trust. The power of revocation reserved in the trust deeds in the case at bar makes a most important difference between those deeds and the devise involved in *Slade v. Patten*. The decision there seems to be based on the conclusion that no provision was made for the termination of the trust, but that it was to be continued for the benefit of the "heirs" of the daughters, and therefore to continue indefinitely. "There is no provision for the termination of the trust estate," remarks the court.

In one paragraph of the opinion the court makes use of the following language: "But assuming it to have been the testator's intention that on the decease of his daughters their respective shares should go to the heirs of such daughters in fee simple, still, this would create a perpetuity, because it was possible, that they might have heirs unborn at the testator's death and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards."

This statement is absolutely inconsistent with the facts of the case as well as the well settled principles of law. It cannot admit of doubt even that a devise of property to a daughter for life and at her death to her heirs in fee is perfectly good.

But the foregoing statement from the opinion may be regarded as only a dictum. The real question which the court decided was that the word "heirs" was a word of general import and not limited to those persons who would be heirs within a life in being and twenty-one years and a fraction thereafter, and therefore the trust undertook to preserve the estate for persons who might become heirs indefinitely and hence violated the rule.

The interests devised, however, were clearly vested interests. The legal title was given to the trustees, the equitable fee to the daughters

Slade v. Patten

Erroneous statement

and their heirs, but all interests were present and vested. The legal estate vested in the trustees at the testator's death, and at the same time the entire equitable interest limited to the daughters and their heirs vested in them. No other interest was devised or bequeathed. All the estates and interests that were ever to arise vested immediately upon the testator's death. After correctly stating the rule, the court says: "In view of the trust, therefore, it must be deemed void as creating a perpetuity."

From the expressions in the opinion to which we have referred, it seems to have been assumed that a trust which will not or may not terminate within lives in being and twenty-one years and a fraction afterwards is void as creating a perpetuity. But this is not correct. It cannot be sustained either upon principle or authority. A future limitation that may not vest within that period creates a perpetuity, and is therefore void. But a limitation that must vest, if at all, within the period does not create a perpetuity, and it makes no difference when the trust or interest limited terminates, if it has vested within the period. "All that is required by the rule against perpetuities is, that the estate or interest shall vest within the prescribed period. *Seaver v. Fitzgerald*, 141 Mass. 401, 403, 6 N. E. 73. The right of possession or enjoyment may be postponed longer."

The reasoning of the court was wrong. No injustice was done to the testator's daughters, however; for, owing to his having used language which by itself expressed an absolute gift to his daughters and their heirs, followed by a proviso that trustees should hold the legal title in trust for them and their heirs, the court, by rejecting the proviso in reference to the trustees as void, decided that there was an absolute gift by devise to the daughters which took effect.

The opinion, therefore, in *Slade v. Patten* cannot be sustained upon authority. *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, is a case where the owner of hotel property devised it to trustees with directions to lease it, but prohibited alienation during the term of a trust which exceeded lives in being and twenty-one years thereafter. The court held such a trust void, and gave effect to an alternative limitation contained in the will. In this case there was an absolute suspension of the power of alienation for a period prohibited by the rules of law, unlike the case at bar.

The cases of *Deford v. Deford*, 36 Md. 168, *Gouldsboro v. Martin*, 41 Md. 488, and *Collins & Bernard v. Foley*, 63 Md. 162, 52 Am. Rep. 505, would seem to support the dictum of the reasoning in *Slade v. Patten*, and these Maryland cases are the only ones to which the attention of the court has been called, or which in the examination of the case before us, we have been able to find, supporting that doctrine. But the doctrine of these cases is opposed to the great trend of authority elsewhere, and Gray, in his very thorough and valuable work, speaks

Barnum v. Barnum.

*Express prohibition
of alienation
for period of R. P.
was held void.*

of these cases as grave, practical errors growing out of confounding the rule against perpetuities with the rules disallowing restraints on alienation.

It is unnecessary to consider any of the other objections raised, inasmuch as the conclusion to which the court has arrived determines the validity of the trust deeds, and thus disposes of the case.

Judgment for defendant.

ARMSTRONG v. BARBER.

(Supreme Court of Illinois, 1909. 239 Ill. 389, 88 N. E. 246.)

CARTER, J.⁴ * * * All the reasons for holding that George and Elsie take a present interest at testator's death are alike applicable to Arthur's one-third. If it be conceded that as to Arthur's share the trusteeship, in the discretion of the trustees may last longer than ten years from the probate, and even during Arthur's whole life, still that does not render the provisions void, because his interest vested, as did those of George and Elsie, at the date of testator's death. If it be argued that this might create an indestructible trust in the trustees, the answer is as suggested in Gray on Perpetuities, (2d Ed. § 121i), that this does not violate the rule against perpetuities, as that rule "is concerned only with the beginning of interests;" that said rule "settles the time within which interests must vest, but when once vested they are all, present and future alike, subject to the same restraints against alienation, and with this the rule against perpetuities has nothing to do." In England the creation of such indestructible trusts of such absolute equitable interests is not permitted. Saunders v. Vautier, 4 Beav. 115; Harbin v. Masterman, [1894] 2 Ch. 184; Weatherall v. Thornburgh, 8 Ch. Div. 261; Gray on Restraints on Alienation, (2d Ed.) §§ 105-112. In this State such trusts have been permitted. Lunt v. Lunt, supra, 108 Ill. 307. The authorities in this and other jurisdictions bearing on this question are reviewed at some length in Kales on Future Interests, sections 286 to 296, inclusive. Once such trusts are permitted it follows that there must be some limits as to the length of time they can be made to last. It is suggested in Gray on Perpetuities, (2d Ed. § 121i), that it is perhaps likely that the same period as that prescribed by the rule against perpetuities should be taken, but the author adds that it is open to the courts to adopt some other period, if found advisable. There are intimations in some of the authorities that, in a case like the present, any provision which permits the trustees to retain property in trusteeship for ten years from the probate of the will is wholly void, the trusteeship, however, still remaining, with the difference that instead of being indestructible for the beneficiaries who

English law does not permit indestructible trusts of absolute equitable interests, but Illinois permits them within limits

Gray suggests period defined by R v P with respect to vesting be adopted. some authorities believe that any provision permitting trustees to hold property for 10 years is void.

⁴ The statement of facts is omitted and only part of the opinion is given.

are of age and who have an absolute indestructible equitable interest may compel the trustees to transfer the legal title to them although the time specified in the will for the termination of the trust has not arrived. This court, in *Kohtz v. Eldred*, 208 Ill. 60, 69 N. E. 900, has stated that such a trust will terminate as soon as the object for which it was established has been accomplished. The question when this trust may end is, however, not necessary for the decision in this case. Admitting, as most favorable to appellee's contention, that the probate of this will might have been delayed, still that does not in any way militate against the legal and equitable interests vesting thereunder immediately upon the death of the testator. At most, the failure to probate promptly could only delay the distribution of the funds, and such distribution, as we have pointed out, could be controlled by the courts under the rules governing restraints on alienation of property. * * *

CHAPTER IV
LIMITATIONS TO CLASSES

LEAKE v. ROBINSON.

(Court of Chancery, 1817. 2 Mer. 363.)

John Milward Rowe, by his will, dated the 17th of June, 1790, gave to the plaintiffs (whom he appointed executors,) all his three per cent. and four per cent. stock, upon trust, in the first place, to pay to his wife, Sukey Rowe, during her life, two several annuities of £245 8s., and £168, out of the dividends of the four per cents, (which with certain other provisions, were declared to be in bar of dower and thirds,) and in the next place, to pay and apply an annuity of £54 12s. (thereby given) towards the maintenance, education, or advancement of his grandson, William Rowe Robinson, until he should attain twenty-five; and from and after his attainment of that age, to pay him the said annuity during his life; and after his decease, the testator bequeathed the principal sum of £1,820, (part of his three per cent. annuities,) or so much thereof as should produce the annual sum of £54 12s. as after mentioned; and after the decease of his wife, he directed that his said executors should pay and apply the annual sum of £145, (part of the annuity of £245 8s.) and the annual sum of £40 (part of the annuity of £168,) towards the maintenance of the said W. R. Robinson till twenty-five; and afterwards for his life and after his decease, bequeathed the principal sums of £4,846 16s. 8d., three per cents, and £1000 four per cents, as after mentioned.

The testator then directed the plaintiffs to apply the dividends of £3,333 6s. 8d., three per cents, for the maintenance and advancement of his grandson, Charles Mitford, until twenty-five, and upon his attaining that age, to transfer to him the said principal sum of £3,333 6s. 8d., three per cents.

He then gave to the plaintiffs £1,000 India stock upon trust, to apply the dividends, &c. thereof, and also the annual sum of £100, (part of the dividends, &c. of his three per cent. stock,) or so much as they should think fit, towards the maintenance, education, and advancement of his said grandson, William Rowe Robinson, until twenty-five; and upon his attaining that age, he gave to him the dividends of the said stock during his life; and after his decease, he bequeathed the said £1,000 East India stock, and the sum of £3,333 6s. 8d. three per cents, (the dividends whereof then produced £100 per ann.) as after mentioned.

The testator then devised and bequeathed to the plaintiffs, their heirs, &c. all his real estates at Westham and Pevensy, of which he was seised in fee, or as mortgagee in possession, or otherwise, and the principal sums charged thereon, and the ground-rents issuing out of his messuages in Hedge Lane, upon trust to apply the said ground-rents, and the rents and profits of his said estates, and interest of the said mortgage moneys, or such parts as they should judge proper, towards the maintenance, education, or advancement of his said grandson, William Rowe Robinson, until twenty-five; and after his attaining that age, to pay to, or permit him to have and receive the same during his life, and after his death, (in case he should leave any lawful issue,) to pay and apply the said several annual sums of £54 12s. £145 8s. £100 and £40, and the dividends of the said £1,000 India stock, and the rents and profits of the said estates at Westham and Pevensy, and the interest of the said mortgage moneys, and the said ground rents, or such part thereof as they (the plaintiffs) should think proper, unto, and for the maintenance, education, and advancement of all and every the child and children of the said William Rowe Robinson, lawfully begotten, until (being sons,) they should respectively attain twenty-five, or (being daughters,) should attain such age, or marry with the consent of parents or guardians; and then to pay, transfer, and assign an equal proportion of the said several principal sums of £1,820, £4,846 16s. 8d., and £3,333 6s. 8d. three per cents, £1,000 four per cents, and £1,000 East India stock, and the said ground-rents and estates at Westham and Pevensy, and the mortgage moneys, and all the interest, dividends, or rents due or payable in respect of the same, "to such child or children, being a son or sons, who shall attain such age or ages of twenty-five as aforesaid, and to such child or children, being a daughter or daughters who shall attain such age or ages, or be married as aforesaid, his, her, or their heirs, executors, or administrators; if only one such child, or, having been more, if all but one should die, before their shares should become payable as aforesaid, then the whole to such only, or surviving child."

The testator then directed as follows; that "in case the said William Rowe Robinson shall happen to die without leaving issue, living at the time of his decease, or leaving such, they shall die all before any of them shall attain twenty-five, if sons, and if daughters, before they shall attain such age, or be married as aforesaid;" then the plaintiffs should pay, apply, and transfer the said principal sums of stock, ground-rents, estates and mortgage moneys, "unto and amongst all and every the brothers and sisters of the said William Rowe Robinson, share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage, with such consent as aforesaid."

He then directed the plaintiffs to invest the surplus or savings to arise out of the said several annuities, dividends, ground rents, and

interest, until his said grandson, William Rowe Robinson, or his issue, (if any), or his brothers and sisters who should become entitled as aforesaid, should attain twenty-five, or be married as aforesaid, and pay and apply the same for the benefit of the person or persons entitled, upon the attainment of such age or marriage respectively.

The testator then (after making certain provisions out of the remainder of his stock before bequeathed to the plaintiffs for others of his grandchildren,) gave to the plaintiffs, their executors, &c. all sums of money then due to him on mortgage, (except those secured on the estates at Westham and Pevensy,) upon trust, to pay one moiety of the interest to his daughter Mrs. Robinson, for her life, and after her death, to her husband, George Robinson, for his life, and after the death of the survivor, in and towards the maintenance and advancement of W. R. Robinson, till twenty-five, and after, &c. to W. R. Robinson for life, and after his decease, towards the maintenance and advancement of all and every his child and children, till twenty-five, or marriage as aforesaid, and upon trust, to pay or assign an equal proportion of such moiety of the said mortgage moneys, to such child or children respectively, and in case the said William Rowe Robinson should die without leaving issue, or all such issue should die before twenty-five, or marriage as aforesaid, then upon trust to pay and divide the same, unto and among all and every the brothers and sisters of the said William Rowe Robinson, share and share alike, at their respective ages of twenty-five, or marriage as aforesaid; with interest in the mean time, for such brothers and sisters, as before directed with respect to the issue (if any) of the said William Rowe Robinson.

He then directed the plaintiffs to pay the other moiety of the interest due to him on mortgage, to his daughter Frances Dippery Mitford, and her husband William Mitford, for their lives and the life of the survivor, and after the decease of the survivor of them, to pay and dispose of the said interest and principal moneys, to and among their children, in the same manner as he had before directed, with respect to the issue (if any) of the said William Rowe Robinson.

The testator then gave to the plaintiffs, their heirs, executors, &c. all the residue and remainder of his real and personal estate and effects not before disposed of, upon trust to sell, (in case his daughters should think proper and so direct,) and lay out the produce in the purchase of real estates on government securities, and out of such real and personal estate till disposed of, and the produce, &c. to pay one moiety of the rents, interest, and dividends to his daughter, Mrs. Robinson for her life, and after her death, to her husband for his life, and after the death of the survivor, to pay and apply the said moiety, or so much thereof as they should think fit, unto, or for the maintenance, education, and advancement of the said child and children of the said Elizabeth Grace Robinson, by the said George Robinson, (other than and except the said W. R. Robinson,) until they should

attain twenty-five, or marry as aforesaid, in equal shares and proportions, and after the attainment of such age or marriage, to pay and transfer all such moiety of the residue or produce thereof, to and among such child or children, in equal shares and proportions, and with regard to the remaining moiety, he directed that his daughter Mrs. Mitford, and her husband, and the child or children (if any) of them, and their issue, should have and enjoy the same, in the same manner as before expressed with regard to his daughter Mrs. Robinson and her family. The testator then directed that in case of the death of any of his said grandchildren before attaining twenty-five or marriage, the shares of them so dying, should go to the survivors of their respective brothers and sisters; and in case of the death of either of his said two daughters, without leaving issue by her said husband, living at her decease, or any child or children of such issue, then and in such case, the share or proportion of such part of his estate or effects given by him, or intended for such issue, or the child or children of such issue, should go to and be divided amongst the issue of his surviving daughter, by her then husband, or the child or children of such issue who might be dead, equally, share and share alike; and in case both his said daughters should die without issue living at their respective deceases by their then respective husbands, or any child or children of such issue who might be deceased, then he directed that each of his said daughters, (subject to the life interest of their then husbands,) might (notwithstanding their coverture,) give and dispose of her share and proportion of his said estate and effects to such person or persons as she might think proper, either by deed or will.

On the 17th of June, 1790, when the testator made this will, his grandson William Rowe Robinson, had one brother and three sisters living. Between the date of the will and the testator's death, he had another sister born.

On the 9th of February, 1792, the testator died. Between the death of the testator and the death of William Rowe Robinson, the said William Rowe Robinson had two other brothers born. On the 10th of October, 1800, William Rowe Robinson died; having attained twenty-five without issue, unmarried and intestate; and another sister was born after his death.

At the time of the testator's will, and of his death, Mr. and Mrs. Mitford had five children, one of whom was since dead, leaving issue; and after the testator's death, they had another child.

Sukey Rowe, the testator's widow, survived him, and died in 1804, having first made her will, and appointed Mr. Mitford, and another, executors thereof. Mrs. Mitford was also dead, and her husband had taken out administration.

Under these circumstances, the question for the decision of the court was, whether, in the event which happened, of the death of William Rowe Robinson without issue, the limitation to his brothers and sisters, to take effect on their attainment of the age of twenty-five, or

marriage as aforesaid, was a good and effectual limitation, or was void, as being too remote. And this principally depended on the determination of two other questions, viz. first, what classes of persons were those intended by the testator to take, in the event of William Rowe Robinson dying without issue, or without issue living to attain the age of twenty-five, under the description of "all and every the brothers and sisters of the said William Rowe Robinson;" because, if that limitation were held to extend to all the brothers and sisters who might be born, and (in the event which happened) actually were born, after the death of the testator, and the period of vesting was postponed by the will till their attainment of the age of twenty-five, it is obvious that more than twenty-one years, (the period beyond which a limitation by way of executory devise cannot take effect) might pass after the death of the testator before the arrival of the limited time: and this, consequently, gave rise to the second question; which was, whether the attainment of twenty-five was in fact the period assigned for the vesting of the several shares, or was to be taken only as the time fixed for the payment of the several shares which had already vested at some antecedent period.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT]. The first point to be determined in this case is, Who are included in the description of brothers and sisters of William Rowe Robinson, and of children of Mr. and Mrs. Robinson, and Mr. and Mrs. Mitford—whether those only who were in being at the time of the testator's death, or all who might come in esse during the lives of the respective tenants for life. Upon that point I do not see how a question can possibly be raised. Not only is the rule of construction completely settled, but in this case, I apprehend the actual intention of the testator to be perfectly clear. Indeed, I believe, wherever a testator gives to a parent for life, with remainder to his children, he does mean to include all the children such parent may at any time have. That is not an artificial rule. It is the rule which excludes any of the children that is, and has been called an artificial rule—namely, the rule in *Andrews v. Partington*, 3 Bro. C. C. 60, 401, and other cases of that description, which excludes all who may be born after the eldest attains twenty-one. The case of *Ellison v. Airey*, 1 Ves. 111, might have been decided the other way without at all affecting this; for there it was the death of one person that determined what children of another person were entitled to take. It is impossible to impute to this testator an intention to exclude all the children of his grandson, William Rowe Robinson, who should not be living at his (the testator's) own death, that grandson having no children at the time the will was made. All the bequests to the children of his daughters are made in as comprehensive terms.

As to the brothers and sisters of William Rowe Robinson, I do not apprehend that it is at all necessary to speculate on the question suggested by Mr. Bell, viz. who would, within the meaning of the will,

come under the description of brothers and sisters—whether only the children of both parents, or such as one of them might have after the death of the other.

Our question is, whether the testator's bounty was confined to such brothers and sisters (in whatever sense these words may be taken) as should be living at his own death. According to the established rule of construction, and what I conceive to have been the actual intention of the testator, all who were living at the time of William Rowe Robinson's death must be held to be comprehended in the description.

Having ascertained the persons intended to take, the next question is at what time the interests given to them were to vest.

There is no direct gift to any of these classes of persons. It is only through the medium of directions given to the trustees, that we can ascertain the benefits intended for them. The trustees have a discretionary power to apply what portion of the income they think fit, for the support, maintenance, and advancement of the infant legatees. Except in one instance, the testator does not say what is to become of the surplus interest. In the case of the property first given to William Rowe Robinson for life, the surplus interest is to accumulate, and to be paid with the capital, either to himself, or to his children, or to his brothers and sisters, when they shall have attained the age of twenty-five.

No direction being given as to the surplus interest of the two moieties of the mortgage money, it will make part of the residue; for, although the interest of residue goes with the capital, that of particular legacies does not, even supposing it be the payment, and not the vesting, that is postponed. It is a mistake to suppose that the trustees are authorized to apply any part of the capital for the benefit of any legatee not attaining twenty-five. It is only in the residuary clause that produce is spoken of, and it is evident that the direction relates only to the income of the property, or of the produce thereof when it should be sold.

As to the capital, there being, as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is, with regard to this, some difference of expression in the different parts of the will. In some instances the testator directs the payment to be to such child or children as shall attain twenty-five. In others the payment is to be made upon attainment of the age of twenty-five. In the residuary clause it is, from and immediately after such child or children shall attain the age of twenty-five, that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none were to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May v. Wood*, 3 Bro. C. C. 471, of which the enjoyment could be postponed. The

direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. The case of *Batsford v. Kebbell*, 3 Ves. 363, was much more favorable for the legatee; for the interest of the fund was given to him absolutely until he should attain the age of thirty-two, at which time the testatrix directed her executors to transfer to him the principal for his own use. He died under thirty-two. Lord Rosslyn said, "There is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description."

It was supposed that the clauses in the will, where the word "such" is left out, might be construed differently from those in which it is inserted; and that, although where the payment is to be to such child or children as shall attain twenty-five, nothing could vest in any not answering that description, yet where the payment is to be to children upon the attainment of twenty-five, or from and after their attaining twenty-five, the vesting is not postponed. If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description when they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to such of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift.

I am aware, however, that although, with regard to particular legacies, this doctrine has not been controverted, yet the case of *Booth v. Booth*, 4 Ves. 399, may be considered as throwing some doubt upon it, when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord Alvanley felt that he had a difficult case to deal with. Some violence was done to the words in favor of what he conceived to be, and what in all probability was, the intention. That intention however was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made. Lord Alvanley admits that, if it had been otherwise, it might have made some ingredient in the argument. Then the whole interest was given to them absolutely,—a circumstance which has always been held to furnish a strong presumption of intention to vest the capital, and which is not afforded by a direction for maintenance out of the interest, as was decided in the case of *Pulsford v. Hunter*, 3 Bro. C. C. 416. The legatees might both live to extreme old age, without the event ever happening on which the legacy was made payable. There was no survivorship between them, nor was there any bequest over in the event of the death of both or either; so that intestacy must have been the consequence of death before marriage. In every one of these particulars this case differs from that of *Booth v. Booth*.

They agree in nothing, except that the words "from and immediately after" occur in both.

The case of *Booth v. Booth* is therefore not merely no authority for what is contended for by the grandchildren, but it is a strong authority the other way. For it shows that, where there is no gift but by a direction to transfer from and after a given event, the vesting would be postponed till after that event had happened; unless, from particular circumstances, you are enabled to collect a contrary intention. For otherwise Lord Alvanley would only have had to say, "These words can have no such effect as is ascribed to them. They operate only as a postponement of the enjoyment." Here, interest is not given to children dying before twenty-five. Children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five, leaving issue. All is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age? When the vesting is so clearly and expressly postponed, it is in vain to endeavor to infer from other expressions, used without any reference to that object, that the testator did not conceive himself to have postponed the vesting. That he has unnecessarily provided for survivorship; that he has spoken of shares of grandchildren dying under twenty-five, and, in the last proviso, given over the moiety of the residue only in the event of either of his daughters dying without leaving any issue or any children of such issue,—are all of them circumstances that appear to me not at all to affect the question of vesting, as none of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made.

Then, assuming that after-born grandchildren were to be let in, and that the vesting was not to take place till twenty-five, the consequence is, that it might not take place till more than twenty-one years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void, unless the court can distinguish between the children born before, and those born after, the testator's death. Upon what ground can that distinction rest? Not upon the intention of the testator; for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who are included in it were equally capable of taking. It is the period of vesting, and not the description of the legatees, that produces the incapacity. Now, how am I to ascertain in which part of the will it is that the testator has made the blunder which vitiates his bequests? He supposed that he could do legally all that he has done;—that is, include after-born grandchildren, and also postpone the vesting till twenty-five. But, if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born

grandchildren, rather than abridge the period of vesting? I should think quite the contrary. It is very unlikely that he should have excluded one half of the family of his daughters, in order only that the other half might be kept four years longer out of the enjoyment of what he left them. It is much more probable that he would have said, "I do mean to include all my grandchildren, but as you tell me that I cannot do so, and at the same time postpone the vesting till twenty-five, I will postpone it only till twenty-one." If I could at all alter the will, I should be inclined to alter it in the way in which it seems to me probable that the testator himself would have altered it. That alteration would at least have an important object to justify it; for it would give validity to all the bequests in the will. The other alteration would only give them a partial effect; and that too by making a distinction, which the testator himself never intended to make, between those who were the equal objects of his bounty. In the latter case, I should be new-modeling a bequest which, standing by itself, is perfectly valid; while I left unaltered that clause which alone impedes the execution of the testator's intention in favor of all his grandchildren. Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled. In the construction of the Act of Parliament passed after the Thellusson cause, I thought myself at liberty to hold that the trust of accumulation was void only for the excess beyond the period to which the Act restrained it. And the Lord Chancellor afterwards approved of my decision. But there the Act introduced a restriction on a liberty antecedently enjoyed, and therefore it was only to the extent of the excess that the prohibition was transgressed. Whereas executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated, the whole devise is held to be void.

To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests, what he never intended them to be, viz. a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death.

If the present case were an entirely new question, I should doubt very much whether this could be done. But it is a question which

appears to me to be perfectly settled by antecedent decisions, and in cases in which there were grounds for supporting the bequests that do not here exist. In *Jee v. Audley*, 1 Cox, 324, there were no after-born children—no distinction therefore to be made between persons capable and persons incapable—(all were capable)—no difficulty, consequently, in adjusting the proportions that the capable children were to take, or in determining the manner, or the period, of ascertaining those proportions. I am asked why the existence of incapable children should prevent capable children from taking. But, in *Jee v. Audley*, the mere possibility that there might have been incapable children was sufficient to exclude those who were capable. It is said, the devise there was future. Certainly; but only in the same sense in which these bequests are future: that is, so conceived as to let in after-born children; which was the sole reason for its being held to be void. Unless my decision on the first point be erroneous, the bequests in this case do equally include after-born children of the testator's daughters, and are therefore equally void.

The case of *Routledge v. Dorril*, 2 Ves. 357, appears to me to be also an express authority on the point now in question. And I think that the circumstance, that there the will was an execution of a power, was rather favorable than adverse to the courts making a distinction between the two sets of grandchildren. For it might have been contended that after-born grandchildren were not proper objects of the power,—that the appointment was therefore void quoad them, but good quoad those who were capable of taking under the power. Whatever might be the value of that argument, it would have no application to the question now before the court. For in this case it could not be said that any one grandchild was, more or less than another, the proper object of the testator's spontaneous bounty; and therefore we have not the line, which the power might have furnished, for making a distinction between the two classes of grandchildren. If, even in such a case, the distinction could not be made, a fortiori is it impossible to make it in this.

The case of *Blandford v. Thackerell*, 2 Ves. 238, has no application to the present question. There was no vice or excess in the testator's bequest, which the court had to cure by excluding some of the objects in whose favor it was conceived. It was a sort of charitable intention for the benefit of children and grandchildren of relations of a specified description. As it was not a future bequest, or by way of remainder, it would, according to the established rules of construction, extend only to children and grandchildren living at the testator's death. Lord Rosslyn thought fit, (probably because it was in the nature of a charity,) to extend it to all the objects to whom the testator might legally have extended it—that is, children or grandchildren born during the lives of the different relations. Whether that was, or was not, a correct execution of the particular will, the case has no bearing at all on the point now under discussion. The case of *Wil-*

kinson v. Adam, 1 V. & B. 422, was referred to, as furnishing an instance of a distinction made between those who were, and those who were not, capable of taking under the same devise. That was merely a question of description, who were or were not included under the denomination of children. If it could be shown that after-born grandchildren are not entitled to the appellation of grandchildren, there would be a short end of the present case. On the whole, my opinion is, that all the bequests to the grandchildren as classes, (for I have nothing to do with the bequests to individuals,) are wholly void.

A question has been made, whether the particular bequests thus declared void do or do not fall into the residue. I have always understood that, with regard to personal estate, everything which is ill given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of,—whether by the death of a legatee, or by the remoteness, and consequent illegality, of the bequest. Either way it is residue,—i. e. something upon which no other disposition of the will effectually operates. It may in words have been before given; but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue.

A testator supposes that each part of his will is to take effect, and consequently cannot be said to have any intention to include in his residue anything that he has before given. I do not see, therefore, how such arguments as might be used in cases of the description of *Roe v. Avis*, 4 T. R. 605; *Church v. Mundy*, 12 Ves. 426; and *Welby v. Welby*, 2 V. & B. 187, can be here applicable. The limitations of a particular bequest, and those of the residue, may be quite incongruous; for the testator supposes that each is to have its separate effect. But what eventually turns out to be undisposed of will not the less constitute residue, because some of the provisions contained in the residuary clause may be inapplicable to a case of which the testator did not foresee the existence.

I am of opinion that, in so far as any of the particular bequests are ill disposed of, they fall into the residue. But then, according to what I have already determined, there is no good disposition of the residue itself after the death of the tenants for life, excepting in so far as the ultimate proviso may operate upon the subject of it. As to that proviso, one half of the residue is placed out of the reach of its operation, by Mrs. Mitford's having left children at her death. The consequence is, that, subject to Mr. Mitford's life interest, it belongs to the testator's next of kin. The fate of the other half rests in contingency. If Mrs. Robinson should die without leaving issue, it is well given over to the children of Mrs. Mitford, there being nothing

in this bequest to make it too remote; and it being evident that the testator used the words "surviving sister" in the same sense as other sister. But if Mrs. Robinson shall leave issue, this half also will, at her death, be undisposed of, and divisible among the next of kin.

The question as to the widow's right to share in the property which turns out to be undisposed of, I take to be settled by the case of *Pickering v. Lord Stanford*, 2 Ves. 272, 581; 3 Ves. 332, 492; 4 B. C. C. 214.¹

PICKEN v. MATTHEWS.

(Court of Chancery, 1878. 10 Ch. Div. 264.)

Francis Hooff, by his will, gave his property, real and personal, to trustees on trust to pay certain legacies and annuities, and continued as follows: "Subject as aforesaid, I direct my trustees to stand possessed of my said trust estate, upon trust for such of the children of my daughter Helen by her first husband (but not her children by her present husband), and the children of my daughter Charlotte, who being sons shall live to attain the age of twenty-five years, or being daughters shall attain that age or previously marry, whichever shall first happen; and I expressly direct that all such grandchildren shall participate equally without regard to the number of each family." And the testator empowered his trustees to maintain the children out of their expectant shares until they should respectively acquire vested interests in the trust estate.

The testator died in December, 1865. The testator's daughter Helen had at the date of the testator's death three children by her first husband, of whom the plaintiff had attained the age of twenty-five at the date of the testator's death. Charlotte had two children who were infants.

MALINS, V. C. I have very carefully considered the cases which have been cited; and the conclusion to which I have come will have the advantage, that it will, I think, carry into effect the intention of the testator.

If the two daughters of the testator had had no children living at his death, the gift would have been void for remoteness; because it would not be certain that the property would vest within a life or lives in being and twenty-one years after. But this is a gift to living grandchildren. The testator evidently knew that his grandchildren were in existence, and I must attribute to him knowledge of their ages, knowledge therefore that before his death the plaintiff had attained the age of twenty-five years. Now, the rules of law applicable to this case are, first, that a gift to a class not preceded by any life estate is a gift to such of the class as are living at the death of the testator. The

¹ See, also, *Porter v. Fox*, 6 Sim. 485 (1834).

case of *Singleton v. Gilbert*, 1 Bro. C. C. 542, n.; 1 Cox, 68, proceeded on that footing. There, there was a demise of real estate (subject to a term to secure annuities) to all the children of A., and the heirs of their bodies. A. had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitants. It was held that the after-born child could not take, though if there had been a precedent life interest, that would have been enough to postpone the period of vesting. Lord Chancellor Thurlow, in giving judgment, says, "The general principle is that, where the legacy is given to all the children, it shall not extend to after-born children; but where it is given with any suspension of the time so as to make the gift take place by a fair, or even by a strained construction (for so far some of the cases go) at a future period, then such children shall take as are living at that period. But in this case I can see no circumstance to take it out of the general rule." That is a decision that the devise extends only to those children who are living at the death of the testator. It is a rule of convenience.

The second rule is, that where you have a gift for such of the children of A. as shall attain a specified age, only those who are in esse when the first of the class attains the specified age can take. All after-born children are excluded. This also is a rule of convenience. It was laid down in the case of *Andrews v. Partington*, 3 Bro. C. C. 401, and has been followed in numerous cases, of which *Hoste v. Pratt*, 3 Ves. 730, and a case before me of *Gimblet v. Purton*, Law Rep. 12 Eq. 427, are examples. In the latter case I proceeded on the principle that only those who were alive when the first of the class attained twenty-one could take. The maximum number to take was then ascertained. Vice-Chancellor Wigram, in giving judgment in the case of *Williams v. Teale*, 6 Hare, 239, makes this observation: "If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt but that the limitations over to the children of A. would be void: *Leake v. Robinson*, 2 Mer. 363; but if in that case A. had died, living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice would exclude them from the benefit of the bequest, on the ground only that if A. had survived the testator the legacy would have been void, because the class in that state of things could not have been ascertained." So that he adopts the principle that when once the class to take has been ascertained there is no objection to postponing the vesting to a future period.

Upon the authority of these cases I come to the conclusion that the persons who can take under this limitation are those who were living at the death of the testator. *Viner v. Francis*, 2 Bro. C. C. 658, a leading authority on the subject, shows that the same principle prevails whether the parent of the children who are to take be alive or

dead at the date of the will. I have already mentioned *Singleton v. Gilbert and Viner v. Francis*. These cases, as well as *Doe v. Sheffield*, 13 East, 526, and *Doe v. Over*, 1 Taunt. 263, all show that a gift to a class only embraces those of the class who are living at the death of the testator.

Here there is a gift to such of a class as shall attain twenty-five. The class was ascertained at the death of the testator because one of them had then attained twenty-five. The two infant children of *Charlotte Heale* who were alive at the death of the testator are entitled to take, provided they attain the age of twenty-five years.

The case mainly relied on by the other side was *Griffith v. Blunt*, 4 Beav. 248. There Lord Langdale, in giving judgment, said that the will was really free from ambiguity; the vesting was not to take effect till twenty-five, and therefore the gift was too remote. But the real question was, In whom was the property to vest? Was the class to take ascertained at the death of the testator?

Here I hold that there is a valid gift because one of the children of *Helen* (by her former husband) had attained twenty-five at the death of the testator; the maximum number to take was, therefore, then ascertained, and the gift in question is not void for remoteness.²

² Suppose the limitations be upon trust to A. for life, then upon trust for such children of A. as should attain the age of 25, and suppose one had attained that age at the testator's death. See Gray, *Rule Against Perpetuities* (2d and 3d Ed.) § 205a; *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Pitzel v. Schneider*, 216 Ill. 87, 74 N. E. 779.

Suppose an immediate vested bequest to the grandchildren of A., a living person, to be paid them at 25, and suppose A. has one grandchild in esse, at the testator's death, who is three years old. Is there a valid gift to that grandchild? See 19 H. L. R. 598; Gray, *Rule Against Perpetuities* (2d & 3d Eds.) § 121b (where, however, Mr. Gray inadvertently states the case considered, erroneously, as a gift "to the grandchildren of the testator" and "to the children of A.").

In *re Moseley's Trusts*, L. R. 11 Eq. 499, 11 Ch. Div. 555, 5 App. Cas. 714: The testator, after giving a legacy of £3000 to trustees upon trust to pay the interest to his daughter, *Mary Jordan*, for her life for her separate use, provided as follows: 'And from the decease of my said daughter my will is, that the sum of £3000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue living at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living.' None of the children of *Mary Jordan* died under twenty-one leaving issue, but some died under age without leaving issue. Five attained twenty-one, of whom two died in their mother's lifetime, and the remaining three survived her. Held, the gift after the death of *Mary Jordan* failed for remoteness.

CHAPTER V

SEPARABLE LIMITATIONS, INDEPENDENT GIFTS, AND
LIMITATIONS TO A SERIES

LONGHEAD d. HOPKINS v. PHELPS.

(Court of King's Bench, 1771. 2 W. Bl. 704.)

Ejectment and special case. 30th and 31st August, 1706, John Phelps, in consideration of an intended marriage with Mary Moore, conveyed the premises in question to the use of himself and his heirs till the marriage. And from the marriage to trustees for forty years, on trusts which never took effect; remainder to John Phelps for ninety-nine years, if he so long lived; remainder to trustees for the life of John Phelps, to preserve contingent remainders; remainder in case Mary Moore should survive John Phelps, to trustees for fifty years, on trusts which never took effect; remainder to Mary Moore for life for her jointure; remainder to trustees for 1000 years on trusts after-mentioned; remainder to the first and other sons of John Phelps on said Mary begotten successively in tail male; remainder to the right heirs of John Phelps. The trust of the 1000 years' term was declared, that, "in case the said John Phelps should happen to die without issue male of his body, on the body of the said Mary begotten, or if all the issue male between them shall happen to die without issue, and there should be issue female of the marriage, which should arrive respectively to the age or ages of eighteen years, or be married: Then, from and after the death of the survivor of John Phelps and Mary Moore without issue male, or in case at the death of the survivor there shall be issue male, then from and after the death of such issue male without issue, the trustees should raise £500 for one daughter, £1000 for two; and, in case of three or more, should assign the whole term to their use; with a clause of maintenance till eighteen or marriage." There was issue of this marriage one son, Richard, and four daughters, who all lived to eighteen, and were married; and they, or their representatives, are the now defendants. 1731, John Phelps died. 1744, Richard Phelps, the son, died without issue; but devised to his wife Mary, (who afterwards married Thomas Hopkins, the lessor of the plaintiff), inter alia the premises in question. 1760, Mary, the mother, died, and the four daughters entered, against whom this ejectment is brought.

Glyn, Serjeant, for the plaintiff, argued, that the trusts of the term were void, being on too remote a contingency,—the dying of the issue male of the marriage without issue generally.

But THE COURT, without hearing counsel for the defendants, were clear that the first part of the contingency was good, viz., "in case John and Mary died without leaving issue male." And as that happened in fact to be the case, they would not enter into the consideration how far the other branch of the contingency might have been supported; which could only come in question, in case Richard had survived both his parents. So ordered the Postea to the defendants.¹

PROCTOR v. BISHOP OF BATH AND WELLS.

(Court of Common Pleas, 1794. 2 H. Bl. 358.)

In this quare impedit, brought to recover the presentation to the church of the rectory of West Coker in Somersetshire, the declaration stated, that one William Ruddock was seised in fee of the advowson, and presented, that on his death it descended to his two nieces Jane and Mary Hall, that Jane Hall intermarried with Nathaniel Webb, and Mary with Thomas Proctor: that Nathaniel Webb died, his wife surviving him, whereby the said Jane in her own right, and Thomas Proctor and Mary in her right were seised, that the church then became vacant by the death of the incumbent, whereby the said Jane Webb and Thomas Proctor in right of the said Mary, presented their clerk; that Jane Webb died, upon whose death her whole share of the advowson descended to her son Nathaniel Webb, who thereupon became seised in fee in coparcenary, with Thomas Proctor and Mary his wife; that Thomas Proctor died, his wife surviving him, whereby the said Nathaniel Webb the son, and Mary Proctor became seised. There were then set forth several presentations on vacancies by Nathaniel Webb and Mary Proctor. The death of the said Nathaniel Webb was then stated, whose share descended to his son Nathaniel Webb, who became seised in coparcenary with Mary Proctor: that Mary Proctor died, upon whose death her share descended to her grandson Thomas Proctor, who became seised, together with the last-mentioned Nathaniel Webb: that the church again became vacant, upon which, they not agreeing upon any person to be presented by them jointly, the said Nathaniel Webb presented the said Thomas Proctor, as in the first turn of the said Jane Webb, the elder sister of the said Mary Proctor: that he died and his share descended to Elizabeth Proctor, his sister, the present plaintiff, who was entitled to represent in the first turn of the said Mary Proctor, the younger sister of the said Jane Webb, yet, &c.

The bishop pleaded the usual plea as ordinary; and the other defendants—That true it was that the said Nathaniel Webb the grandson of Jane Webb and the said Mary Proctor were seised of the

¹ See Doe d. Herbert v. Selby, 2 B. & C. 926.

advowson in coparcenary, and that Mary Proctor died so seised, and that the said Nathaniel Webb presented as in the first turn of the said Jane Webb, &c.: but the said defendants further said, that the said Mary Proctor being so seised made her last will and testament, and gave and devised unto the first or other son of her grandson, the said last-mentioned Thomas Proctor, that should be bred a clergyman and be in holy orders, and to his heirs and assigns all her right of presentation to the said rectory, &c.: but in case her said grandson the said last-mentioned Thomas Proctor should have no such son, then she gave and devised the said right of presentation unto her grandson the said Thomas Moore, his heirs and assigns forever: that afterwards the said Mary Proctor died so seised, leaving the said last-mentioned Thomas Proctor and Thomas Moore her surviving, and that afterwards the said Thomas Proctor died without having ever had any son; whereby and by virtue of the said last will and testament of the said Mary Proctor, the said Thomas Moore became seised of all the share of the said Mary Proctor of and in the said advowson, &c., wherefore it belonged to the said Thomas Moore to present, &c. as in the first turn of the said Mary Proctor the younger son of the said Jane Webb, &c.

To this plea there was a general demurrer, which was twice argued; the first time by Bond, Serjt., for the plaintiff, and Heywood, Serjt., for the defendants; and a second time by Adair, Serjt., for the plaintiff, and Le Blanc, Serjt., for the defendants.

THE COURT (absent Mr. Justice BULLER) were clearly of opinion that the first devise to the son of Thomas Proctor was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to Moore, as it depended on the same event, was also void; for the words of the will would not admit of the contingency being divided, as was the case in Longhead v. Phelps, 2 Black. 704; and there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords in the case of The Earl of Chatham v. Tothill, 6 Brown Cas. in Parl. 451, in which the judges founded their opinion on Butterfield v. Butterfield, 1 Vezey, 134. Consequently the heir-at-law of the testatrix was entitled.

Judgment for the plaintiff.²

² Per Jessel, M. R., in Miles v. Harford, 12 Ch. D. 691, 702-705: "As I understand the rule of law it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although, if that event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and, if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void.

"What I have said is hardly intelligible without an illustration: On a

CHALLIS v. DOE d. EVERS.³

(Exchequer Chamber and House of Lords, 1850, 1859. 18 Q. B. 231; 7 H. L. Cas. 531.)

ALDERSON, B.⁴ This is a writ of error upon the judgment of the Court of Queen's Bench upon a special verdict.

This was an action of ejectment, brought to recover one-twelfth part of certain property devised by the will of one Thomas Dolley to

gift to A. for life with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, 'or if he shall have no son,' is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of England, still the alternative event will take effect because that is the expression.

"The testator, in addition to his expression of a gift over, has also expressed another gift over on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed have held that it will not take effect if it is not expressed, that is, if it is really a gift over on the death before attaining twenty-five or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions they give effect to both of them as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if A. has no son who attains twenty-five, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities.

"Now, we come to the case we have before us. The estate is to go over if any of his sons get another estate, that is, if any one of his sons who has got possession of this estate gets one of the other estates, or if any of the issue male of the body of any of the sons gets the estate. Here you have two events expressed. He might have said, if any of the issue male of my body get the estate, which would have included both events, and then you could not have split it up, but he has not said so. He has divided it for some reason or other, probably a conveyancer's one, because it is an alteration of a conveyancer's form. The words 'sons' and 'issue male' are both added, but he has divided that and suggests two events, then and in any of the events 'and so often as the same shall happen the uses hereby limited of and concerning my freehold hereditaments to or in trust for any such younger son or whose issue male shall for the time being become entitled as aforesaid, and to or in trust for his issue male shall absolutely cease.' That is, there is a cesser of the estate either of the younger son or the issue male of the younger son. Why should I alter the words? Why should I say that the event of the younger son properly expressed succeeding to the estate being in due time is to be void for remoteness? The rea-

³ An appeal from this decree, on behalf of the Crown, was heard before Lord Lyndhurst, C. His Lordship directed a case to be made for the opinion of the Court of Common Pleas upon the will. But, before the case was argued, the suit was compromised.—*Rep.*

⁴ The judges who sat in the Exchequer Chamber were Maule, Williams, and Talfourd, JJ., and Platt, B. The case in the Queen's Bench is reported 18 Q. B. 224.

his daughter Elizabeth. The lessors of the plaintiff were Mary Ann Evers and her husband, she being one of two children of John Dolley, the son of the testator.

The testator had four children, John, Sarah, Ann, and Elizabeth: and, by his will, dated 12th June, 1819, he gave the property (the one-twelfth of which is now in question) to trustees during the life of his daughter Elizabeth, in trust for her separate use, and, after her decease, he gave the same to such children as she might have, if a son or sons, who should live to the age of twenty-three years, and, if a daughter or daughters, who should live to the age of twenty-one years, their heirs and assigns, as tenants in common. He then provided for the disposition of the property in the event of one or more of the children of Elizabeth dying, leaving others or another surviving. He then proceeded thus: "In case all the children of my said daughter Elizabeth Maria shall die, if a son or sons, under the age of twenty-three years, or, if a daughter, under the age of twenty-one years, or if she has none," I give the said property, &c. unto the said trustees, during the respective lives of my son John and my daughters Sarah Ward and Ann Dolley, upon trust for the use of John, and the separate uses of Sarah and Ann, during their lives, in equal shares; "and, upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of twenty-three years, and, if a daughter or daughters, living to the age of twenty-one years, his, her and their heirs, executors, administrators and assigns;" if more than one, as tenants in common. "And" (the part of the devise upon which the question depends), "in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto"

son suggested to me is this, it is quite plain he means it to go along the whole line. I agree.

"So in the case of a man dying without a son attaining twenty-five. That is not good although he means it to apply to the case of his having no son, and there is none. It is not what he means as to the event, but whether he has expressed the event on which the estate is to cease, so as to bring one alternative within the limits, and if he has chosen to say the estate is to cease first of all, as he might have said if a younger son becomes a peer or attains the age of fifty, or any other event within the limits, or any of the issue male of my younger sons shall become a peer, one gift over might be valid, he might have said if any of my issue male shall become a peer, or if the issue male of my younger son become a peer thereupon the estate shall go over, that would have been different, but I think I have no right to alter the expression. The law is purely technical. The expressions are there, and using them gives effect to the real intention. Why should I go out of my way to extend technical law to a case to which it has not hitherto been extended? It seems to me that I ought to read the expressions as I find them. The event which is expressed has happened. It is within legal limits, and I think the estate should go over."

{ the child or children of my said son and two daughters having issue, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child, to them, his or her heirs, executors, administrators and assigns, as taking in equal shares from his or her father or mother, his, her and their heirs, executors, administrators and assigns."

Elizabeth died in August 1838, having been married, but never having had a child. Upon her death, her brother and two sisters took each one-third of the property devised to her as above. In March 1847 Ann died, having been married, but also never having had a child. And thereupon Mrs. Evers, being one of two children of John, and being twenty-one years of age, claimed one-twelfth of the property devised to Elizabeth, insisting that, upon the event which had happened, the two children of John became entitled to half of the one-third of the property devised to Elizabeth which had come to Ann upon her death, and that she, as one of them, was entitled to the half of this half, or one-twelfth of the whole.

A special verdict was found, which stated the above facts: and judgment was given by the Court of Queen's Bench for the lessors of the plaintiff. And upon this judgment the present writ of error is brought.

This will came under the consideration of the Court of Queen's Bench in the case of Doe dem. Dolley v. Ward, 9 A. & E. 582: and both parties acquiesce, and, as we think, most correctly, in the propriety of that decision.

We are to take it, therefore, as clearly established that by this will the testator gave an estate for life to his daughter, Elizabeth, with a contingent remainder in fee to her unborn children, which, on the birth of a child, became a vested remainder in fee; and that, upon such child or children being born, but failing, if male, to attain twenty-three, and, if female, twenty-one, then he gave Elizabeth's share over by an executory devise to his other three children equally. Now it is clear that this executory devise over would be void as too remote. But in this part of his will the testator also provided, by a distinct and separate clause, that, if Elizabeth should have no children, the property devised to her should go over in like manner to his three remaining children. Now in that event (which happened) the contingent remainder to Elizabeth's children never vested; and so the devise over took effect, not as an executory devise, but as a good contingent remainder to the three other children of the testator, one of whom was the testator's daughter Ann.

In the event therefore which has happened, the devise was one to Elizabeth for life, contingent remainder to her unborn issue (which failed), contingent remainder, as to one-third, to Ann for life, with a contingent remainder in fee to Ann's unborn issue, to become vested on the birth of a child, and with the devise over (on which the present

question turns) in favor of the children of her surviving brother John and sister Sarah. Now Ann died never having had a child; and, consequently, the contingent remainder in fee given to her children failed.

We must look therefore at the terms of the devise over.

They are as follows: "In case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty-three years, or if a daughter, who shall attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child," &c.

Now here there are not the two events which were separately and distinctly mentioned in the former devise over. The event, if she shall have no children, is not mentioned in terms at all.

The question between the parties is, whether this devise over be void or not. It may be well admitted that the testator intended to include in these words two events: first, the event of Ann having no child at all; for, certainly, if she never had a child, she must die without leaving a son who could attain twenty-three or a daughter who could attain twenty-one; but, secondly, he also intended to include in these same words the compound event of her having a child and that child dying under the prescribed age. This second event is, according to all the cases, too remote an event to take effect according to law. The first, if it stood alone, is legal. The thing to be settled is the principle upon which the court is to act.

In the first place, it seems established that the time to construe the will is at the testator's death. The devise must be legal at that time, to oust the heir-at-law. Now, at the death of the testator and in the lifetime of Ann, how would this devise have been construed? For it is not sufficient that, on the happening of certain events, the devise may take effect, and, if limited to these events originally, would have been valid: but it ought to be shown that the devise of the testator must be valid and legal in all the events contemplated by him.

This, we think, is the principle contained in the passage of Sir W. Grant's judgment in *Leake v. Robinson*, 2 Meriv. 390, in which he says: "Executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits." In a devise to a class, therefore, the courts do not split the devise into its parts and give effect to the legal part of it. For this, says Sir W. Grant, is to make a will for the testator. He says: "I give my property to the whole of this class." It may be that the persons to whom he is not permitted by law to give it are the very persons in favor of whom he includes the whole class in his bounty: and therefore, in splitting the devise into its parts, you may perhaps violate his will, even as to those to whom you give it. If he

separates the devise himself, it is not so. Here the meaning, and the true meaning, of this clause is, In every event which can happen in which Ann dies leaving no child who if male attains twenty-three or if female twenty-one, I give the estate over. That is what he says, and what he means. He includes all these events in one class. Some are legal, some illegal. How is the court to separate these events, which the testator has expressly joined together, without making a will for him?

The principle, therefore, seems to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the instant of the testator's death. Do the cases cited affect this principle?

On looking at them, we find that in all of them the devise in any event was legal, and that it was competent to the testator to make it. In *Jones v. Westcomb*, 1 Eq. Ca. Abr. 245, the case on which the Court of Queen's Bench proceeded, this was so. That was a bequest to the wife for life, and, after her death, to the child with which she was supposed enceinte, and, if such child should die before twenty-one, then, as to one-third, to his wife, and two-thirds to other persons: and it was held, the wife not being enceinte, that the bequest over took effect. But, if the testator had distinctly expressed all that the court held to be included in the words he used, the whole would have been still legal. This is not an authority, therefore, for splitting a devise and giving effect to the legal, rejecting altogether the illegal part of it. *Gulliver v. Wickett*, 1 Wils. 105, which is in truth the same case, only applying the will to real estate, is to the same effect. And the observations of the court in this latter case, as to the validity of the executory devise over, if it took effect as an executory devise, were material if this necessity for the devise being legal in all the contingencies contemplated by the testator be the true principle on which the court acts, and may reconcile the observations of Mr. Fearne (*Cont. R.* p. 396) with those of Bayley, J., in *Doe dem. Harris v. Howell*, 10 B. & C. 191, 200. *Meadows v. Parry*, 1 Ves. & B. 124, is to the same effect. These cases are fully explained and put on a very clear principle by Sir W. Grant in *Murray v. Jones*, 3 Ves. & B. 319. They show, no doubt, that the existence and failure of the children to whom the provisions limited is made is not in all cases, and was not in these cases, a condition precedent to the devise over. But they show no more, and do not at all apply to the question now before the court, whether, if one of the contingencies be illegal, the single devise which includes that contingency with others becomes void. If Lady Bath had separately stated in her will the two contingencies, in either of which Mrs. Markham was to take, each would have been legal; and the court held that her including them in one expression made no difference. It is like expressing the individuals of a class, all of whom can legally take, and including all those individuals in a class which is

good. But the reverse is true if some of the individuals cannot legally take. There, if expressly named, the will is carried partly into effect. If classed, it is void altogether.

Suppose that this had been the limitation in a deed: To Ann for life, remainder to her children in fee, and, if she have none who, if a male, attains twenty-three, or, if a female, attains twenty-one, then over: it is, we apprehend, clear enough that such a limitation over would be void altogether at the common law. It may however, says Mr. Fearne (Cont. R. p. 373), be good in a will, or by way of use, upon a contingency to happen within a reasonable period. Now, if so, must the contingency here so happen? We think not: for it may go beyond the time allowed by law, if the natural and full effect be given to the words of the testator.

For these reasons, we think that the judgment of the Queen's Bench must be reversed.

Judgment reversed.

The case was then brought to the House of Lords.

The judges were summoned, and Mr. Justice WIGHTMAN, Mr. Justice WILLIAMS, Mr. Baron MARTIN, Mr. Justice CROMPTON, Mr. Baron BRAMWELL, and Mr. Baron WATSON attended.

THE LORD CHANCELLOR [LORD CHELMSFORD] moved that the following question be put to the judges:

Neither of the testator's daughters, Elizabeth Maria and Ann, ever having had any issue, and Ann, the survivor, having died in 1847, does the will contain any valid devise on her death to the children of John and Sarah of the property originally given to Elizabeth Maria and Ann respectively for their lives?

Mr. JUSTICE WIGHTMAN. My Lords, for the purpose of considering the question proposed by your Lordships, it will not be necessary to state in detail the terms of the devises and limitations in the will, as they are stated shortly in the case of the defendant in error, and somewhat more at length, but very distinctly and correctly, in the judgment of the Court of Exchequer Chamber.

The question in effect is, whether the Court of Queen's Bench was right in holding that the devise over to the children of John and Sarah took effect as a contingent remainder on the death of Ann without issue, or whether the Court of Exchequer Chamber was right in holding that the devise over to the children of John and Sarah was one indivisible executory devise which could not be split or separated into two parts.

Upon this point the decision of the Court of Exchequer Chamber seems to be mainly founded upon the judgment of Sir William Grant in the case of *Leake v. Robinson*, 2 Mer. 363. In that case the limitation over was to the whole of a class, of whom some were capable and others incapable; and it was held by Sir William Grant that such a limitation could not be divided and be good as an executory devise for such as were capable, and bad for those that were incapable. The

class was indivisible, except by the testator himself, for if divided after his death it might be that the persons of the class who were by law incapable of taking in remainder were the very persons in favor of whom he included the whole class; and therefore, if the devise were split, the persons who would take might not be those whom it was the intention of the testator to benefit.

But the present case is upon this point clearly distinguishable; and the limitation over seems to be in its nature divisible, the having no child at all being one contingency, and the having a child which, if a son, does not reach the age of twenty-three, or if a female, twenty-one, being the other. In *Doe d. Herbert v. Selby*, 2 B. & C. 926, it was held that an estate might be devised over in either of two events, and that in one event the devise may operate as a contingent remainder, and in the other as an executory devise, and the Court of Queen's Bench in the judgment in the present case considers that it was governed by the case of *Doe v. Selby*.

ante p. 45.

It is admitted by the Court of Exchequer Chamber that by the words used by the testator in the limitation over, he intended to include two events, first, the event of Ann never having a child at all, and the compound event of her having a child, and that child dying within the prescribed age. The first event, if it stood alone, was legal. The second event was too remote to take effect according to law. The Court of Exchequer Chamber, however, was of opinion, that the testator included all these events, some legal, others illegal, in one class, and that the court could not separate them; that the true meaning of the clause was, "in any event which can happen in which Ann dies leaving no child, who, if male, attains twenty-three years, or if female, twenty-one, I give the estate over."

The whole question, therefore, as before observed is, whether the clause for carrying the estate over is divisible or not. If it is, the appellants ought to succeed, if not, the respondents ought to succeed. The terms used in the limitation over include two contingencies; would there have been any real difference if the terms had been to Ann for life, with remainder to her children in fee, and if she has no child, or if she have a child who if a son shall not attain twenty-three years, or if a daughter who shall not attain twenty-one years, then over? In such case it can hardly be doubted but that the estate would be devised over in either of two events, and that in one event the devise over would be good as a remainder, though the second alternative would be objectionable as an executory devise on the ground of remoteness. The Court of Exchequer Chamber remarks that in the case of *Jones v. Westcomb*, *Gulliver v. Wickett*, and the other cases cited upon the argument, the limitations over, whether divisible or not, were in any event legal, and those cases, therefore, do not affect the question in this, which turns upon the divisibility of the contingencies; and, commenting upon the case of *Murray v. Jones*, the court observes, "That if Lady Bath had separately stated in her will

the two contingencies in either of which Mrs. Markham was to take, each would have been legal, and her including them in one expression made no difference. It is like expressing the individuals of a class all of whom can legally take, which will be good; but the reverse is the case if some of the individuals cannot legally take." That was the case in *Leake v. Robinson*, which is clearly distinguishable from the present, for the reasons already stated; and it may indeed be cited as an authority to show that the limitation over in that case might have been good, if the terms used had been such as to separate such part of the class as could take from such as could not.

No case or authority has been cited to show that where a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression; and our opinion does not at all conflict with the authority of the cases of *Proctor v. The Bishop of Bath and Wells*, 2 H. Bl. 358, and *Jee v. Audley*, 1 Cox, C. C. 324, in neither of which cases was it possible for the limitation over to operate as a remainder.

We are therefore of opinion, for the reasons we have given, that the Court of Exchequer Chamber was wrong in holding that the contingencies in the limitation over could not be separated; and as that was the ground of the decision, it is unnecessary to enter into the consideration of various points which were made, and cases which were cited upon the argument before your Lordships, as we think that the devise was divisible, and that the judgment of the Court of Queen's Bench was right, and that the will contained a valid devise on the death of Ann to the children of John and Sarah of the property originally given to Elizabeth Maria and Ann respectively for their lives.

LORD CRANWORTH. My Lords, in this case I do not propose to trouble your Lordships by going over the facts, or stating the terms of the devise. The will has been so fully considered, that after the unanimous opinion which we have received from the learned judges upon its construction, I think it is unnecessary for me to do more than to state to your Lordships that I concur in the opinion of the judges, and very shortly to state the grounds of that concurrence.

I think that the gift to the children of John and Sarah on the death of Ann without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good; because when the particular estate determined, the contingency on which the remainder was to take effect had happened.

On the death of Ann, the testator gives what she had enjoyed for her life to her children, that is, sons at the age of twenty-three and daughters at twenty-one. This devise, according to the decision of the Court of Queen's Bench in *Doe d. Dolley v. Ward*, would, if Ann had left any children, have given them a vested estate in fee simple with a subsequent executory devise, or attempted executory devise to the children of John and Sarah in the event of the sons dying under

twenty-three. This would have been bad for remoteness. But in the event which happened the gift to the children of Ann never took effect, so that the question as to the remoteness of the gift over on the death of those children under twenty-three never arose. On the death of Ann, the contingency on which one sixth of the shares of Elizabeth and Ann was given to the children of John had happened, for Ann had then died without any child who could attain the age of twenty-three years; and there is no rule which could prevent the estate from then vesting in those to whom it was given on a contingency which happened at the instant when the particular estate determined.

The case is not distinguishable in principle from *Gulliver v. Wickett*. There, it is true, the devise over, if there had been a child, was on an event not too remote, and which, therefore, might have taken effect. In that respect it differs from the present case; but the court held that the devise in the event which did happen, of there being no child, took effect, not as an executory devise, but as a contingent remainder. I state that, although I know that a very high authority, Mr. Fearne (*Cont. Rem.* 9th Ed. p. 396), says the contrary; but looking at the case, I can come to no other conclusion. The note of the reporter, at page 106, appears to me to show that he did not fully appreciate the force of Chief Justice Lee's language, which seems to have been studiously framed with the view of showing that in one event, that which did not happen, namely, the event of there having been a child, the gift over must have taken effect (if at all) as an executory devise, but in the event which did happen, namely, there being no child, the gift took effect as a remainder. The language is this; after stating the case, he says, taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer (the cases he had referred to), and therefore we are all of opinion, "That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child, in contingency in fee, with a devise over, which we hold a good executory devise, as it is to commence within twenty-one years after a life in being, and if the contingency of a child never happened, then the last remainder to take effect upon the death of the wife; and the number of contingencies is not material, if they are all to happen within a life in being or a reasonable time afterwards."

Now, I am aware that Mr. Fearne treats the gift as an executory devise, and not as a remainder. But this is directly at variance with the language of the court (which I have just read), and as I think with the well-understood distinctions between executory devises and contingent remainders. If the language of the gift over had been that, "In case of the death of my said son, or either of my said two daughters without leaving a child who shall attain the age of twenty-three years or without ever having had a child, then I give the share of such son or daughter unto the children," &c.; surely, on the happening of the latter alternative, namely, the death of one of the daughters

without ever having had a child, the children taking under the gift over, would have taken a remainder. They would have taken an estate expressly given to them on the determination of the preceding life estate, given to them, it is true, on a contingency which, according to the hypothesis, would have happened at the instant when the particular estate came to an end. I can see no distinction, when we are only construing the language of the will, between the case where the contingency of dying without having had a child is, as I have suggested, expressed, and where it is implied, as it is in the present case. There is a contingent remainder in fee to the child of the tenant for life if she had had one; if she had none then there is a gift to others in fee; the contingency must be determined at her death; and whether the result should be to give the estate to her own child, or to the children of her brother and sister, in either case the gift must take effect as a remainder, for no prior estate is divested or displaced.

It is true that if the former alternative had happened, that is, if the daughter, tenant for life, had left a child, then there was a gift over on the death of that child, which was void for remoteness. That gift over could only take effect, if at all, as an executory devise; for it would be a gift over divesting the fee simple given to the child of the tenant for life. But I see no reason for holding that because in one alternative the gift must have operated as an executory devise, therefore it must do so in the other. In the case which has happened there is a gift to the children of the surviving son and daughter taking effect immediately on the termination of the preceding life estate, and which therefore is unobjectionable.

I therefore entirely concur in the unanimous opinion of the judges, that the judgment of the Exchequer Chamber reversing that of the Queen's Bench was wrong.

LORD WENSLEYDALE. My Lords, I entirely agree with the learned judges in the answer which they have given unanimously to the question which your Lordships proposed to them, and in the advice given by my noble and learned friend who has preceded me.

The facts of the case upon which the question arises are very succinctly and distinctly stated in the judgment of the Court of Exchequer Chamber delivered by the late lamented Baron Alderson, and no fault can be found with any part of it prior to that relating to the clause which the judges in the Court of Exchequer Chamber held that they could not construe divisibly; nor can any objection be made to the principles of construction which the court laid down, except as to that particular clause.

The court held it to be clearly established that the testator gave an estate for life to his daughter Elizabeth Maria, with a contingent remainder in fee to her unborn children, which became vested on the birth of a child, and that upon such child or children being born, but failing, if a male, to attain twenty-three, and, if a female, twenty-one,

then he gave Elizabeth Maria's share by executory devise to his three other children equally. That executory devise was too remote. But he also provided by a distinct clause that if Elizabeth Maria had no child the property should go over in like manner to his three other children; and that event having happened, the devise over took effect, not as an executory devise, but as a good contingent remainder to his three other children, one of whom was Ann. She died, never having had a child, and the contingent remainder in fee to her children failed. And the question arises on the terms of the devise over, in which the court observes there are not the two events which are separately and distinctly mentioned in the former devise. The devise over, if she shall have no children, is not mentioned in terms at all.

The court admitted that the testator intended to include in the words of the clause the double events, first of Ann having no child at all (for, certainly, if she never had a child, she must die without leaving a son or daughter who should attain the required age), and, secondly, the compound event of her having a child, and that child dying under the prescribed age. But the court did not feel itself at liberty, in the case of an executory devise, so to construe the clause, but acted on the principle that a devise to a class, as Sir William Grant held in the case of *Leake v. Robinson*, could not be split.

In concurrence with the opinion we have received from the learned judges, I think, this is a mistake. The gift to a class is a gift to a body of persons, uncertain in number at the time of the gift, but to be ascertained at a future time, and who are all to take equally, the share of each depending, as to amount, upon the ultimate number of persons (see 1 *Jarman on Wills*, 287-295), and that ultimate number is incapable of being ascertained within legal limits. Such a devise as this, Sir William Grant held he could not split into portions, for that would be to make a new will. But that doctrine is entirely inapplicable to this case. There is nothing to prevent the construing of the clause in the first instance, and ascertaining its proper meaning, though it be an executory devise, and having ascertained its meaning, to apply the rules of law to it. So doing in this case, there cannot be a doubt that the meaning of the clause is what the Court of Queen's Bench suggests it to be, and its legal effect is precisely the same as if the testator had provided, in express words, for the event of Ann having no children, as he had done in the former clause as to Elizabeth having none. So reading this clause, there is no doubt that in the event which happened of Ann having no children, the gift over took effect by way of contingent remainder.

LORD CHELMSFORD. My Lords, the question in this case is, whether the devise over in case of the testator's daughter Ann dying without issue, or in case of all the children which she might have dying, if a son, under the age of twenty-three years, or if a daughter, under the age of twenty-one years, will embrace the case, which is not expressly mentioned, of the daughter Ann never having a child at all;

and if so, whether the devise over is good in that event, or whether it must not all be taken together, and the part with respect to the sons dying under the age of twenty-three being too remote an event to take effect according to law, the whole devise must not be held to be void.

Both the Court of Queen's Bench and the Court of Exchequer Chamber consider that the devise in question included the case of the daughter Ann having no child; Mr. Baron Alderson, who delivered the opinion of the Court of Error, saying: "It may be well admitted that the testator intended to include in the words two events: first, the event of Ann having no child at all, for certainly, if she never had a child, she must die without leaving a son who could attain twenty-three, or a daughter who could attain twenty-one; but secondly, he also intended to include in the same words the compound event of her having a child, and that child dying under the prescribed age." But the Court of Queen's Bench held that the limitation might operate as a contingent remainder, in the event of Ann having no child, which would of course take effect, if at all, upon the determination of her life estate, although, if she had died leaving children, the limitation would have been void, as it would then only take effect as an executory devise, and would be bad as being too remote. The judges in the Court of Exchequer Chamber, on the contrary, held that, although the limitation included the event of Ann's having no child, which would of course, if it had stood alone, be a perfectly valid bequest, to take effect on Ann's death, yet that being entire and indivisible, and part of it depending upon an event too remote to take effect according to law, it was altogether void. The ground upon which they proceeded was, that a devise upon different contingencies can only be split into its parts, and effect given to one part of it, where all the contingencies contemplated by the testator are legal, and for this reason they distinguished the case of *Jones v. Westcomb* upon which the Court of Queen's Bench proceeded, and the case of *Gulliver v. Wickett*, which was upon the same will, from the present case. But it appears to me that the distinction is not to be supported either upon principle or by authority. It is conceded by the Court of Error that the limitation in question involves a contingency with a double aspect, depending upon events which are distinct and separate from each other. The alternative contingencies must therefore be taken as if they had been separately and distinctly expressed. Why then should the words of contingency, on which the void estate was intended to be limited, affect the valid estate to which they do not apply? And can there be any difference in principle between cases where the alternative limitations, though distinct and separate in their nature, are both involved in words which apply equally to and include within them both the limitations and those where each of the limitations is separately expressed by its appropriate description? If this is so, the opinion of the Court of Exchequer Chamber is opposed to the authority of the

cases of *Leake v. Robinson*, *Goring v. Howard*, 16 Sim. 325, and other cases which relate to personal property, and *Monypenny v. Dering*, 2 De G., M. & G. 145, which is a case of real property. The case of *Proctor v. The Bishop of Bath and Wells* was pressed upon your Lordships as a conclusive authority in favor of the defendant; but it appears to me to afford him no assistance. In that case there was no possibility of the limitation ever taking effect independently of the first devise. It was limited upon the event of Thomas Proctor having no son capable of entering into holy orders. This must necessarily have been contingent during the life of Thomas Proctor, the devise over was wholly dependent upon it, and as the court said, "The words of the will could not admit of the contingency being divided." If the devise over had been in case Thomas Proctor should have no such son at the death of the testator, it would have been more like the present case, and would have exactly resembled *Monypenny v. Dering*, and there would have been no doubt, notwithstanding the invalidity of the devise to the son of Thomas Proctor, that the alternative limitation would have been good.

I therefore concur in the opinion which has been expressed by my noble and learned friends, that the judgment of the Court of Queen's Bench was correct, and that the judgment of the Court of Exchequer Chamber reversing that judgment was erroneous, and ought to be reversed.

LORD BROUGHAM. My Lords, I entirely agree with all my three noble and learned friends who have addressed your Lordships, and with the learned judges who, after full consideration, have given a clear and unanimous opinion upon the subject. As to the cases, of which there are several, I need not go into them. One of them is *Proctor v. The Bishop of Bath and Wells*. In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise. There were also several other cases which I need not go into, as my noble and learned friends have referred to them. I therefore move your Lordships to pronounce judgment for the plaintiff in error, reversing the judgment of the Court of Exchequer Chamber, and setting up the judgment of the Court of Queen's Bench.

Judgment of the Court of Exchequer Chamber reversed, and judgment given for the plaintiff in error.⁵

⁵ The principal case was misapplied in *Watson v. Young*, 28 Ch. D. 436 (1885), but its correct application was made in *In re Bence*, [1891] 3 Ch. 242, and in *In re Hancock*, [1901] 1 Ch. (C. A.) 482, and [1902] A. C. 14, where the misapplication in *Watson v. Young* was noted.

STORRS v. BENBOW.

(Court of Chancery, 1853. 3 De Gex, M. & G. 390.)

THE LORD CHANCELLOR⁶ [LORD CRANWORTH]. I was perfectly prepared to dispose of this case three months ago, but was told that the point was very much the same as that raised in *Gooch v. Gooch*, 3 De G. M. & G. 366, and that the parties therefore wished the matter to stand over until that case was disposed of, thinking it might have a material bearing upon the present question. I confess, however, that this appears to me to be a perfectly clear case, and to be independent of any decision in *Gooch v. Gooch*.

The question arises upon a clause in a codicil which is in these words: "Item. I direct my executors to pay by and out of my personal estate exclusively the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years without benefit of survivorship." This is a money legacy to each child of any nephew the testator had or might have. The testator had brothers living; but there might be legacies too remote, because the gift included legacies to children of a child not yet born.

The bill was filed twenty or thirty years ago; and the cause was heard before Sir John Leach. The argument then was, that the gift was too remote; but Sir John Leach thought that, according to the true construction of the clause, children born in the lifetime of the testator were meant, and therefore he said the gift could not be too remote, for it only let in children that might be born between the date of the will and the death. A decree was accordingly made declaring that the children in esse only at the time of the death of the testator were entitled to the legacies, and it was referred to the master to inquire, &c. The master found that the plaintiff was in esse in this sense; namely, that the testator died in October and the plaintiff was born six months afterwards; and I think he was so. The question then is whether he is entitled; I am of opinion that he certainly is; for he was a child in esse within the meaning put upon the clause by Sir John Leach.

There are three ways in which this gift might be interpreted: it might mean children that were in esse at the date of the will; it might mean children that might come into esse in the lifetime of the testator; and it might mean children born at any time. I own it seems to me that this gentleman is entitled quacunque via. If it was to the children then in being, he would, I think, be probably within the meaning of such description; but if it was to children to come in esse in his lifetime and afterwards to be born, it seems to me that a child in ventre

⁶ The opinion only is here given.

sa mere at the death of the testator was a child "hereafter to be born" within the meaning of the provision.

The rule that makes a limitation of this kind mean children at the death of the testator is one of convenience: a line must be drawn somewhere, otherwise the distribution of the testator's estate would be stopped, and executors would not know how to act; but that rule of convenience cannot be applied to exclude a child certainly within the meaning of the limitation, in the absence of any contrary expressed intention of the testator. I think therefore that Sir John Leach was right, supposing the interpretation of the will to be what I have stated, and that this child certainly comes within the description. I must add, however, that I do not say that the gift was at all remote if it meant a child to be born at any time, because this is not the case of a class; it is a gift of a pecuniary legacy of a particular amount to every child of every nephew which the testator then had, or of every nephew that might be born after his death, and is therefore good as to the children of the nephews he then had, and bad as to the children of nephews to be born after his death.

It would be a mistake to compare this with *Leake v. Robinson*, 2 Mer. 363, and other cases where the parties take as a class; for the difficulty which there arises as to giving it to some and not giving it to others does not apply here. The question of whether or not the children of after-born nephews shall or shall not take, has no bearing at all upon the question of whether the child of an existing nephew takes; the legacy given to him cannot be bad because there is a legacy given under a similar description to a person who would not be able to take because the gift would be too remote. I give therefore no positive opinion upon the point of remoteness generally in this case, because I think that quacunque via, on the construction of the will, there is nothing to justify the exclusion from taking of a child who was conceived at the death of the testator and born six or seven months afterwards. If the words in question meant children who though not then in existence should be in existence at the death, the plaintiff was in existence at the death; and if they mean children born at any time, he was born and must have been born if at all within such a time as made his legacy not remote. I am therefore of opinion that in any way he is entitled

CATTLIN v. BROWN.

(Court of Chancery, 1853. 11 Hare, 372.)

The question arose upon a devise by Frances Bannister, who died in 1805, to Thomas Bannister Cattlin for life, with remainder to all and every the child and children of the said Thomas Bannister Cattlin, during their natural lives, in equal shares if more than one; and after the decease of any or either of such child or children, then the part

or share of him, her, or them so dying unto his, her, or their child or children lawfully begotten or to be begotten, and to his, her, or their heirs forever, as tenants in common.

The testator died in January, 1805.

Thomas Bannister Cattlin had issue five children; namely, George, Emma, Cecilia, Caroline, and Clement, who were born in the lifetime, and were living at the death of the testator; and one child named Judee, who became the wife of Adam Brown, and went to India in 1828, and it is presumed died on her passage or immediately after her arrival, as she was not afterwards heard of, and who left issue several children, some of whom survived Thomas Bannister Cattlin the tenant for life. Caroline, one of the children, who survived the testator, had also issue several children. Thomas Bannister Cattlin also had other issue, ten children, Thomas Magnus, Charlotte, Frederick William, Eliza, Frederick Fisher, William, Emily, Clarissa, Mary, and Susannah, born after the decease of the testator. Of these, two, Frederick William and Eliza, died in his lifetime without having had any issue. Several of the other children who were born after the death of the testator had issue.

The devised estate was subject to a mortgage created by the testator for securing the payment of £2000 and interest; and under the decree of the court, made in 1843, the same estates were conveyed in fee by way of mortgage to secure £2574 and interest, which was raised to pay the debts of the testator.

The authorities referred to are mentioned in the judgment, with the exception of Griffith v. Pownall, 13 Sim. 393, which is to the same effect as the cases referred to in the fifth rule. (Infra, page 377 [see p. 554, this volume].)

VICE-CHANCELLOR [SIR WILLIAM PAGE WOOD]. The point in this case is one of some novelty, and I therefore propose to state somewhat fully the reasons that have led me to the conclusion to which I have come.

The question arises on a short devise to Thomas Bannister Cattlin for life, and after his decease to all and every his children or child, for their lives, in equal shares, and after the decease of any or either of them, the part or share of the child so dying unto his, her, or their children or child, and his, her, or their heirs forever, as tenants in common.

There were some children of Thomas Bannister Cattlin in esse at the death of the testator, and others who were subsequently born; and the question which has been argued is, whether the remainder in fee to any of the grandchildren could take effect, it being admitted that the remainder in fee to the children of those children of Thomas Bannister Cattlin who were born after the death of the testator cannot take effect.

The first observation that arises in this case is, that the limitations are none of them by way of executory devise, but are limitations of

contingent remainders. I apprehend, however, that a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law. It has been sometimes a question whether a limitation over beyond the period might or might not be supported as a good contingent remainder, on the ground of its destructibility in the lifetime of the tenant for life. Mr. Jarman in his learned work discusses the point, and observes, "the same species of reasoning, by which a remainder or an executory limitation, to arise on the determination of an estate tail, is supported, might seem to apply to a contingent remainder, which is liable to be destroyed by the act of the owner of the preceding estate of freehold, no estate being interposed for its preservation; but the writer is not aware of any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, be devised to A. for life, with remainder to his eldest son who should be living at his decease for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease; although A. in his lifetime might destroy all the remainders, and the eldest son after his (A.'s) decease might destroy the ultimate remainder in fee devised to his children, without being amenable either at law or in equity to the persons whose estates are thus destroyed, such ultimate remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in these cases is effected by what the law calls a tortious or wrongful act (though it is a wrong without a remedy), the perpetration of which is not to be presumed." 1 Jarman, Wills, 226. The latter observation applies very strongly to this case, for here the legal estate is outstanding and subject to a mortgage, and the party in whom such legal estate is vested would be, in effect, a trustee to support the contingent remainder, the destruction of which, under such circumstances, could only be effected by an act which would be doubly tortious. The rule is stated in the able argument of Mr. Preston, in *Mogg v. Mogg*, 1 Mer. 654. He says, "A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect." *Id.* 664. That is, I think, a perfectly accurate statement of the law which I am to apply to this case.

I am bound, however, in this case, to look at the whole question, and to consider how it would stand on the doctrine which has been established with regard to gifts by way of executory devise.

The first rule is, that an executory devise is bad unless it be clear, at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. This principle will be found expressly stated in the opinion delivered by the present Lord Chancellor, when advising the House of Lords in the case of *Lord Dungannon v. Smith*, 12 Cl. & Fin. 546, 570.

The second rule is, that you must ascertain the objects of the testator's bounty, by construing his will without any reference to the rules of law which prohibit remote limitations; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

Thirdly, if the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. One of the earliest cases affirming this rule is that of *Proctor v. The Bishop of Bath and Wells*, 2 Hen. Bl. 358. The devise in that case was of an advowson, in fee, to the first or other son of Thomas Proctor, the grandson of the testatrix, that should be bred a clergyman and be in holy orders; but in case he should have no such son, then to another grandson of the testatrix in fee: and it was held that the first devise was void as depending on too remote a contingency; and that the latter limitation, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided. In the recent case of *Lord Dungannon v. Smith*, 12 Cl. & Fin. 546, it was sought, in support of the bequest, to show that one of the series of persons who might be the heirs male of the body of the grandson, might take within the prescribed period, and was not therefore within the objection; but the answer was, that "there was no gift to him in terms different from the gift to all others who may be able to bring themselves within the terms of the gift," and that "where a testator has made a general bequest, embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, the one embracing the lawful, the other the unlawful objects of his bounty." 12 Cl. & Fin. 574.

The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them nominatim, because they were intended to take in shares to be regulated in amount, augmented or diminished, according to the number of the other members of the class, and not to take exclusively of those other members. Of this rule the cases of *Jee v. Audley*, 1 Cox, 324, *Leake v. Robinson*, 2 Mer. 363, and *Gooch v. Gooch*, 14 Beav. 565, are illustrations. *Jee v. Audley* was a strong case of that class, for there all the children actually in esse might have

taken, and it was only the possibility that there might have been incapable children, which excluded those who were capable.

The fifth and last rule to which I need to advert, is this,—that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs v. Benbow*, 2 Myl. & K. 46. That was a gift of £500 apiece to each child that might be born to either of the children of the testator's brothers, without benefit of survivorship. The legacy of £500 to each of the children living at the death of the testator, who alone could take, was unaffected by the number of subsequently born children, who were excluded; and the exclusion of the latter did not therefore affect the children who were capable of taking under the bequest. The last rule, in fact, amounts to no more than this,—that the gift being single to each party, you have only to consider whether that particular gift must of necessity vest, if at all (according to the first rule), within the limit allowed by law.

Let us now consider the facts of the present case, and apply the rules which have been stated to those facts; and inquire whether the gift be or be not to a number of persons in shares, which, being distinctly ascertained and settled, are incapable of augmentation or diminution. And here I would observe, that it at first appeared to me that there was no distinction between the present case and the late case of *Greenwood v. Roberts*, 15 Beav. 92, where there was a gift of an annuity to the testator's brother, and, after the decease of the annuitant, to and amongst such of his children as might be then living, in equal shares during their lives, with a provision that at the decease of any of them, so much capital as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be forthwith converted into money, and divided equally amongst the children of him or her so dying, as and when they should severally attain the age of twenty-one years; and he gave them vested interests therein, and directed, that if any children of his brother should at his decease be dead, and had left issue, such issue should have the share the parent would have had if he had outlived the brother. If the circumstances of that case had not in fact been distinguishable, I should have been under the necessity of differing from it; but in that case the children of the brother, who were born and in esse at the death of the testator, might all have been dead at the death of the brother. The case therefore fell within the third and fourth rules which I have mentioned. It was a gift to a class to be ascertained at a time beyond the limits of remoteness, and all the members of the class might be persons without these limits. The children born at the testator's death

might take no interest whatever. On this ground the decision in *Greenwood v. Roberts* was, no doubt, perfectly right.⁷

The testator devises the estate to Thomas Bannister Cattlin for life, with remainder to all his children as tenants in common for life, with remainder as to every share of every child to the children of that child in fee. Now, to follow the respective shares of the property, suppose Thomas Bannister Cattlin to have four sons, A., B., C., and D., and A. and B. to be living at the testator's death and the others to be born afterwards. A. and B., on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of C. and D., but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests nor the remainder in fee are capable of being wholly divested in favor of any party beyond the legal limits, neither could any one intended by the testator to take an interest, but at a period beyond the legal limits, possibly take in lieu of A. or B.; their shares are not therefore within the third rule, or governed by the judgment in the case of *Lord Dungannon v. Smith*, as might have been the case if the devise had been to the sons of Thomas Bannister Cattlin living at his decease, with remainder to their sons in fee, for then there might possibly, at the death of Thomas Bannister Cattlin, have been no son who was in existence at the testator's death. Neither, again, can any possible event happening after the death of Thomas Bannister Cattlin, augment or diminish the share of A. or B. Here, then, A. and B. are respectively persons in esse at the death of the testator, who are to take a share that must be ascertained in a manner incapable of augmentation or diminution at the expiration of another life in esse. What is there to prevent the limitation of that share to him for life, with remainder to his children in fee? for this share must of necessity vest, if at all, within the legal limits, and complies, therefore, with the rule. It is in reality the case of *Storrs v. Benbow*, substituting a given share for a given sum of money.

The two shares of A. and B., in the case I have supposed, are wholly free from the questions which arose in *Leake v. Robinson*, or *Lord Dungannon v. Smith*. Sir William Grant, in *Leake v. Robinson*, speaking of the bequest made by the testator in that case, says: "He supposed that he could do all that he has done,—that is, include after-born children, and also postpone the vesting until twenty-five. But if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than abridge the period of vesting? I should think quite the contrary" (2 Mer. 388).

The present case is free from the difficulty which is pointed out in those remarks, and upon which the point in that case was determined.

⁷ See, however, *Gray, Rule Against Perpetuities*, § 391. Compare with *Wilson v. Wilson*, 28 L. J. Ch. 95.

The case of *Dodd v. Wake*, 8 Sim. 615, which was mentioned, comes within the same category as *Greenwood v. Roberts*. In *Dodd v. Wake*, the bequest of a sum of money was limited unto and amongst the children of the testator's daughter, who should be living at the time the eldest should live to attain the age of twenty-four years, and the issue of such of the children of his said daughter as might then happen to be dead leaving issue, to be equally divided between or among them, share and share alike, as tenants in common. There were three children living at the death of the testator, who might have attained the age of twenty-four within the proper period,—but upon that form of bequest it seems clear, as the Vice-Chancellor held, that the testator did not intend it to apply of necessity to any existing child, but to take effect only when the first child attained twenty-four, which might possibly be without the period of legal limitation. The children living on that event might or might not be composed of a class not in existence at the death of the testator.

In the case now before me, no person out of the prescribed limits could possibly take the whole of A. or B.'s share, and the exact amount of each share is finally ascertained within the legal limits; and from the time that it is so ascertained, no party without the legal period can possibly acquire the least interest in it, so as to divest or diminish it; nor can any party whose interest is so ascertained within the period, or his children, acquire any interest in the shares of such other parties so as to augment it.

The limitation as to the shares of C. and D. in the case I have supposed would be clearly void, as their children might be born at a period exceeding the limits which the law allows, they themselves not being in esse at the death of the testator. I observe that Mr. Jarman expresses a doubt whether the state of events should not be considered as they stood at the date of the will (1 Jarm. Wills, 229 n. s). It is now clear that the death of the testator is the time to be looked at. The rule on this point is plainly expressed by the present Lord Chancellor [Lord Cranworth] in the case of *Lord Dungannon v. Smith*, where, observing that a gift to the person who at the death of B. should be the heir male of his body, if he should attain twenty-one, would be good as to the person who should be heir male of B. at his death, he adds: "It would be good, because at the death of the testator it would be absolutely certain that the bequest must take effect, if at all, within twenty-one years after the death of B.; and it would not be rendered invalid by a subsequent gift to others, which might be too remote" (12 Cl. & Fin. 574; see also *Williams v. Teale*, 6 Hare [31 Eng. Ch. R.] 239).

The declaration will be, that the estate was by the will of the testator well limited in fee to the children of those children of Thomas Bannister Cattlin who were living at the death of the testator.⁸

⁸ Accord: *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412 (1888).

ON LIMITATIONS TO A SERIES.—See *Wainman v. Field, Kay*, 507 (1854); *Lyons v. Bradley*, 168 Ala. 505, 53 South. 244 (1910).

CHAPTER VI
MODIFYING CLAUSES

RING v. HARDWICK.

(Court of Chancery, 1840. 2 Beav. 352.)

The question in this case arose upon the will of William Davies, dated in 1825, whereby he gave his residuary personal estate to P. Hardwick, Wm. Clare, and his wife, Mary Davies, upon trust to convert and to invest in their names upon government security, and to pay the dividends and the rent of the leaseholds, &c. to his wife, Mary Davies, "during the term of her natural life or widowhood;" and he proceeded as follows: "And from and immediately after the death or second marriage of my wife the said Martha Davies, then upon trust that they the said Philip Hardwick, William Clare and Mary Davies, or the survivors, &c., do and shall with all convenient speed collect in the outstanding parts of my said personal estate, and add the same to my money in the funds, and make a division of all the said money then in the funds, &c., and all and every other parts or part of my said personal estate between all and every of my four children, viz. my two sons, the said William Davies and James Davies, and my two daughters, the said Mary Davies and Martha Ann West." He then provided that the "division" was not to be made into four equal parts, but that a sum of £2000 should be appropriated and paid out of the shares of his sons, James and William Davies, "to or for the use and to augment the shares of his two daughters, the said Mary Davies and Martha Ann West, in equal shares and proportions, to be received by or for the use of them the said Mary Davies and Martha Ann West. And subject thereto the division of all and singular his said personal property at the decease or second marriage of his said wife, the said Martha Davies, was to be equal, share and share alike, between his said four children, viz. his said two sons, the said William Davies and James Davies, and his said two daughters, the said Mary Davies and Martha Ann West, the shares of his said two sons, the said William Davies and James Davies, were to be paid and transferred to them immediately upon the decease or second marriage of his said wife, the said Martha Davies, upon their first appropriating thereout, or otherwise paying the said sum of £2000 to or for the use of, and to augment the shares of his said two daughters, the said Mary Davies and the said Martha Ann West; to hold the said shares

unto them the said William Davies and James Davies severally and respectively, and their several and respective executors, administrators and assigns, from thenceforth absolutely forever."

The will then contained a gift over between the surviving brother and sisters of the sons' shares, in case either died unmarried and without issue before their shares should become payable, and proceeded as follows: "But as touching and concerning the shares of my said personal estate, which with the said augmentations will become the property of my said daughters, the said Mary Davies and Martha Ann West, upon the decease or second marriage of my said wife, the said Martha Davies, my directions are, and I do hereby declare my will and meaning to be, that the whole of such shares and augmentations shall immediately upon the decease or second marriage of my said wife, the said Martha Davies, be invested and laid out upon government security at the Bank of England, under the superintendence of them, the said Philip Hardwick and William Clare, or the survivor of them, in manner following, that is to say, the share and augmentation of the said Mary Davies as hereinbefore mentioned, and also any other augmentation which may become her share by the decease of the said William Davies and James Davies or either of them unmarried and without issue, as is also hereinbefore mentioned, or by the decease of the said Martha Ann West, as hereinafter mentioned, shall be so invested and laid out in the names of the said Philip Hardwick, William Clare and William Davies, or the survivors, &c. jointly with and in the name of her the said Mary Davies, upon trust that they the said Philip Hardwick, William Clare and William Davies, &c. do and shall permit my said daughter, the said Mary Davies, to receive the dividends for life for her separate use;" "and from and after her decease then upon further trust that they, the said Philip Hardwick, William Clare and William Davies, &c. do and shall pay, divide and transfer the capital money which formed the share and augmentation of my said daughter, the said Mary Davies, unto, amongst and between all the children, whether male or female, and both male and female of my said daughter, the said Mary Davies, in equal shares and proportions, and to become vested in such children respectively at the age of twenty-five years; and if any such children or child shall die under that age, the share or shares of all and every such children or child shall be divided amongst the survivors of such children who shall live to attain that age; and if only one child shall live to attain that age, then the whole of such share and augmentation shall belong to such only child upon his or her attaining that age; and if it shall happen that the said Mary Davies shall depart this life without leaving any such children or child who shall live to attain the said age of twenty-five years, then the whole of the said shares and augmentations shall be upon trust, and shall be divided between all the children of the said William Davies, James Davies and Martha Ann West, whether male or female, and both

male and female, who shall live to attain the said age of twenty-five years, in equal shares and proportions; and if only one such child shall live to attain that age, then the whole of such share and augmentations shall belong to such only child upon his or her attaining that age."

The testator declared similar trusts, *mutatis mutandis*, of Martha Ann West's share, and contained the following powers of maintenance and advancement: "Provided always, that in case of the death of the said Mary Davies or the said Martha Ann West before their children, or the children or child of either of them, shall have attained the said age of twenty-five years, or in case they the said Mary Davies and Martha Ann West, or either of them, shall depart this life without leaving any children or a child, and there shall be then living any children or a child of the said William Davies and James Davies, or either of them, but such children or child may not then have attained the said age of twenty-five years, it shall be lawful for the said Philip Hardwick, William Clare, and William Davies, &c. to receive the dividends of the share and augmentations of the said Mary Davies and Martha Ann West, or either of them, as the case may be, and apply the same dividends, or a competent part thereof, for the education and maintenance of the children or child of the said Mary Davies and Martha Ann West, or of the said William Davies and James Davies, as the case may be, until such children or child shall attain the said age of twenty-five years, according to the true intent and meaning of this my said will as hereinbefore mentioned and expressed in respect thereof; and upon the same principle, in the event or events last aforesaid, it shall and may be lawful for the said Philip Hardwick, William Clare and William Davies, &c. with the consent of the said Mary Davies and Martha Ann West during their respective lifetimes, and after their deaths or the death of either of them, then in the discretion of the said Philip Hardwick, William Clare and William Davies, &c., by sale of any part of the said government securities, to raise and advance any part of the share of any one or more of the said children for their advancement in the world, not exceeding one quarter part of the probable expectant share of every one such."

The testator died in 1827; his widow survived him but a short time; his daughter, Mary Davies, married the plaintiff, Mr. Ring, and died in 1829, without having had any child born alive, and the plaintiff was her administrator. The testator's sons, William Davies and James Davies, were also dead, and had left children. Martha Ann West was living, and had children, two of whom were born in the testator's life.

The questions which arose upon the death of Mary Ring without children, as to the share intended for her and her children, were first, whether the gift over to the children of her brothers and sisters was too remote; and if so, then whether under the circumstances she took a life or an absolute interest in that share.

Mr. Pemberton having commenced his reply,

THE MASTER OF THE ROLLS [LORD LANGDALE] said: The children, on whose behalf this case has been argued, if they take anything must take it under that clause directing a division between all the children "who should live to attain the age of twenty-five years." It is admitted, that a gift expressed by those words is by itself too remote and void; but then it is said, there are other directions in the will which ought to qualify that construction. The directions are first of all, upon the death or second marriage of the wife to invest, &c. the particular share previously given to a daughter, in the name of the trustees. Then it is said, that in the subsequent clause, which refers to a period when the children are under twenty-five, that which was intended for the children is termed "the share" of the children, and that, therefore, the gift is vested, subject to be divested; but I consider this share means such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot therefore alter the effect of the previous gift. Next it is said to be a gift with a double aspect. I am of opinion that that is not the true construction of the clause. In respect to the clauses for maintenance and for raising money for advancement, they are accessories to that which is void, and cannot therefore alter the construction. Upon the other point as to the extent of the gift to the daughter, I will hear a reply.

Mr. Pemberton having replied,

THE MASTER OF THE ROLLS said: I think that there is sufficient to be collected from the prior words in this will to give an absolute interest to the daughters; and those prior words are so connected with what follows as to show that the testator intended a restriction of that absolute interest; and the restriction not having become effectual, the whole interest remained according to the original gift.

WHITEHEAD v. BENNETT.

(Court of Chancery, 1853. 22 L. J. Ch. N. S. 1020.)

Samuel Barker, by his will, dated the 21st of November, 1834, appointed Joseph Todd, Edward Loyd, Benjamin Braidley and Robert Bennett, to be his trustees and executors, to whom and their heirs, executors and administrators he gave, devised and bequeathed all his freehold, leasehold and personal property upon trust to sell, when and as they should think proper. The testator then gave several annuities and legacies, and continued: "All the money arising from the sale of my freehold and leasehold estates, and the money arising from my personal estate not consisting of money, as well as all my moneys, to be invested for the benefit of my three daughters, Maria Whitehead, widow, Anne Bennett, wife of Robert Bennett, and Mary Bennett, wife of Charles Bennett, and the interest thereof to be paid to

each of my said daughters during their respective natural lives without the control of their husbands, and on the decease of each of them I do will and direct that one half of the fund or share from which interest or the income thereof is hereby directed to be paid to the parent respectively for life as aforesaid, shall be paid to the children of each of my daughters so dying, equally, at the age of twenty-one years. And it is my will that the interest of the other half shall be paid to the children of each of my daughters for their respective lives, and on the decease of my said grandchildren respectively, the share of which they, my said grandchildren, are only to receive the interest thereof for life as aforesaid, to be paid to their children respectively when and as they attain their respective ages of twenty-one years.

The testator died, leaving his three daughters, Maria, Anne and Mary surviving him.

Maria and Anne were still living and were defendants to the suit, but Mary died in 1837, before the suit was instituted, leaving four children, who were also made defendants.

There were several great-grandchildren of the testator, one of whom was born after the testator's death.

The first question was, whether or not the gift to the testator's great-grandchildren was void for remoteness. The next question was, whether the three daughters of the testator took absolute interests under the will. There was also a question as to the rights of the children of Anne, inasmuch as some of them might die in their mother's lifetime, but which, under the circumstances, it was not necessary to decide at present.

KINDERSLEY, V. C. It seems impossible to argue that the limitation to the great-grandchildren is not void. Indeed, that question has scarcely been pressed. There is no doubt whatever about this general principle, that if a residue or sum of money by way of legacy, be given or appointed to A. by a testator in the first instance, and then there is a modification of that gift, or a limitation over for the benefit of persons, the issue of the parties, although those subsequent limitations may fail, no doubt, the first gift, which was an absolute gift, would prevail, no matter whether it was a gift or an appointment under a power. The question here, then, really is this, whether there is such a gift to the party in the first instance, as to come within the principle and the authorities cited? Is there a gift to one daughter or to each of the daughters of a third part of the money, and then a limitation of the share thus given in the first instance absolutely, in such a form as that it falls within the principle, so as to make each of the daughters entitled to the benefit of the first absolute gift? In the first place, it is very questionable whether a direction to invest for the benefit of the daughters subject to these limitations, would amount to an absolute gift. It seems clear that a gift to invest for the benefit of A., B. and C. would be enough if it stopped there, but it does not

follow that a mere direction to invest, followed by the limitations in this will, would be an absolute primary gift, but where there is a gift to invest for the benefit of daughters, how can I say the testator meant to make an absolute gift to the daughters as joint tenants, and then to go on and limit, not that gift in joint tenancy, but one half of the third share to the children of one, and then as to the other moiety of that third, to the children of that one for life? Can I say that the testator meant it to be an absolute gift with that sort of limitation, even if it were a joint tenancy? What he meant was, that this money should be invested for the benefit of his daughters, and then he directs how they are to derive that benefit. He does not express that he has given a share to each for life; he carefully abstains from that, and speaks of it as the share, the income of which is given to the daughter for life. Therefore, I think, taking all the will together, though I admit that a clear direction to invest for the benefit of A., B. and C. would be an absolute gift to them, yet that, in this case, there is not an absolute gift to the daughters, and that the principle of the cases cited is not impeached. I acted on this principle myself in the case of *Harvey v. Stracey*, 1 Drew. 73, and should do so again if the same circumstances occurred; but I do not consider this case within the principle. I ought to have observed that the other question, as to the rights of the children of Anne, does not arise. I think I am bound to say that it is clear, whatever the testator does not dispose of goes to the heir of the testator qua heir, because he is entitled to every portion of the testator's real estate which is undisposed of. There was the case of *Fitch v. Weber*, 6 Hare, 145, where the testator charged his estate for the benefit of certain persons, and it was held that the heir was entitled to the benefit of what was undisposed of, because it was part of the testator's real estate, and he is entitled to it whether conversion has taken place or not.

ON INTERESTS AFTER ESTATES TAIL.—See *Goodwin v. Clark*, 1 Lev. 35 (1662); *Nicoils v. Sheffield*, 2 Bro. C. C. 215 (1787); *Wilkes v. Lion*, 2 Cow. (N. Y.) 333 (1823).

CHAPTER VII

POWERS

BRISTOW v. BOOTHBY.

(Court of Chancery, 1826. 2 Sim. & S. 465.)

By Sir Brooke and Lady Boothby's marriage settlement, certain freehold estates, the property of the lady, were settled on Sir Brooke Boothby for life, with remainder to Lady Boothby for life, with remainder to trustees for 500 years, for raising portions for the younger children of the marriage, with remainder to the first and other sons of the marriage in tail male, with remainder to certain other trustees, for a term of 1,000 years, to raise portions for the daughters in default of issue male of the marriage, with remainder to the first and other sons of Lady Boothby, by any after-taken husband, in tail male, with remainder to the daughters of Lady Boothby, equally, as tenants in common in tail, with remainder to the survivor of Sir Brooke and Lady Boothby in fee: and it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them should die without issue, and Sir Brooke should survive Lady Boothby, then it should be lawful for Lady Boothby, by deed or will, whether she should be covert or sole, and notwithstanding her coverture, to charge the premises with £5,000, to be raised and paid, after the decease of Sir Brooke and Lady Boothby, and such failure of issue as aforesaid, to such person as Lady Boothby should direct, and to create a term of years for the better raising of such sum of money.

There was only one child of the marriage, who died at the age of eight years.¹

Lady Boothby died in the lifetime of Sir Brooke, having, by her will, executed the power of charging the settled estates with the £5,000.

The present suit was instituted, by a person claiming under that will, against the heir of Sir Brooke Boothby, for the purpose of giving effect to that charge. The defendant put in a general demurrer.

THE VICE-CHANCELLOR [SIR JOHN LEACH]. In that part of the instrument which creates the power, the clear expressed intention is, that it shall only take effect upon a general failure of issue of the marriage; and there is no language, in any other part of the instrument, which can authorize a court to state that this was not the real intention of the parties. There can be no doubt that, if it had been

¹ The child died before its parents. See s. c. 4 L. J. O. S. Ch. 88.

pointed out to the parties that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, and that the power and the limitations to the issue would have been made to correspond. But there is nothing in this instrument which enables me to say whether this would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage, who were inheritable under the settlement, as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that the event upon which the power is to arise, being too remote, the demurrer must be allowed.²

BRAY v. BREE.

(House of Lords, 1834. 2 Clark & F. 453.)

THE LORD CHANCELLOR³ [LORD BROUGHAM]. My Lords, this appeal from a decision of the Vice-Chancellor [Sir Launcelot Shadwell] raised a question of considerable nicety, although now, on a further consideration of it, I entertain very little doubt as to what your Lordships' judgment ought to be. The nature of the case, rather than any great difficulty that I experienced in making up my mind to advise your Lordships on it, has given rise to the intention I have of entering into the circumstances somewhat more at large than I otherwise might have done in a case where I saw no reason to differ from the court below.

Upon the marriage of Broad Malkin and Elizabeth Spode, by a settlement then made, the sum of £8000, secured by bond, was vested in trustees, subject to the joint appointment of the husband and wife among the child or children of the marriage. I need not state the terms of that power of appointment, as the question arises not upon that, but upon the several appointment of the wife, she surviving her husband; which was in exactly the same terms, word for word, as the power of appointment given to the two jointly. The fund was to be in trust for all and every the child and children of Elizabeth Spode, by Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to such conditions, restrictions, and limitations over the same (to be always for the benefit of some one or more of such child or children), as the said Elizabeth Spode alone, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be by her

² See *Lanesborough v. Fox*, Cas. temp. Talb. 262 (1733).

³ The opinion only is given.

signed and published in the presence of and to be attested by the like number of witnesses, should direct or appoint. The settlement then goes on to provide for the case of there being neither a joint appointment by the husband and wife, nor a several appointment by her, in execution of the power; in which event it provides for the transfer of the fund of £8000 to the child and children, if more than one, share and share alike, at certain ages mentioned.

Mrs. Malkin survived her husband, having but one child, Saba Eliza Malkin, and she executed the power to that daughter; she, in effect, appointed, for she appointed under certain limitations "to such person or persons as she, the said Saba Eliza Bray, at any time or times, and from time to time, during my life, or after my decease, and notwithstanding her present or future coverture, should (in manner therein mentioned) direct or appoint." So that she gave Saba, her daughter, the power of appointment; and in default of that execution of the power, she then limited the fund in a way which it is unnecessary here to state. Saba Eliza, who was married to Mr. Bray, having afterwards appointed to her uncle William Hammersley, who has departed this life since the appeal was brought, the question arises between her husband and the appointee's representatives under Saba Eliza's execution of the power; which question is, whether she took an absolute interest in the £8000 under the original settlement, in which case the fund would belong to her husband, or whether she took under her mother's power of appointment. If she did not take under her mother's power of appointment, but took under the original settlement, in that case cadet questio. If she did take under her mother's power of appointment, the remaining question is whether she well executed that power given to her by her mother. I have no doubt that there is a good execution of the power in that case; but the question raised, as your Lordships may perceive, is twofold: first, whether the power under the settlement of 1805, and which Elizabeth Malkin, the mother, assumed to execute, was a power of appointing, in the event which occurred, to one child, or only a power of distribution, appointing among more than one child; that is, whether it was a power of appointment, or whether only, in effect, a power to ascertain the shares which several individuals should respectively take. That is the principal question, and the only one encumbered with the least doubt: on the other, that is, whether the power was well executed, I have not any doubt whatsoever. [His Lordship then addressed himself to the question whether the power given to Elizabeth Malkin authorized her, in the event of there being but one child, to appoint to that child, and he determined that it did. This discussion, which occupies all the rest of the opinion except the last paragraph, is omitted. That last paragraph is as follows:]

My Lords, it was said that *Alexander v. Alexander*, 2 Ves. Sen. 640, touched a part of this case; *Folkes v. Western*, 9 Ves. 456, also was relied upon on the part of the appellant. Much doubt has been

thrown upon that case at different times; it was said there was another point in that case decided, which had been wrongly decided; but my opinion is, that *Folkes v. Western*, as far as it applies to this case, is rather against than for the purpose for which it was cited. My Lords, I rely upon the reasons I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; for these reasons it appears to me that the present judgment is right, and I shall move your Lordships that the judgment of the court below be affirmed. I do not propose to your Lordships to give any costs in this case; it appears that the money went to the uncle of the wife, upon her death; the husband probably was advised that there was a serious question whether he was not entitled to it; and I think, under these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed, without costs.⁴

MORGAN v. GRONOW.

(Court of Chancery, 1873. L. R. 16 Eq. 1.)⁵

This was a suit to administer the trusts of a settlement dated the 27th of October, 1821, and made upon the marriage of Thomas Gronow and Mary Ann Lettsom, whereby a sum of £32,500 £3 10s. Bank Annuities was settled upon certain trusts for the benefit of Mr. and Mrs. Gronow during their joint lives and the life of the survivor of them, and after the death of the survivor, in trust for the child or children of the marriage or any one or more of such children, in exclusion of the others of them, as Mr. and Mrs. Gronow should jointly appoint, and in default of such appointment, as the survivor of Mr. and Mrs. Gronow should by deed or will appoint, and in default for the children of the marriage equally, the shares of sons to be vested at twenty-one, and those of daughters at that age or on marriage; and there was the usual hotchpot clause. The settlement contained a power to invest in land; and part of the Bank Annuities was sold and invested under this power in the purchase of two estates, the Lanharry estate and the Ash Hall estate; and the unsold residue of the Bank Annuities amounted to about £14,000.

The joint power of appointment was not exercised. Mrs. Gronow died in 1832, leaving her husband Thomas Gronow her surviving. There were seven children of the marriage, the eldest of whom was the defendant William Lettsom Gronow, who had become of unsound mind. Of the others, it is only necessary to name two daughters, Louisa Lettsom Gronow and Elizabeth Lettsom Gronow.

⁴ Accord: *In re Teague's Settlement*, L. R. 10 Eq. 564 (1870); *Mifflin's Appeal*, 121 Pa. 205, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781 (1888).

⁵ Statement of the case abridged, and part of opinion omitted.

Subsequently to 1832, Thomas Gronow executed divers appointments under the power in that behalf contained in the settlement. Of these appointments, three only, made by deeds poll dated respectively the 12th of November, 1846, the 5th of December, 1860, and the 20th of March, 1867, need be mentioned for the purposes of this report.

By the deed poll of the 12th of November, 1846, Thomas Gronow appointed, first, that after his death the trustees of the settlement should, out of the stocks, funds, securities, and property which might have arisen from the sum of £32,500 Bank Annuities originally comprised in the settlement, and which might then be subject to the trusts thereof, raise such a sum as would be sufficient for the purchase of a government annuity of £300 during the joint lives of William Lettsom Gronow and Catherine Anne his wife, and the life of the survivor of them, and should apply the same for the benefit of William Lettsom Gronow in manner therein mentioned; and, secondly, that the trustees should, after his death, out of so much of the said stocks, funds, shares, and property as should remain after answering the purposes aforesaid, raise two several sums of £7000; and should as to one of the said sums of £7000 invest the same in manner therein mentioned, and should stand possessed of the investments and the income thereof upon such trusts, to take effect only after the marriage of Louisa Lettsom Gronow, as she should, by any deed or deeds executed either before or after her marriage, appoint; and in the mean time, and until any such appointment, and so far as any such, if incomplete, should not extend, should pay the income of such investments to Louisa Lettsom Gronow during her life for her separate use without power of anticipation; and after her decease should hold the said investments and the income thereof upon such trusts as she should by will appoint; and should as to the other sum of £7000 invest the same and stand possessed thereof upon the trusts therein mentioned, being trusts for the benefit of Elizabeth Lettsom Gronow similar to those thereby declared for the benefit of Louisa Lettsom Gronow with respect to the first sum of £7000.

Louisa Lettsom Gronow died on the 23d of January, 1868, without having been married. By her will she appointed the £7000 first mentioned in the deed poll of the 12th of November, 1846, to her sister Elizabeth Lettsom Fisher for her separate use.

Thomas Gronow died on the 17th of August, 1870.

The cause now came on for further consideration. One of the questions was: whether either of the sums of £7000 and £7000 was validly appointed.

LORD SELBORNE, L. C. * * * The next question is as to the interest of Louisa, with respect to whom the matters stand simply in this way—that no interest in any part of the capital of £7000 beyond the mere life interest is given to her, except by virtue of a power to appoint the capital of that sum by will contained in the deed of the 12th of November, 1846. If she had been living at the date of the

instrument creating the power, I should have thought that was within the terms of the power. She was not, however, then living; and, inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limits allowed by the rule as to perpetuities, not only *Wollaston v. King*, Law Rep. 8 Eq. 165, but principle, obliges me to hold, however reluctantly, that that is void. It is the same thing as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time. If there had been a gift in the deed to her when she attained the age of twenty-five, to vest then and not earlier, it would have been too remote; a fortiori, such a gift as this, depending upon the exercise of the power, must be too remote also.

With regard to the £7000 given to Elizabeth, if the matter had rested upon the original deed I should have been of the same opinion, because marriage in the case of an unmarried and unborn child is an event as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being, as death is; and the case is not one in which there is any gift of the absolute interest in the capital to her independently of the exercise of the power, or of the other power to be exercised by will only. Nothing is given independently of those powers and the exercise of them except a life interest.

I cannot accede to the view that the cases, of which *White v. St. Barbe*, 1 V. & B. 399, and *Langston v. Blackmore*, Amb. 289, are examples, in the least degree touch such an instrument as this. *Langston v. Blackmore*, which is one of the strongest cases in its circumstances, was, after all, only an example of exactly the same principle as *White v. St. Barbe*; that is to say, that when there is an instrument which is made with the concurrence of the object of the power to whom the whole might be validly appointed (which was the case in *Langston v. Blackmore*), if the instrument goes on to settle the fund, as there, in strict settlement upon the object of the power for life, with remainder to such wife as that object of the power should marry, remainder to the children of that object of the power, and, for want of such children, over to other persons, so as to make it a strict settlement, out and out, which would be absolutely operative, and leave nothing to be done if they were all objects of the power, it shall be held to be in substance, if the facts warrant it, the object of the power concurring, an appointment absolutely to the object of the power and a settlement by him on those particular limitations. Here there is no appointment to the object of the power of the capital at all, unless it is to be got at through the medium of these powers of appointment; nor is there any settlement, except by the same exercise of those future powers of appointment, upon any one whatever. The whole thing remains in abeyance, and can vest in nobody till those

powers are exercised, the one of which is dependent, not upon the mere will of the person to whom it is given, but upon the future uncertain event of marriage, uncertain as to the fact and uncertain as to the time, and the other upon the equally uncertain event, as to time, of death.⁶

At first my impression was that nothing was shown to have taken place afterwards which would mend the case in favor of Elizabeth; but more careful attention to the particular terms of the subsequent document has altered that impression, and I now think, although the original appointment was bad, except as to the life estate, as far as Elizabeth was concerned, that the subsequent deed of the 5th of December, 1860, followed up, I think, ten years afterwards by the deed of the 21st of October, 1870, have had the effect of validly vesting that £7000 in the trustees of that deed of the 21st of October, 1870. [Balance of opinion relating to this point omitted.]

WILKINSON v. DUNCAN.

(Court of Chancery, 1861. 30 Beav. 111.)

George Wilkinson, the uncle, died in 1836, having by his will bequeathed the residue of his personal estate, and the produce of real estate to trustees, upon trust for his nephew George Wilkinson for his life, and from and after his decease upon the following trusts for his children:

“Upon trust for all and every, or such one or more exclusively of the others or other of the children or child of George Wilkinson, in such manner and form, and if more than one, in such parts, shares and proportions, and with such limitations over and substitutions in favor of any one or more of the others of the said children, and to vest and be payable and paid, transferred and assigned, at such time or times, age or ages, and upon such contingencies, and under and subject to such directions and regulations for maintenance, education or advancement, as George Wilkinson” by deed or will “shall from time to time direct and appoint; and in default of and subject to such direction or appointment, and so far as any such, if incomplete, shall not extend, upon trust for all and every the children and child of the said George Wilkinson, who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married, to be equally divided between such children, if more than one, in equal shares and proportions, as tenants in common.”

⁶ So where A. under a marriage settlement having power to appoint a fund in favor of the children of the marriage, by her will and execution of the power appointed to C. for life, with remainder to such persons as C. should by will appoint, the power in C. was void for remoteness. *Wollaston v. King*, L. R. 8 Eq. 165; *Tredennick v. Tredennick*, L. R. [1900] 1 I. R. 354.

The will contained no hotchpot clause.

George Wilkinson the nephew made his will in November, 1858, whereby, after reciting his uncle's will, and the power of appointment over his residuary estate therein contained, and that the residuary estate consisted of £14,500 more or less, he proceeded as follows:

"Now in exercise of the same power and of every other power so enabling me, I do hereby direct and appoint, that the trustees for the time being of the said will shall, after my decease, stand possessed of the said residuary estate, upon trust, after my decease, as to the income thereof, and until the portions of my children in the capital shall become payable and divisible as hereinafter directed, to pay the same to the trustees of my will, for the maintenance, education or advancement of my children, in such manner as they, in their uncontrolled direction, shall think most beneficial to them, such application of the income to cease, as to each child, as and when he or she shall become entitled to his or her portion of capital. And as to the capital of such residuary estate, upon trust for the benefit of my children in the manner hereinafter mentioned, viz., to pay £2,000 to each of my daughters, as and when they shall respectively attain twenty-four years of age; and in the event of my daughters dying under twenty-four years of age then to pay the said sum of £2,000 to her surviving sister (as the case may be). And as to the residue of such capital, to divide the same between my sons equally (if more than one) as and when they shall respectively attain twenty-four years of age, and if only one then the whole to such only son.

"And if my son George shall succeed me in my business, and on this condition only, then his share shall be paid to him at twenty-one years of age, instead of twenty-four, but not otherwise. And in the event of no son attaining twenty-four years of age, and in the event of the above provision for my daughters taking effect, then to divide the same between them, as soon as and when they shall severally attain twenty-four years of age."

George Wilkinson, the nephew, died in November, 1859, leaving ten children, two of whom were under the age of three years at his death.

A question had arisen whether the appointment to the children at twenty-four was to any extent invalid on the ground of remoteness.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. I will state the view I take, and I will look at the authorities, and hear the defendants if necessary.

I think that the bequest is distinct from that in *Leake v. Robinson*, 2 Mer. 363, and that Sir William Page Wood correctly states the principles in *Cattlin v. Brown*, 11 Hare, 377. He states the 5th rule thus: "Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished, whatever be the number of the other members, then the gift may be good as to those within the

limits allowed by law. This was settled in the case of *Storrs v. Benbow*, 2 Myl. & K. 46.”

That appears to me to be a very accurate statement of the law. The distinction between the case of *Leake v. Robinson* and the present is this: In *Leake v. Robinson* the property was given to A. for life, and afterwards to pay to such of his children as should attain twenty-five.

It was therefore impossible to ascertain the class until it was known how many children attained twenty-five, and consequently the period for ascertaining the class was beyond the time allowed by the rule of law, and too remote. But if the testator had said, that upon the death of the tenant for life, the estate should be divided into as many shares as the tenant for life had children, and that one share should be vested in each child on his attaining twenty-five, then I apprehend the bequest would be good as to those children who were of such an age at the testator's death that they must necessarily attain twenty-five within twenty-one years from the death of the tenant for life.

If the testator here had said, “and as to the capital of such residuary fund, to pay it to my daughters when and as they shall attain the age of twenty-four years,” then it would come within the case of *Leake v. Robinson*, but here the terms of the execution of the power are, “as to the capital of such residuary estate upon trust for the benefit of my children” [that is, sons and daughters] “in the manner hereinafter mentioned, viz., to pay £2,000 to each of my daughters as and when they shall respectively attain the age of twenty-four years.”

Upon the death of the second testator, who executed the power, as many sums of £2,000 were to be ascertained as he had daughters, and with respect to those who are within the period or limit of the rule against perpetuity, that is, with respect to those who had attained the age of three years at their father's death, why should not their legacies of £2,000 each be paid to them, why are they to be affected by the invalidity of the gift to the others?

The circumstance that there is a gift over in case a daughter should die under twenty-four does not affect the matter.

What I stated in *Seaman v. Wood*, 22 Beav. 591, was this: Where there is a class to be ascertained, which consists partly of persons who are clearly within the limits allowed by law, and partly of those who are not within such limits, then, as you cannot ascertain the members of the class until after the period permitted by the doctrine against perpetuities, the whole gift is void, for you do not know, and cannot ascertain, within the proper limit of time, what each person is to take.

I intended to draw that distinction in *Webster v. Boddington*, 26 Beav. 128, and that was the distinction taken in *Griffith v. Pownall*, 13 Sim. 393, and by Vice-Chancellor Wood in *Cattlin v. Brown*, 11 Hare, 372.

The view I take of the case generally is that which I have stated, viz., where the share of each person is ascertained, the gifts to those who happen to be within the limits of the rule against perpetuity may

be good as to them, though the gifts be invalid as to the others who are beyond that limit, because the number and amount of the shares are ascertained at the proper period and within the proper limit of time.

THE MASTER OF THE ROLLS. I have looked at the cases, but I do not think I can add anything to what I stated yesterday. I think that the principle of the case is clearly laid down by Vice-Chancellor Sir William Page Wood in the fifth proposition which he states in *Cattlin v. Brown*.

I think this will afford instances of both the rules stated by the Vice-Chancellor Wood. In the gift to the daughters a sum is specifically given to each, which is not dependent on the gift to the others, and consequently those will take who can take it within the time allowed by the law against perpetuities. With respect to the gift to the sons, it illustrates the other rule. I am of opinion that it is a gift to a class which cannot be ascertained until all the members of it shall have attained twenty-four, and therefore, with respect to them, the appointment of the residue is wholly void for remoteness. With respect to the daughters, as the number of sums of £2,000 were ascertained at the death of the nephew, I think that those who attain their age of twenty-four within the period of twenty-one years from the death of the nephew are entitled to their shares, and the residue will go as unappointed.

I will make a declaration to that effect.⁷

In re POWELL'S TRUSTS.

(Court of Chancery, 1869. 39 L. J. Ch. N. S. 188.)

This was a petition by Mrs. Littlehales, for payment out of court of certain sums of stock, subject to the trusts of the will of her grandfather, James Powell.

James Powell, by his will dated December 6th, 1830, gave all his moneys, securities for money, stocks and other funds, to trustees upon trust, after the deaths of his wife, Mary Powell, and her sister, Hannah Male, to stand possessed of a sum of £2,000 Consols, in trust, to pay the interest and dividends thereof to the testator's daughter Hannah, the wife of John Hall, for her life, and after her death "in trust to and for such person or persons as his daughter, Hannah Hall, in and by her last will and testament, should direct or appoint; and in default of such direction or limitation, in trust for all and every such child or children of his said daughter as therein mentioned, share and share alike if more than one, and if there should be only one such child, in trust for such only child; and in default of any child or children, then to her own right heirs; and as to a further sum of £3,000 stock, upon

⁷ Accord: *In re Thompson*, L. R. [1906] 2 Ch. 199; Gray, *Rule Against Perpetuities* (3d Ed.) § 523c et seq.

trust that the said trustees should, after the death of testator's wife, stand possessed thereof upon like trusts as the said sum of £2,000." The said testator died in February, 1831. In January, 1860, the testator's wife and her sister, both being then dead, the trustees of the testator's will paid into court, under the Trustee Relief Act, a sum of £6,950 Consols, as representing (less certain deductions) the said two sums of £2,000 and £3,000 stock bequeathed by the testator's will as aforesaid, together with a further sum of £2,000 stock bequeathed by his will to Hannah Hall for her life, with power to her to appoint the same by deed. The stock representing such last-mentioned sum had been paid out by an order of court, and there was left a sum of £4,936 13s. 4d. Consols, representing the said two bequests of £2,000 and £3,000 standing in court "ex parte the legacies given to Hannah Hall for life, with remainders over."

Hannah Hall duly made her will, dated December 11th, 1868, whereby she appointed Edmund Stainton Day and John Frederick Hall the executors and trustees thereof, and after certain specific and pecuniary legacies, and a bequest of her furniture and other household effects to her daughter, Sarah Maria Littlehales, she proceeded as follows: "As to all the rest, residue and remainder of my estate and effects, I give, devise and bequeath the same unto my said executors, upon trust: in the first place, to convert the same, or such part thereof as they shall think fit, into money, and to invest the proceeds to arise from such sale in their joint names in government securities, and to pay the annual income thereof, and also of the rest of my estate, unto my said daughter, during her life, for her sole and separate use and independent of her present and any future husband; and from and after her decease, upon trust, to stand possessed of the same in trust for all and every the children of my said daughter, who being a son or sons, shall live to attain twenty-one, or being a daughter or daughters, shall live to attain that age, or marry under that age; and if there shall be but one who shall live to attain that age, or marry as aforesaid, then in trust for such one child absolutely." The said will also contained powers of maintenance and advancement in favor of Mrs. Littlehales' children.

The will of Hannah Hall contained no mention of or reference to the will of her grandfather, James Powell, or her power of appointment thereunder. Hannah Hall died July 15th, 1869, and her will was duly proved. She had issue one child, viz., the petitioner, Sarah Maria Littlehales, born after the death of the testator, James Powell, and now the wife of Frederick Littlehales. Mrs. Littlehales had six children, infants. There was no settlement or agreement for a settlement on her marriage affecting this fund. She now presented this petition for payment of the said sum of £4,936 13s. 4d. Consols to her husband.

Mr. Speed, for the petitioner.

JAMES, V. C., said, he was clearly of opinion that the power of appointment given to Mrs. Hall by her father's will, fell within the 27th

section of the Wills Act, so that the general bequest contained in Mrs. Hall's will operated as a valid execution of such power. But the general power vested in Mrs. Hall of appointing by her will the remainder in the fund, after the termination of her life interest, being exercisable only on her death, was not equivalent to her having the absolute ownership of the fund which was tied up for the whole of her life. The interests in the fund purported to be conferred by Mrs. Hall's will on Mrs. Littlehales and her children, must therefore be taken to be interests created by the will of James Powell. Hence the rule against perpetuities must apply to this case, and the gift to the children of Mrs. Littlehales was void for remoteness. Mrs. Littlehales was entitled to the fund, and (subject to her assent on being examined) the order would be made for payment of it out to her husband. The costs of all parties to come out of the fund.⁸

ROUS v. JACKSON.

(Chancery Division, 1885. 29 Ch. Div. 521.)

By a settlement dated the 12th of July, 1800, made on the marriage of John Abdy and Caroline Hatch, certain sums of bank stock and bank annuities were assigned to trustees upon trust to pay the income to John Abdy during the joint lives of John Abdy and Caroline Hatch, and after his decease to pay the income to Caroline Hatch, and after her decease upon trusts in favor of the children of the marriage as therein mentioned, with a proviso that if there should not be any child or children of the marriage (which event happened), then the trustees should stand possessed of the bank stock and bank annuities upon trust, if Caroline Hatch survived John Abdy, to transfer the same to her executors, administrators or assigns, but that if she should die in his lifetime (which event happened), then upon trust to transfer the same to such person or persons, upon such trusts, and for such intents and purposes, and subject to such provisos and declarations as she should by her will, notwithstanding her intended coverture, direct or appoint, and in default thereof, or in case any such direction or appointment should be made which should not be a complete and entire disposition of the whole of the bank stock and bank annuities, then upon trust that the trustees should stand possessed of the same, or so much thereof as should remain unappointed or undisposed of, in trust for John Abdy, his executors, administrators or assigns, and should transfer the same to him or them accordingly.

By her last will, dated the 7th of April, 1838, Caroline Hatch, then Caroline Abdy, in pursuance and by virtue of the power and authority

⁸ See *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91; *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; *Gray*, *Rule Against Perpetuities* (3d Ed.) §§ 948-969.

given and reserved to her in and by the above indenture of settlement, and of all other powers and authorities in her vested, or her thereto enabling, and in exercise and execution thereof, directed and appointed that the trustees of the settlement should as soon as might be after her decease transfer the funds then subject to the trusts of the settlement into the names of Thomas Mills and Charles Druce, to whom the testatrix also appointed and gave all the moneys, stocks and funds which she had power to dispose of by virtue of the settlement, upon trust to lay out and invest the same in the purchase of land to be conveyed to the use of John Abdy for life, and after his decease to, for, and upon the uses, trusts, intents and purposes, and with, under, and subject to the powers, provisos, declarations and agreements limited, expressed, declared and contained in and by an indenture of settlement bearing even date with, but executed before, the execution of that her will (of which settlement the said Thomas Mills and Charles Druce were also trustees), and the testatrix appointed the said Thomas Mills, Charles Druce, and her husband, trustees and executors of his will.

By the indenture so referred to in the will of Caroline Abdy, and dated the 7th of April, 1838, it was agreed and declared that the hereditaments and premises thereby appointed should from and after the decease and failure of issue of Caroline Abdy (but subject to the prior uses and estates therein mentioned), go, remain and be to the use of James Mills and his assigns during his life, and after his decease to the use of his issue in tail as therein mentioned, and in default of such issue to the use of Christopher John Mills for his life, and after his decease to the use of the plaintiff William John Rous for life, and after his decease to the use of his first and other sons in tail male, with divers remainders over.

Caroline Abdy died on the 4th of May, 1838, without ever having had any issue, and her will was proved by her husband and the other two executors, and the funds then subject to the trusts of the indenture of the 12th of July, 1800, were transferred into the names of the said Thomas Mills and Charles Druce.

John Abdy died on the 1st of April, 1840, having by his will given all the residue of his personal estate and effects to Thomas Abdy for his own use and benefit, who died on the 20th of July, 1877, having by his will appointed the defendants Cartmell Harrison and James Crofts Ingram executors thereof.

Christopher John Mills died on the 4th of October, 1855.

James Mills died on the 18th of December, 1883, without ever having had any issue. James Mills and the plaintiff were both born subsequently to the execution of the indenture of the 12th of July, 1800.

The trust funds appointed by the will of Caroline Abdy were never invested in the purchase of land pursuant to the direction in that behalf in her will, and were when this action was commenced standing in the name of the trustees of her will.

The plaintiff claimed a declaration that the will of Caroline E. H. Abdy operated as a valid execution of the power of appointment reserved to her by the indenture of the 12th of July, 1880, and that the trust funds subject to the indenture of settlement were validly appointed, and that the plaintiff was entitled to the income thereof.

CHITTY, J. (after stating the facts of the case proceeded as follows): Mrs. Abdy by her will expressly exercised the power of appointment given her by the settlement, directing the trustees of that settlement to transfer the funds comprised in the power to two trustees named by her, to whom she also appointed and gave "all other moneys, stocks, and funds of which she had power to dispose by virtue of the said indenture of settlement or otherwise howsoever" upon the trusts and to and for the intents and purposes therein mentioned.

The principle laid down by *Wilkinson v. Schneider*, Law Rep. 9 Eq. 423, is firmly established, that under a general testamentary power of appointment such as this the trustees of the settlement creating the power are bound to hand over the trust funds in their hands to the persons named by the donee of the power, and therefore the trusts in default of appointment cannot arise.

In the case of the exercise of such a power by a man the rule is clear. In the case of a married woman, which is the case before me, the late Master of the Rolls has decided in the case of *In re Pinède's Settlement*, 12 Ch. D. 667, that the married woman can make the fund her own by exercising the power, and in this case if all the trusts limited by Mrs. Abdy had failed, I have no doubt that her husband would be entitled to take the property by virtue of his marital right.

On the part of the representatives of the husband it is argued that the trusts of the will and settlement of even date are to be incorporated with and read as part of the settlement of 1800, and that then, according to the decision of James, V. C., in *In re Powell's Trusts*, 39 L. J. (Ch.) 188, they are invalid as contravening the rule against perpetuities: that is so, and the question therefore arises whether the decision in *In re Powell's Trusts* is consistent with the course of authorities. James, V. C., in that case decided that such a general testamentary power of appointment given to a married woman is not equivalent to ownership, so that as regards the rule against perpetuities the interest arising under the execution of the power by her will must be considered as created under the deed or will conferring the power.

This decision is reported in the Law Journal reports, and also in the Weekly Reporter, but it is not reported in the Law Reports, but I am not entitled to say on that account that it is not properly reported, or an authority to which I need pay no attention. The case is reported, and I must attend to it and deal with it as best I can. I think the Vice-Chancellor in that case fell into an error. I can find no distinction between the case of capacity to alienate existing by reason of a general power and general capacity to alienate property. For the pur-

poses of the power, the person exercising it, whether a man or a married woman, stands in exactly the same position with reference to the disposition purported to be made under the power.

Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers says (8th ed., p. 394): "A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases." He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord St. Leonards also says, *Ibid.*, p. 395: "Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it." He goes on to quote Mr. Powell's note to Fearn's *Executory Devises* (page 5), in favor of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee.

There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established "after a series of cases:." Butler's *Coke upon Littleton*, 272a.

I think, therefore, there must be some error, some slip in the decision of *James, V. C.*, in *In re Powell's Trusts*, and that the case was wrongly decided, and consequently that I must treat a feme covert as capable of creating the same limitations under a general power of appointment as she could under a will of her separate estate. The result, therefore, is, that I hold the appointment by Mrs. Abdy valid, and I give judgment for the plaintiff in the terms asked for by the statement of claim.⁹

⁹ Accord: *In re Flower*, 55 L. J. Ch. N. S. 200 (1885); *Stuart v. Babington*, 27 L. R. (Ireland) 531; 26 H. L. R. 64.

AS TO POWERS OF SALE IN TRUSTEES.—*Lantsbery v. Collier*, 2 K. & J. 709 (1856); *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Gray, Rule Against Perpetuities*, §§ 481-509 (2d Ed.) §§ 509a-509r.

Threat v. Pow 235 Mass 514
Don. James

CHAPTER VIII

CHARITIES

CHRIST'S HOSPITAL v. GRAINGER.

(Court of Chancery, 1849. 1 Macn. & G. 460.)

The material facts and circumstances of this case, which has been already reported in the court below (16 Sim. 83), and the several points raised on the hearing of the appeal, are sufficiently stated for the purpose of this report in the following judgment.

THE LORD CHANCELLOR [LORD COTTENHAM]. This is an appeal by the Attorney-General, who is a defendant in the cause, and the first question to be considered is the position which the Attorney-General has assumed by this rehearing.

The Corporation of London, as governors of Christ's Hospital, by the bill claimed certain property which had been left by the testator, John Hendricke, in 1624, to the corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the corporation of London for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney-General in the Court of Exchequer against the corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confined to Reading; and providing, as in the will, that if the corporation of Reading should neglect to perform the directions of the decree, or should misemploy the trust property, and such neglect and misemployment should continue for a year, the legacy should be void and of no effect as to Reading, and that the property should be forthwith paid and transferred to the corporation of London, for the benefit of Christ's Hospital.

That the directions of this decree as well as those of the will have been neglected and unperformed for the period of far more than one year, is a fact clearly established, and not in dispute on this rehearing. Upon this fact the corporation of London by their bill sought to recover the property for the benefit of Christ's Hospital, and this the decree of the Vice-Chancellor directed. The Attorney-General was properly a party to this suit, but, as it appears, took no part in the discussion. To this there could be no objection, there being before the court parties, the trustees for the town of Reading, immediately inter-

ested in resisting the claim of the plaintiffs; but that course could only be unobjectionable upon the Attorney-General's having considered that he might properly, not only leave the discussion to the other defendants, but abide by the decision upon it. I cannot approve of any party after a decree, which he did not oppose, reopening the discussion by a rehearing. As to such a party the proceeding is in effect an original hearing. What might be the result of such an attempt by an ordinary party, I need not now decide; because in cases of charities the court is less strict in enforcing its rules of proceeding, and will not upon such an objection refuse to hear such case as the Attorney-General may have to make.

This leads to the consideration of what the case is that the Attorney-General can make upon this rehearing. The only case he can make, and what he has attempted, is to show that the bill ought to have been dismissed; that so far as this cause is concerned, the court ought to have decided that, although the directions of the will and of the decree of the Exchequer have been wholly neglected, and the charity property, therefore, misapplied, the town of Reading is nevertheless to continue in the enjoyment of the property. Such in point of form must be the contention of the Attorney-General; but such is not and cannot be his real object; but he, finding that the decree shuts out the case which he had thought it right to present to the court upon an information,¹ takes this step to remove that impediment out of his way. This again shows how unfortunate it was he did not raise the whole case in the court below, which might and ought to have been done by the cause and the information being heard together. This court is well justified in regretting, and possibly in complaining, that this was not done; but I do not think it right upon these grounds to decline giving my opinion upon the points raised now for the first time by the Attorney-General, and I proceed, therefore, to consider them, bearing in mind that this is a gift to a corporation upon certain charitable trusts, with a proviso that in a certain event such gift shall cease, and the property be transferred to another corporation for certain other charitable trusts; and that the event, upon which such cesser and transfer were directed to take place, has happened.

Brown v. Higgs, 8 Ves. 574, was indeed cited, as proving that the gift over could not take effect from the act of the trustees. That case not only does not support that proposition, but proceeds upon a principle inconsistent with it; for it only upon this point decided, that the object of a testator should not be disappointed by the neglect of a trustee; but in this case the testator has made the gift over to depend

¹ Previously to the institution of this suit, an information had been filed by the Attorney-General on the recommendation of the charity commissioners (but to which the present plaintiffs were not made parties), praying a scheme for the future regulation of the charity, and suggesting a *cy pres* application of its funds to the building and endowment of schools in the town of Reading.—*Rep.*

upon the act of the trustee; and to hold that the act of the trustee was inoperative for that purpose, would be to defeat and not to forward his object. The Attorney-General, however, further contends that this provision for cesser and transfer was void as repugnant to the original gift. This is so, if the original gift was indefeasible, but not otherwise, and that is the question; the proposition therefore is only a consequence of the point in dispute, if decided one way, and not an argument for the decision.

It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account.

The next argument was, that the forfeiture created by the will was destroyed by the decree, and that the forfeiture created by the decree was inoperative, being beyond the jurisdiction of the court. These arguments are not very consistent. If the court exceeded its jurisdiction in the provision for the transfer, the provisions of the will were not affected by it; but in fact the decree only varied the first trusts prescribed by the will, substituting others; but preserved the forfeiture; and whether the forfeiture under the will or under the decree be the operative provision is not material, it being established that the event has happened which under either was to create the cesser and transfer. To meet this answer, it was contended, that the bill sought relief only under the provisions of the will; but that is not so, for the bill alleges that "the plaintiffs are advised that under the circumstances before stated the limitation over in favor of the plaintiffs contained in the will has taken effect, and that the plaintiffs are now entitled under the provisions of the will and of the decree to have the estates and property transferred to them."

But lastly, it was contended, that the plaintiffs' claim was barred by time, more than twenty years having elapsed since the facts which are said to have created the forfeiture, and since the plaintiffs knew of these facts. Time is permitted to create a bar in order to quiet titles. Is then the Attorney-General contending that time has sanctioned the breaches of trust committed by the corporation of Reading, and that the purposes to which they applied the trust property are not to be disturbed? This cannot be, and is not the object of the Attorney-General. His object is to let in the jurisdiction of the court for the purpose of having the property applied to purposes distinct from any provisions of the will or decree. He repudiates the purposes to which the corporation of Reading were directed to apply the property, as

much as he does those to which the corporation of London were directed to apply it. Is this quieting the title of the corporation, or of those who now claim in their place?² The question is not whether time is a bar to any claim adverse to the title of the original donee; but whether such title is to be superseded in favor of those to whom upon failure of such title the testator has given the property, or in favor of general charity unconnected with any expressed object of the testator. If, indeed, there were adverse claims between cestui que trusts, time might create a bar as between them, though it could not as between a cestui que trust and a trustee, upon the principle ultimately established in *Cholmondeley v. Clinton*, 2 J. & W. 1; but that is not the case here: both the contending parties, the Attorney-General and the plaintiffs, under the same facts, claim the property which up to the present time has remained in the hands of the forfeiting party who no longer disputes the forfeiture. As between the Attorney-General and the plaintiffs, there has not been any adverse title or possession.

Some confusion may have arisen from the use of the word forfeiture. In one sense, the cesser of one set of trusts, and the commencement of the other may be considered as a forfeiture, but the form and substance of the provision is rather a substitution of one trust for another. The property was vested in the corporation of Reading, but in a certain event they were to become trustees of it for Christ's Hospital. Now if the effect of these provisions was to constitute the corporation of Reading, in the event which happened, trustees for Christ's Hospital, until they transferred the property as directed, (and such it would seem was the only interest they had, and the only duty they had to perform,) there could not have arisen, as between them and the plaintiffs, any question of time or adverse possession: but that is not the question I have to consider.

It appears to me that the Attorney-General cannot maintain the points he has attempted to establish upon this rehearing, and that the decree of the Vice-Chancellor must be affirmed.³

² i. e. The defendants, Grainger and others, who had been appointed by the Lord Chancellor trustees of the charity estates under the provisions of the Municipal Reform Act.—*Rep.*

³ Accord: *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141 (1887); *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

In re TYLER.

(Chancery Division, Court of Appeal. L. R. [1891] 3 Ch. 252.)

Appeal from Mr. Justice Stirling. Sir James Tyler, who died on the 5th of April, 1890, by his will, dated the 18th of April, 1882, after appointing his brothers, William Tyler and Charles Tyler, his executors, made the following bequest:

"I give to the trustees for the time being of the London Missionary Society the sum of £42,000 Russian 5 per Cent. Stock, with a reit-charge to my brother, Charles Tyler, Esq., of £1000 a year for life. Also I commit to their keeping of the keys of my family vault at Highgate Cemetery, to the (sic) care and charge, my brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the Blue Coat School, Newgate Street, London."

This was an originating summons to obtain the opinion of the court as to whether (among other questions arising on the will) the condition attached to the above legacy, for keeping up the testator's family vault, was valid and binding on the legatees, the trustees of the London Missionary Society.

The summons was heard before Mr. Justice Stirling on the 21st of February, 1891.

STIRLING, J. The question I have to consider is, whether the condition attached by the testator to the legacy to the London Missionary Society is binding on the trustees of that society, or is void. No doubt a trust or gift for keeping up a tomb not forming part of a church is bad, since such a purpose is not charitable, and the trust or gift creates a perpetuity. Thomson v. Shakespear, 1 D. F. & J. 399; Rickard v. Robson, 31 Beav. 244; Hoare v. Osborne, Law Rep. 1 Eq. 585. Here, however, the question is not whether the gift or trust for the purpose of keeping up the tomb is good or bad, but whether the gift over, in the event of failure to keep in repair, to another charity can be held to be bad. The rule against perpetuities has no application to a transfer in a certain event from one charity to another, as is expressly laid down by Lord Cottenham in the case of Christ's Hospital v. Grainger, 1 Mac. & G. 460, 464. It is said that the condition tends to produce or bring about a misapplication of funds devoted to charitable purposes, and the case of Wilkinson v. Wilkinson was referred to as showing that the gift must, therefore, be held to be bad. I am, however, unable to see that the condition imposed here tends necessarily to a breach of trust on the part of the trustees of the society. Such societies depend largely on the voluntary contributions of their supporters; and the funds required for keeping the

family vault in repair may readily, I doubt not, be obtained from persons willing to subscribe for the purpose of retaining the administration of this large fund in the hands of the society, and without in the least trenching on any funds devoted to charitable purposes.

I am of opinion, therefore, that the condition is good.

From that decision the defendants, the trustees of the London Missionary Society, appealed, asking that it might be declared that the condition attached to the legacy was void, and that the gift over of the legacy to the defendants, the Governors of Christ's Hospital, upon the breach of such condition, was not a good gift.

Since the commencement of the proceedings the plaintiff had died, the defendant, Charles Tyler, thus becoming the testator's sole legal personal representative.

The appeal came on for hearing on the 17th of July, 1891.

LINDLEY, L. J. In this case Sir James Tyler, by his will, made a disposition which is not in very artificial language, but it is tolerably plain. It runs thus: "I give to the trustees for the time being of the London Missionary Society the sum of £42,000 Russian 5 per Cent. Stock, with a rent-charge to my brother Charles Tyler, Esq., of £1000 a year for life. Also I commit to their keeping of the keys of my family vault at Highgate Cemetery to the care and charge." Then comes a clause which is parenthetical: "My brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair, and name legible, and to rebuild when it shall require."

Leaving out the parenthetical clause as to the brothers, it runs thus: "I commit to their keeping"—that is, the London Missionary Society's keeping—"of the keys of my family vault at Highgate to the care and charge"—I suppose that means "their" care and charge—"the same to be kept in good repair, and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the Blue Coat School, Newgate Street, London."

Mr. Justice Stirling has decided that the condition on which the gift over is to take effect is valid, and the appeal to us is against so much of his order as declares that the condition of repairing and rebuilding the family vault is a valid condition and binding on the defendants, the London Missionary Society; the defendants asking that that may be reversed.

There is no doubt whatever that this condition, in one sense, tends to a perpetuity. The tomb or vault is to be kept in repair, and in repair for ever. There is also no doubt, and I think it is settled, that a gift of that kind cannot be supported as a charitable gift. But, then, this case is said to fall within an exception to the general rule relating to perpetuities. It is common knowledge that the rule as to perpetuities does not apply to property given to charities; and there are reasons why it should not. It is an exception to the general rule; and

we are guided in the application of that doctrine by the case which has been referred to of *Christ's Hospital v. Grainger*, 1 Mac. & G. 460. It is sufficient for me to refer to the head-note for the facts. The bequest there was "to the corporation of Reading, on certain trusts for the benefit of the poor of the town of Reading, with a proviso that, if the corporation of Reading should, for one whole year, neglect to observe the directions of the will, the gift should be utterly void, and the property be transferred to the corporation of London, in trust for a hospital in the town of London." It was argued that that gift over was invalid, and Lord Cottenham disposes of the argument in this way (1 Mac. & G. 464): "It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account."

Guided by that decision, and acting on that principle, Mr. Justice Stirling held that this condition was a valid condition; and it appears to me that he was right. What is this gift when you come to look at it? It is a gift of £42,000 Russian 5 per Cent. Stock to the London Missionary Society. What for? It is for their charitable purposes. It is a gift to them for the purposes for which they exist. Then there is a gift over to another charity in a given event—that is to say, the non-repair of the testator's vault. It seems to me to fall precisely within the principle on which *Christ's Hospital v. Grainger* was decided. A gift to a charity for charitable purposes, with a gift over on an event which may be beyond the ordinary limit of perpetuities to another charity—I cannot see that there is anything illegal in this. Mr. Buckley has put it in the strongest way he can. He says that, if you give effect to this condition, you will be enabling people to evade the law relating to perpetuities. I take it this decision will not go the length—certainly I do not intend it should, so far as I am concerned—that you can get out of the law against perpetuities by making a charity a trustee. That would be absurd; but that is not this case. This property is given to the London Missionary Society for their charitable purposes. Then, there is a condition that, if the tomb is not kept in order, the fund shall go over to another charity. That appears to me, both on principle and authority, to be valid; and I do not think it is a sufficient answer to say that such a conclusion is an inducement to do that which contravenes the law against perpetuities. There is nothing illegal in keeping up a tomb; on the contrary, it is a very laudable thing to do. It is a rule of law that you shall not tie up property in such a way as to infringe what we know as the law against

perpetuities; but there is nothing illegal in what the testator has done here. The appeal must be dismissed with costs.

FRY, L. J. I am of the same opinion.

In this case the testator has given a sum of money to one charity with a gift over to another charity upon the happening of a certain event. That event, no doubt, is such as to create an inducement or motive on the part of the first donee, the London Missionary Society, to repair the family tomb of the testator. Inasmuch as both the donees of this fund, the first donee and the second, are charitable bodies, and are created for the purposes of charity, the rule of law against perpetuities has nothing whatever to do with the donees. Does the rule of law against perpetuities create any objection to the nature of the condition? If the testator had required the first donee, the London Missionary Society, to apply any portions of the fund towards the repair of the family tomb, that would, in all probability, at any rate, to the extent of the sum required, have been void as a perpetuity which was not charity. But he has done nothing of the sort. He has given the first donee no power to apply any part of the money. He has only created a condition that the sum shall go over to Christ's Hospital if the London Missionary Society do not keep the tomb in repair. Keeping the tomb in repair is not an illegal object. If it were, the condition tending to bring about an illegal act would itself be illegal; but to repair the tomb is a perfectly lawful thing. All that can be said is that it is not lawful to tie up property for that purpose. But the rule of law against perpetuities applies to property, not motives; and I know of no rule which says that you may not try to enforce a condition creating a perpetual inducement to do a thing which is lawful. That is this case.

Then it is said by Mr. Buckley, "But if the gift had been to the London Missionary Society simply, they might have spent the money; by imposing this condition you require them to keep that invested, because it may have to go over at any moment to Christ's Hospital." What is the harm of that? Being a charity, and not affected by the rule against perpetuities, whether you direct them to keep the money invested in plain words, or whether you impose the condition which renders it necessary to keep it invested, seems to me the same thing and to be equally harmless, and not affected by the law against perpetuities.

I think the learned Judge in the court below was quite right, and that this appeal must be dismissed.

LOPES, L. J. I am of the same opinion.

In re BOWEN.

(Chancery Division, 1893. L. R. [1893] 2 Ch. 491.)

Adjourned summons. The Rev. Daniel Bowen, of Wann-I-for, in the county of Cardigan, by his will, dated the 3d of September, 1846, bequeathed to trustees two sums of £1,700 and £500, respectively, upon trust to invest the same, and in the next place to establish in each of certain parishes in Wales, a Welsh day-school to be called the "Wann-I-for Charity School," and to continue the same schools for ever thereafter; and he declared that "if at any time hereafter the Government of this kingdom shall establish a general system of education, the several trusts of the said several sums of £1,700 and £500 shall cease and determine, and I bequeath the said several sums in the same manner as I have bequeathed the residue of my personal estate."

The testator appointed his sisters, Jane Lloyd, Ann Phillips, and Rachel Rees, to be his executrixes and residuary legatees.

The testator died in October, 1847, and after his death the two sums of £1,700 and £500 were duly applied for the purposes of the charities.

This was an originating summons taken out by the personal representatives of the residuary legatees raising the following questions: (1) whether the Government had by the Elementary Education Act, 1870, and the Acts amending it, established a general system of education; (2) whether the trusts by the will declared of the two sums of £1,700 and £500 had ceased and determined; and (3) whether, if so, those sums had fallen into the residue of the testator's estate. The summons was opposed by the trustees of the charities and the Attorney-General.

STIRLING, J. (after stating the facts, continued). According to the law as stated by Sir G. Jessel, M. R., in *London and South-Western Railway Co. v. Gomm*, 20 Ch. D. 562, 581, if the gift in favor of the residuary legatees is one 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, then the gift is bad, unless the circumstance that the prior gift is in favor of a charity makes a difference. It has been decided that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another. *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; *In re Tyler*, [1891] 3 Ch. 252. The principle of those decisions, however, does not extend, in my opinion, to cases where (1) an immediate gift in favor of private individuals is followed by an executory gift in favor of charity, or (2) an immediate gift in favor of charity is followed by an executory gift in favor of private individuals. Of the former class of cases Lord Chancellor Selborne, in giving the judgment of the Court of Appeal in *Chamberlayne v. Bockett*, Law Rep. 8 Ch. 211, says: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment,

to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." The second class of cases does not seem to have fallen under the consideration of any court in this country; but the Supreme Court of Massachusetts has in *Brattle-Square Church v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, and *Theological Education Society v. Attorney-General*, 135 Mass. 285, held that the rule against perpetuities applies to them. For the knowledge of these decisions I am indebted to the very learned and able treatise of Professor J. C. Gray on the Rule against Perpetuities (see sect. 593), to which I was referred in argument. On the other hand, as property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to develop as the law prescribes. Of this an example is to be found in *In re Randell*, 38 Ch. D. 213, 218, in which the head-note is as follows: "A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at H. for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings was ever demanded, she directed the £14,000 to fall into her residue:—Held, first, that the testatrix had not expressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy près*; secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities." In giving judgment Mr. Justice North said: "On the construction of the will, it is a charity for a particular limited purpose, and nothing beyond that is declared; as soon as that particular purpose comes to an end, the fund which was subjected to that particular trust falls into the residue of the estate; and it would do so just as much if there was no such limitation as this in the will, as it does when the limitation exists. The limitation is that, in that case, 'the trust moneys, and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my residuary personal estate.' If she had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law."

The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i. e., whether the testator has given the property to charity, in perpetuity, subject

to an executory gift in favor of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by Lord Selborne in *Pearks v. Moseley*, 5 App. Cas. 714, 719: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law." Now, the sums of £1,700 and £500 are bequeathed to trustees who are obviously selected with a view to the efficient administration of the charitable trusts created by the will, and were not intended by the testator to be charged with any duties as regards any other portion of his property. He directs the trustees named in the will, by means of the funds paid over to them by his executors, to establish certain schools, "and to continue the same schools for ever thereafter." He contemplates a perpetual succession of trustees in whom the execution of the trusts is to be vested. I think that on the true construction of the will there is an immediate disposition in favor of charity in perpetuity, and not for any shorter period. That is followed by a gift over if at any time the Government should establish a general system of education; and under that gift over the residuary legatees take a future interest conditional on an event which need not necessarily occur within perpetuity limits. It follows that the gift over is bad; and, consequently, the summons must be dismissed.⁴

⁴ Where the gift to the charity comes to an end at too remote a time, there is a resulting trust, and the fact that at that time those are entitled who would take under the residuary clause makes no difference. In *re Blunt's Trusts*. [1904] 2 Ch. 767; *Hopkins v. Grimshaw*, 165 U. S. 342, 355, 17 Sup. Ct. 401, 41 L. Ed. 739; *Gray, Rule Against Perpetuities* (2d Ed.) § 603i.

SINNETT v. HERBERT.

(Court of Chancery, 1872. L. R. 7 Ch. 232.)

This was an appeal from a decision of Vice-Chancellor Bacon, Law Rep. 12 Eq. 201.⁵

Mary Moine, by her will, dated the 7th of April, 1865, after giving certain annuities and disposing of her real estates, bequeathed to Frederick Rowland Roberts and John Sinnett, whom she appointed her executors, £3,000, "to be by them applied in aid of an endowment for a Welsh church now in course of erection at Aberystwith. And as for and concerning the residue of my personal estates and effects, subject to the payment of my debts, funeral and testamentary expenses, and the legacies hereinbefore by me bequeathed, I bequeath the same to the said F. R. Roberts and J. Sinnett upon trust to be by them applied in aid of erecting or of endowing an additional church at Aberystwith aforesaid."

The testatrix died on the 10th of December, 1866.

A suit having been instituted for the administration of the testatrix's estate, an inquiry was directed by the decree whether there was any church answering the description in the will of "an additional church at Aberystwith" being erected or being about to be erected at the time of the death of the testatrix.

By his certificate, the chief clerk found that there was not any church answering the description in the will of an additional church at Aberystwith being erected or being about to be erected at the time of the testatrix's death.

It appeared from the evidence of the vicar of Aberystwith, that at the date of the will there was at Aberystwith the church of St. Michael, which was constituted by Order in Council in 1861 the district church, and that there was also a church then in course of erection as a chapel of ease to St. Michael's, and known as the "Welsh church," from its being intended to hold the services therein in Welsh. This church was opened for public worship in August, 1867. Beyond these two churches, there was no other church at Aberystwith, and there was not any church being erected or being about to be erected there, although, as the vicar stated, he had often talked with the testatrix respecting the endowment of the Welsh church, and the necessity during the summer season of additional church accommodation, either by enlarging St. Michael's, or by building an additional church, or by having an additional service for visitors at the Welsh church.

The Vice-Chancellor held that the gift of the residue was not intended to provide an endowment, except in the event of a church being erected or in course of erection at the testatrix's death, and that the gift, therefore, failed.

⁵ Part of the case is omitted.

From this decision the Attorney-General appealed.

LORD HATHERLEY, L. C. I entertain no doubt as to what ought to be done in the present case. Very able arguments on both sides have been addressed to me this morning with respect to the application of the doctrine of *cy pres*, but I do not think that there is any necessity for going into that question at present. As far as I can judge from what has been stated there is a possibility of a church being built at Aberystwith, and therefore I think it is extremely probable that we may never arrive at the application of that doctrine at all.

I think it is plain in the first place that upon the true construction of the will the bequest must be taken to be a bequest for the purpose of aiding in the erection of any additional church in Aberystwith. I differ so far from the Vice-Chancellor, who thought that the testatrix intended to confine her executors to the case of an actual church erected and requiring endowment, or a church in progress of erection at the time of her death.

As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the Attorney-General v. Bishop of Chester, 1 Bro. C. C. 444, is a complete answer. In that case the very point which arises here was suggested. There was a sum of £1,000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the king's dominions in America. There was no bishop in America. The sum, being only £1,000, was not very likely in itself to be sufficient to establish a bishop. Nothing could be more remote, or less likely to happen within a reasonable period, than the appropriation of that fund to that particular object. But the court did not direct any application of the fund according to the *cy pres* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time, with liberty to apply, because it was not known whether any bishop would be established. But that the court would continue to retain it forever, waiting until a bishop should be appointed, I think is a very doubtful proposition.

There have been numerous cases of gifts to charities where an inquiry has been directed, whether there is anything in esse to which the fund of the testator can be properly applied so as to carry out his wishes. One of the last of such cases was that cited by Mr. Bristowe, Russell v. Jackson, 10 Hare, 204, in which the testator wished a socialist school to be established. The court held the gift as to the impure personalty to be bad under the Statute of Mortmain. It then directed an inquiry what the principles of socialism were, in order to see whether they contained anything really objectionable. A similar inquiry appears to have been directed in the case of Thompson v. Thompson, 1 Coll. 395, where the testator left a fund for the appointment of a professor to teach his opinions as contained in the testator's printed books, which nobody at that time had read. It being found on inquiry that there was nothing contrary to morality or religion in the

opinions contained in those books, the trust was ordered by the court to be carried out.

The course, therefore, that seems to me the correct one, upon the first part of the case, is to direct an inquiry at chambers whether or not the funds which are effectually given to the trustees for the purpose of aiding in erecting or endowing a church at Aberystwith, or any and what part thereof, can be so laid out and employed.

CHAMBERLAYNE v. BROCKETT.

(Court of Chancery, 1872. L. R. 8 Ch. 206.)

This was an appeal by the Attorney-General from a decision of the Master of the Rolls.

Sarah Chamberlayne, by will dated the 13th of January, 1858, after giving various legacies, mostly for charitable purposes, proceeded as follows:

“As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it. I therefore give and bequeath all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, after payment of all my just debts, my funeral expenses, and legacies as aforesaid, unto my said brothers, William Chamberlayne, John Chamberlayne, and H. T. Chamberlayne, and to the survivors and survivor of them, and to the executors, administrators, and assigns of such survivor upon trust that they do and shall, with all convenient expedition after my death, invest the same and every part thereof in the stock called £3 per Cent. Consolidated Bank Annuities after selling such parts of the said residue as may be necessary for that purpose; and my will and desire is that the said trustees do and shall stand possessed of the said residue so invested as aforesaid upon the trusts, intents, and purposes following: (that is to say) upon trust to pay out of the annual dividends or proceeds of the said residue so invested as aforesaid the sums following, yearly and every year forever (that is to say):” [Here followed a list of small annual payments]. “And my further will and desire is, when and so soon as land shall at any time be given for the purpose as hereinafter mentioned, that an almshouse or almshouses, consisting of ten rooms with suitable appendages for ten poor persons, should be built in the parish of Southam, in the county of Warwick; also an almshouse or almshouses, consisting of five rooms with suitable appendages for five poor persons, in the parish of Long Itchington, in the county of Warwick” [similar directions as to two other almshouses], “all to be built in a plain substantial manner, no expensive ornament what-

ever." [Here followed directions as to the inmates.] "And my will and desire further is, that the surplus remaining after building the almshouses aforesaid should be appropriated to making weekly allowances to the inmates of each; and my will and desire is that each room in the several almshouses aforesaid should be supplied with a suitable Bible of a large type."

The above trustees were named executors.

William and John Chamberlayne predeceased the testatrix. Henry Thomas Chamberlayne, the sole surviving executor, proved the will, and filed his bill against the other next of kin for the administration of the personal estate. The Attorney-General was served with the decree. The residuary estate, which consisted of pure personalty, was found, on taking the account, to amount to upwards of £10,000. The Master of the Rolls, on the case coming on for further consideration, held that the residue was not effectually given in charity, but was divisible among the next of kin of the testatrix.⁶

LORD SELBORNE, L. C. The only question which appears to us to require decision in this case is whether, upon the true construction of the will, a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the almshouses and almspeople was conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument (*Attorney-General v. Bishop of Chester*, 1 Bro. C. C. 444; *Henshaw v. Atkinson*, 3 Madd. 306; and *Sinnett v. Herbert*, Law Rep. 7 Ch. 232; to which may be added *Attorney-General v. Craven*, 21 Beav. 392) prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities (as was said by Lord Cottenham in *Christ's Hospital v. Granger*, 1 Mac. & G. 464) "are to prevent, in the cases to which they ap-

⁶ Lord Romilly, M. R., after giving his reason for holding some of the legacies void, continued:

I am of opinion that the gift of the residue is also void, not as being affected by the Mortmain Act, but as being a perpetuity. Suppose a testator gave £1,000 to be accumulated until some heir of John Jones should select a descendant of A. B. to receive it. That would be void on the ground of perpetuity, because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless and until some person gives land for the purpose of the charity, which may not happen for an indefinite period. I am, therefore, of opinion that there is an intestacy as to the residue.

ply, property from being inalienable beyond certain periods." But those rules do not prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is (to use again Lord Cottenham's language) "neither more nor less alienable" because there is an indefinite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined. If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this court has power to apply the surplus, or the whole (as the case may be) to such other purposes as it may deem proper, upon what is called the *cy pres* principle.

On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.

We agree with what was said by the Master of the Rolls in *Cherry v. Mott*, 1 My. & Cr. 132, that "there may no doubt be a conditional legacy to a charity as well as for any other purpose;" and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the Solicitor-General that *Cherry v. Mott*, and other cases of the same class which have followed it, were ill-decided. If we thought (as appears to have been the view of the Master of the Rolls) that the case now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of almshouses upon the land to be so given, and the maintenance of almspeople therein, we should probably have concurred in the conclusion of his Lordship that such a contingent gift to trustees (although for a charity), having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other than charitable objects.

If, therefore, we differ (as we are compelled to do) from the decree at the Rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" her whole residuary estate "in charity to God

who gave it;” and she “therefore” gives and bequeaths it immediately upon her death to trustees to invest the whole in Consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions on which the present question arises for the erection of almshouses and the maintenance of almspeople therein “when and so soon as land shall at any time hereafter be given for that purpose.” According to *Green v. Ekins*, 2 Atk. 473; *Hodgson v. Lord Bective*, 1 H. & M. 376, 397, and other similar cases, a gift of the residue of personal estate carries with the corpus the whole income arising therefrom and not expressly disposed of as income, or expressly directed to be accumulated, from the day of the death of the testator. Here, therefore, nothing is undisposed of, there is no resulting trust for the next of kin. The intention in favor of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied. Taking this view of the proper construction of the will, we hold the present case to be completely governed by *Attorney-General v. Bishop of Chester*, *Sinnett v. Herbert*, and the other authorities of that class; and we propose accordingly to vary the decree of the Master of the Rolls by a declaration that the residue of the personal estate of the testatrix (which we assume to be all pure personalty) is well given to charity, and by directing an inquiry similar in principle to that in *Sinnett v. Herbert*, whether any land has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

The Lords Justices concurred.

In re LORD STRATHEDEN.

(Chancery Division. L. R. [1894] 3 Ch. 265.)

William Lord Stratheden and Campbell, by his will, dated the 16th of January, 1892, appointed the defendant and two other persons his executors, and thereby he bequeathed “an annuity of £100 to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel.”

The testator died on the 21st of January, 1893, and his will was proved by the defendant alone, who was the sole residuary legatee under the will.

The plaintiff was the lieutenant-colonel of the 22d Middlesex Rifle Volunteer Corps, otherwise known as “The Central London Rangers,” which position he held both at the date of the will and of the death of the testator, and the property of the said volunteer corps

was vested in him. The plaintiff claimed a declaration that the said annuity was a valid bequest, and was vested in him as the commanding officer of the said volunteer corps, and that a sufficient part of the testator's estate might be appropriated to provide for the same.

The defendant, by his statement of defence, alleged that the bequest was void for uncertainty, and also because it infringed the rule against perpetuities.

ROMER, J. I am sorry I do not see my way to uphold the validity of this gift. As was pointed out by Lord Selborne in *Chamberlayne v. Brockett*, Law Rep. 8 Ch. 211, "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." Applying that to the present case, I look to see, in the first place, Is this gift conditional, and what is the condition? Well, unfortunately, it appears to me that it clearly is conditional. The annuity is not to be paid except on the appointment of the next lieutenant-colonel; and if a lieutenant-colonel is not appointed, the annuity is not to commence or be paid. That being so, it being conditional, can I say that the condition must arise within the time that is prescribed by the rules of law against perpetuities? I am sorry to say I cannot. If I could construe it as a gift on the death of the present lieutenant-colonel, the difficulty would be got over; but I do not see my way to construe the will so. It is a gift conditional on the appointment of the next lieutenant-colonel. Now, the next lieutenant-colonel may not be appointed for some time after the death of the present commanding officer; he never may be appointed at all; and, consequently, it appears to me that this is a gift conditional upon an event which transgresses the limit of time prescribed by the rules of law against perpetuities. Therefore, reluctantly, I feel myself bound to hold that this gift fails, and I must dismiss the action, but I do so without costs.⁷

MARTIN v. MARGHAM.

(Court of Chancery, 1844. 14 Sim. 230.)

Samuel Butler, by his will dated in May 1821, bequeathed the whole of his property to trustees in trust to convert the same into money and to invest the proceeds in the three per cents, and after paying certain annuities, to add the dividends to the capital until it should pro-

⁷ See, also, *Worthing Corp. v. Heather*, [1906] 2 Ch. 532; *Girard Trust Co. v. Russell*, 179 Fed. 446, 102 C. C. A. 592 (1910).

duce an income of £600 a year; when he hoped that every five years' receipt of that income would produce an increase of income of £150 a year; and his will was that every such increase of income should be appropriated as he should thereafter specify, for the benefit of the parish charity-schools of this country, in the following order, namely, the first school to receive the benefit, was to be St. Ann's, Limehouse; the second, St. Paul's, Covent Garden; the third, St. Mary's, Sandwich; the fourth, St. Paul's, Shadwell. The testator then named nine other parishes, and left it to his trustees to fix, appoint and establish, in regular rotation, the remaining parish charity-schools, taking always the nearest parish to the last establishment.

The testator died in May 1837.

A suit for the administration of his estate came on for further directions.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL]. Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet, as there is, confessedly, a devotion of his personal estate to charitable purposes, my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may have pointed out for effecting those purposes, has nothing to do with the question whether the devotion for charitable purposes shall take place or not: and that, whatever the difficulty may be, the court, if it is compelled to yield to circumstances, will carry the charitable intention into effect through the medium of some other scheme.

I shall, therefore, declare, that subject to the annuities, there is a good gift of the residue to charitable purposes to be carried into effect according to a scheme to be settled by the master; and I shall direct the master, in settling the scheme, to have regard to the objects specified in the will.⁸

⁸ Part of the case, relating to another point, is here omitted.

See, also, *In re Swain*, L. R. [1905] 1 Ch. 669; *Odell v. Odell*, 10 Allen (Mass.) 1 (1865).

Effect on a trust for accumulation where the ultimate gift is void for remoteness, *Southampton v. Hertford*, 2 Ves. & B. 54 (1813); *Curtis v. Lukin*, 5 Beav. 147 (1842).

On the status of a trust for accumulation for a charity where the gift to charity is valid, *Wharton v. Masterman*, [1895] App. Cas. 186 (H. & L.); *St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231 (1895).

PART V

ILLEGAL CONDITIONS AND RESTRAINTS

CHAPTER I

FORFEITURE OF ESTATES OF INHERITANCE

SECTION 1.—ON ALIENATION

LIT. § 360: Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.¹

CO. LIT. 223 a: “Also, if a feoffment be made, &c.” And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining

¹ Co. Lit. 206b: “If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall be said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heirs shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made.”

See, however, Gray, Restraints on Alienation (2d Ed.) § 19, note 1, and § 77.

and contracting between man and man: and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem; and rerum suarum quilibet est moderator, et arbiter.* And again, *regulariter non valet pactum de re mea non alienanda.* But these are to be understood of conditions annexed to the grant or sale itself in respect of the repugnancy, and not to any other collateral thing, as hereafter shall appear. Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seignior, or a rent, or an advowson, or common, or any other inheritance that lieth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this condition is void. But some have said that a man may grant a rent charge newly created out of lands to a man and to his heirs upon condition that he shall not alien that, that is good, because the rent is of his own creation; but this is against the reason and opinion of our author, and against the height and purity of a fee simple.²

A man before the Statute of *Quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heirs did alien without license, that he should pay a fine, then this had been good. And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himself.³

If A. be seised of Black Acre in fee, and B. enfeoffeth him of White Acre upon condition that A. shall not alien Black Acre, the condition is good,⁴ for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sale of chattels real or personal.

LIT. § 361: 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 a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good.

² Gray, Restraints on Alienation (2d Ed.) §§ 13-30. See, also, *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470 (1852), where the land was charged with a sum of money upon its alienation.

³ Gray, Restraints on Alienation (2d Ed.) § 21, note 1.

⁴ See *Camp v. Cleary*, 76 Va. 140, where, however, the lands corresponding to Blackacre and Whiteacre were passed by the same deed.

CO. LIT. 223 a, 223 b: If a feoffment in fee be made upon condition that the feoffee shall not enfeoff I. S. or any of his heirs or issues, etc., this is good,⁵ for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. And in this case if the feoffee enfeoff I. N. of intent and purpose that he shall enfeoff I. S., some hold that this is a breach of the condition, for quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum.

If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it malum prohibitum, or malum in se. In ancient deeds of feoffment in fee there was most commonly a clause, quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis et judæis.

LIT. § 362: Also, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, &c., such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the Statute of W. 2, cap. 1, was made, by which Statute the estates in tail are ordained.

CO. LIT. 223 b, 224 a: Note here, the double negative in legal construction shall not hinder the negative, viz., sub conditione quod ipse nec hæredes sui non alienarent. And therefore the grammatical construction is not always in judgment of law to be followed.

“But only for their own lives, &c.” And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the state be lawful, yet the condition is good,⁶ because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should be lawful. If a man make a gift in tail upon condition that he shall not make a

⁵ Accord: *Overton v. Lea*, 108 Tenn. 505, 554-556, 68 S. W. 250.

Some cases have gone further, and held that, where provision of forfeiture was upon alienation to any one except a small class, it was valid. *Doe v. Pearson*, 6 East, 173 (1805); *In re Macleay* L. R. 20 Eq. 186 (1875).

See *Attwater v. Attwater*, 18 Beav. 330 (1853); *Gallinger v. Farlinger*, 6 U. C. C. P. 512 (1857). See, also, *In re Rosher*, 26 Ch. Div. 801 (1884).

⁶ But in *Mildmay's Case*, 6 Co. 40a, 42b, 43a, it was said: “So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant.”

See *In re Rosher*, L. R. 26 Ch. D. 801.

lease for three lives or 21 years according to the Statute of 32 H. 8, the condition is good, for the Statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renunciare juri pro se introducto*.

"When he maketh such alienation and discontinuance of the entail." And therefore if a gift in tail be made upon condition, that the donee, &c., shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to any discontinuance of the estate tail (as Littleton here speaketh;) or is against the Statute of Westminster 2, the condition is good without question.⁷ But as to a common recovery the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said Statute of W. 2. And therefore such a condition is repugnant to the estate tail; for it is to be observed, that to this estate tail there be divers incidents. First, to be dispunished of waste. Secondly, that the wife of the donee in tail shall be endowed. Thirdly, that the husband of a feme donee after issue shall be tenant by the curtesy. Fourthly, that tenant in tail may suffer a common recovery: and therefore if a man make a gift in tail, upon condition to restrain him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, that a collateral warranty or a lineal with assets in respect of the recompense, is not restrained by the Statute of Donis conditionalibus, no more is the common recovery in respect of the intended recompense. And Littleton, to the intent to exclude the common recovery, saith, such alienation and discontinuance, joining them together.

If a man before the Statute of Donis conditionalibus had made a gift to a man and to the heirs of his body, upon condition, that after issue he should not have power to sell, this condition should have been repugnant and void. *Pari ratione*, after the Statute a man makes a gift in tail, the law tacite gives him power to suffer a common recovery; therefore to add a condition, that he shall have no power to suffer a common recovery, is repugnant and void.⁸

⁷ In *Anonymous*, 1 Leon. 292 (1584), "A. gave lands in tail to B. upon condition, that if the donee or any of his heirs alien, or discontinue, &c., the land or any part of it, that then the donor re-enter." The donee had issue two daughters, and died. One of them levied a fine. It was held that there was a forfeiture.

⁸ In *Mildmay's Case*, 6 Co. 40a (1605), and in *Mary Portington's Case*, 10 Co. 35b (1613), it was held that a condition attached to an estate tail that the tenant should not agree to suffer a recovery or do any act towards it was void. See, also, *Corbet's Case*, 83b (1599). In *King v. Burchell*, Amb. 379 (1759), upon the devise of an estate tail to John Harris, the proviso "that if John Harris or his issue, or any of them, shall alienate, mortgage, encumber, or commit any act or deed, whereby to alter, change, charge, or defeat the bequests, shall pay or cause to be paid, and he did thereby charge the premises with the payment of £2,000 unto such person or persons, and

If a man make a feoffment to a baron and feme in fee, upon condition, that they shall not alien, to some intent this is good, and to some intent it is void: for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable: but to restrain their alienation by fine is repugnant and void, because it is lawful and unavoidable.

It is said, that if a man enfeoff an infant in fee, upon condition that he shall not alien, this is good to restrain alienations during his minority, but not after his full age.

It is likewise said, that a man by license may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not without the consent of their chapter or convent, alien, because it was intended a mortmain, that is, that it should forever continue in that see or house, for that they had it en auter droit, for religious and good uses.

"The Statute of W. 2, cap. 1." Hereby it appeareth, that whatsoever is prohibited by the intent of any Act of Parliament, may be prohibited by condition, as hath been said.

his or their heirs, who could, should, or ought to take next, by virtue or means of any of the bequests or limitations." Held: "The proviso was repugnant to the estate." See, also, *Stansbury v. Hubner*, 73 Md. 228, 20 Atl. 904, 11 L. R. A. 204, 25 Am. St. Rep. 584.

In *Mildmay's Case*, supra, the reporter states: "And in this case some points on great consideration were resolved, which were not moved in *Corbet's case*: 1. That all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee-simple, as *Littleton* saith, lib. 1. cap. Estate-tail; and the reason thereof was, that neither lords should be defeated of their escheats, wards, &c., nor the farmers or purchasers lose their estates or leases, or be evicted by the heirs of the grantors or lessors; nor such infinite occasions of troubles, contentions and suits arise. But the true policy and rule of the common law in this point, was in effect overthrown by the statute de donis conditionalibus, made anno 13 E. 1. which established a general perpetuity by act of Parliament, for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs. And the same was attempted and endeavoured to be remedied at divers Parliaments and divers bills were exhibited accordingly (which I have seen) but they were always on one pretence or other rejected. But the truth was, that the Lords and Commons knowing that their estates-tail were not to be forfeited for felony or treason: as their estates of inheritances were before the said act, (and chiefly in the time of H. 3. in the Barons' war), and finding that they were not answerable for the debts or incumbrances of their ancestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors, they always rejected such bills: and the same continued in the residue of the reign of E. 1. and of the reigns of E. 2. E. 3. R. 2. H. 4. H. 5. H. 6. and till about the 12th year of E. 4. When the Judges on consultation had amongst themselves, resolved, that an estate tail might be docked and barred by a common recovery; and that by reason of the intended recompense, the common recovery was not within the restraint of the said perpetuity made by the said act of 13 E. 1. By which it appears, that many mischiefs arise on the change of a maxim, and rule of the common law, which those who altered it could not see, when they made the change: for rerum progress, *Offendunt multa, quæ in initio præcaveri seu prævideri non possunt.*"

BRADLEY v. PEIXOTO.

(Court of Chancery, 1797. 3 Ves. 324.)

This cause arose upon the following disposition by the will of Thomas Bradley:

"I give and bequeath to my son Henry Bradley the dividends arising from £1620 of my bank stock for his support during the term of his life: but at his decease the said £1620 bank stock, principal and interest, to devolve to his heirs, executors, administrators and assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessities of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him or her, so attempting, from any benefit in this will and testament, and shall forfeit the whole of their share, principal and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the £1620 bank stock to the plaintiff. The other children were out of the jurisdiction.

MASTER OF THE ROLLS [SIR RICHARD PEPPER ARDEN]. The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply; and the question is, whether by the rules of this court he can demand the legacy, not complying with the injunction, the testator has laid upon him; or rather whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed I have taken some time to consider this case; and have endeavored to satisfy myself, that I am at liberty to refuse the plaintiff the demand, which he now makes. Indeed another reason for delaying my judgment was, that there appeared to be other children, who were interested in this question and were not parties to the cause. The reason given for not having them before the court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made defendants, to sustain their interests: but as they live abroad, the cause has proceeded without them; and according to the opinion, I have formed of this case, they are not necessary parties; because I feel my-

self obliged to say, that the proviso I have before stated is of no effect.

I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort: *Piers v. Winn*, 1 Vent. 321. *Pollexf.* 435. The report in *Ventris* is very confused: but it appears clearly from the report of this case in *Pollexfen*, as well as from many other cases, that the court meant to say, that where there is gift in tail with condition not to suffer a recovery, the condition is void. There are several cases of this kind collected in 2 *Danv. Ab.* 22, which show, that a condition repugnant to the nature of the estate given is void: *Co. Lit.* 223 a, *Dy.* 264. *Mildmay's Case*, 6 *Co.* 40. *Stukeley v. Butler*, *Hob.* 168, is of the same kind; where it was held, that an exception of the very thing, that is the subject of the gift, is of no effect. In all these cases the gift stands, and the condition or exception is rejected. In this case then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift; and the qualification must therefore be rejected. This is not like *Sockett v. Wray*, 4 *Bro. C. C.* 483; for there the gift was to a feme covert for life; and then to such uses as she should by will appoint. She could only appoint by will; and could not bind her executors by any deed in her life-time; and I declared in determining that case, that I should think otherwise in the case of a man or any person having an absolute interest. A man could bind his executors; but not a feme covert. If this had been a gift to the son for life, and after his death as he should appoint, and in default of appointment then to other persons, I desire not to be understood, that it would not be good: if in default of appointment it was to go to his executors, I should doubt, whether it would be so: but I give no opinion upon this. Upon the whole, I am obliged to hold this condition repugnant to the gift and therefore void. Declare, that the condition annexed to the legacy of £1620 bank stock is repugnant to and inconsistent with the interest given to the legatee of the stock, and therefore void; and upon payment of the costs of this suit by the plaintiff let the stock be transferred to him.

In *Peixoto v. The Bank of England*, *Chan.* 3d of June, 1797, the subject of which was a disposition of stock by the same will in precisely the same manner, the Lord Chancellor [*Lord Loughborough*] was very clearly of opinion, that it was an absolute, not a limited, interest; and decreed accordingly.⁹

⁹ Accord: *In re Dugdale*, 28 *Ch. Div.* 176 (1888); *Ware v. Cann*, 10 *B. & C.* 433 (1830); *Latimer v. Waddell*, 119 *N. C.* 370, 26 *S. E.* 122, 3 *L. R. A.* (N. S.) 668; *Potter v. Couch*, 141 *U. S.* 296, 11 *Sup. Ct.* 1005, 35 *L. Ed.* 721 (1891). But see *Camp v. Cleary*, 76 *Va.* 140.

DOE d. NORFOLK v. HAWKE.

(Court of King's Bench, 1802. 2 East, 481.)

On the trial of an ejectment for a certain messuage and lands in Yorkshire, at the last York assizes, a verdict was found for the plaintiff on the demise of John Ibbotson, and for the defendants on the demise of the Duke of Norfolk, subject to the opinion of the court on the following case.

Joseph Whiteley was lessee of the premises in question for the term of 21 years commencing from the 29th September 1789, under a lease granted to him by the Duke of Norfolk, dated 25th January 1790. Whiteley entered into possession of the premises under this lease, and made his will dated 10th October 1790, whereby he disposed of the premises in question as follows: "I give and bequeath to my nephew Abraham Ibbotson, with submission to the Duke of Norfolk, the tenant right of my farm at the Edgefield, which I hold by lease under his Grace, he paying the rent and conforming to the covenants in the lease; but not to dispose of or sell the tenant right to any other person: but if he refuses to dwell there himself, or keep in his own possession, then my will is, that my nephew John Ibbotson (one of the lessors of the plaintiff), shall have the tenant right of the farm at the Edgefield." And the testator directed (amongst other things) that the said farm should be delivered up as before willed a year and a day after his decease by his executrix: and he appointed his niece, Sarah Ibbotson, sole executrix, and gave the residue of his effects to her. The testator Whiteley died in January 1799, having continued in possession of the premises till his death. The executrix married Rowland Hartley, and duly proved the will, and administration was granted to her, and she and her husband entered into the possession of the premises on Whiteley's death. And in February 1800 possession of the premises was duly delivered by them, together with the lease, to A. Ibbotson, in pursuance of Whiteley's will, and A. Ibbotson continued in such possession till he quitted the same as after-mentioned. When A. Ibbotson was in possession of the premises J. Crookes lent him £25 on his note of hand, and thereupon A. Ibbotson deposited with Crookes the lease of the premises as a further security. At the time of lending the £25 it was agreed between Crookes and A. Ibbotson, that Crookes should have the first chance for the farm; but no actual valuation was made. Crookes made further advances to A. Ibbotson, amounting in all to £60; but Crookes knew nothing of Whiteley's will until the whole of the £60 had been advanced. Afterwards A. Ibbotson was arrested at the suit of R. Hartley, to whom he (A. Ibbotson) had given a warrant of attorney; and thereon Crookes paid for A. Ibbotson, at his request, £60 more, to effect A. Ibbotson's liberation. After this Crookes took from A. Ibbotson a warrant of attorney to confess a judgment, and a

bill of sale of A. Ibbotson's goods; but never entered up judgment on such warrant of attorney. Then one William Greaves, at A. Ibbotson's request, paid off the money advanced by Crookes, and took from A. Ibbotson a fresh warrant of attorney to confess a judgment; and at the same time the lease, and a copy of Whiteley's will (which had been in Crookes' possession), were delivered by Crookes. Judgment was entered up on the warrant of attorney so given to Greaves, and execution thereon issued in Trinity Term 1801; but before the entry with Greaves' execution, one Joseph Schofield, another creditor of A. Ibbotson, had levied an execution upon part of the goods of A. Ibbotson, which execution being satisfied by Greaves, was withdrawn, and possession was taken under his execution, and the lease of the premises in question was on the 18th June 1801 publicly sold and assigned by the sheriff under Greaves' execution to the defendants, who were immediately put into possession of the premises, and now continue solely possessed thereof. A. Ibbotson quitted the premises in the morning before the sale, and has ever since ceased to dwell there or have any possession thereof. John Ibbotson (the lessor of the plaintiff) attended at the time and place of sale (which was public), and before the actual sale gave notice of his claim under Whiteley's will to the defendants. The question was, Whether the plaintiff were entitled to recover on the demise of John Ibbotson. If he were, the verdict to stand; if not, a nonsuit to be entered.

LORD ELLENBOROUGH, C. J. The terms of this devise are to be considered as a conditional limitation, in which the interest of Abraham Ibbotson in the premises is limited on certain events, on the happening of which it is given over to John. And the question is, Whether the acts of the party whose incapacity is to be incurred on his refusal to dwell on the farm or keep it in his own possession, have not determined his interest? When he deposited the lease with Crookes as a further security for the several loans of money advanced by him, was this not a voluntary act? and when the lease was afterwards delivered over to another creditor who took up the first demand, and to whom a warrant of attorney was at the same time given, and considering that by so giving up the lease he thereby disabled himself from mortgaging the premises, and by giving the warrant of attorney he enabled the creditor to dispossess him at his option, must he not be taken to have contemplated at the time the legal consequence of these acts which afterwards ensued? That these were voluntary acts there can be no doubt. He put the creditor in possession of the document of the farm; and by all the authorities he thereby gave a specific lien on the lease. For according to Russel v. Russel, 1 Bro. Chan. Cas. 269, and several other cases there mentioned, the making of such a deposit gives jurisdiction to a court of equity to compel a sale of the lease in discharge of the lien. As it then enables the other to turn the party out of possession in default of payment, it shows a purpose in the latter to part with

the possession, and therefore the subsequent proceeding and execution is not strictly in invitum, so as to bring the case within that of *Doe v. Carter*. And there need not be fraud in the transaction; it is enough if there be a manifest intention to depart with the estate, followed by acts to that end, which if not produced immediately by the procurement of the party, may yet be said to be done with his assent. Upon the whole therefore it is enough to say that here was a voluntary departing with the estate.

LAWRENCE, J. The lease was given by the testator to Abraham Ibbotson, so long as he lived on the farm; the material words of the bequest are, "that he should not dispose of or sell the tenant-right to any other person: but if he refused to dwell there himself, or keep it in his own possession," then it was to go over to the lessor of the plaintiff. Now the word refused is only a figurative expression; meaning if the first taker ceased to dwell there. There was certainly no occasion for any person previously to inquire of him whether he would reside there or not, and that he should expressly refuse it.

LE BLANC, J. This would be a strong case if it rested even on the first point; for here are strong circumstances to show that this was a departing with the possession of the estate by the party's own act. Besides which, on the construction of the will it clearly appears to have been the intention of the testator that if A. Ibbotson ceased to live on the premises or keep them in his own possession, they should go over to John Ibbotson.

Postea to the plaintiff.¹⁰

GROSE, J., was absent from indisposition.

¹⁰ In *Williams v. Ash*, 1 How. 1, 11 L. Ed. 25 (1843), male and female slaves were bequeathed to A., provided he should not sell them, in which case they should be free. A. sold a male slave. Held, that he was free. See *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721.

REGARDING THE VALIDITY OF PROVISIONS FOR FORFEITURE UPON ALIENATION OF FUTURE INTERESTS, WHETHER CONTINGENT OR VESTED SUBJECT TO BE DIVESTED, OR VESTED BUT NOT SUBJECT TO BE DIVESTED.—See *Large's Case*, 2 Leon. 82, 3 Leon. 182 (1588); *Powell v. Boggis*, 35 Beav. 535 (1866); In re *Porter*, [1892] 3 Ch. 481; In re *Goulder*, [1905] 2 Ch. 100; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61 (1874); *Gozzard v. Jobbins*, 14 N. S. W. R. Eq. 28 (1893).

SECTION 2.—ON FAILURE TO ALIENATE

ROSS v. ROSS.

(Court of Chancery, 1819. 1 Jac. & W. 154.)

William Ross, a native of Scotland, but domiciled in England, made his will, dated 5th May, 1790; containing, amongst others, the following bequest.

“I give to my son James Hislop Ross the sum of £2000, lawful money of Great Britain, to be paid to him at his age of twenty-five years, or at any time betwixt the age of twenty-one and twenty-five, should my executors think proper so to do, and the interest thereof, in the mean time, to be applied towards his maintenance and education; and in case the said James Hislop Ross should not receive or dispose of by will or otherwise, in his lifetime, the aforesaid sum of £2000, then the said sum shall return, and be paid and payable to the heir entail, in possession of the estate of Shandwick for the time being.”

The estate mentioned in this bequest, situated in the County of Ross, had previously been settled by the testator, by a deed of entail, in favor of Jean Ross, his eldest daughter.

James Hislop Ross survived the testator, and died intestate, in the year 1810, having attained the age of twenty-five years. He had not received the £2000 legacy, but in a suit instituted by Jean Ross, against the executors, to which J. H. Ross was not a party, the accounts of the testator's estate had been taken, and a sum of £1182 had been found by the master, to be the proportion payable to J. H. Ross, in respect of his legacy: this sum was accordingly carried over to his separate account, and invested in the purchase of £1891 3 per cent. annuities.

J. H. Ross being illegitimate, administration of his personal estate was, at the nomination and on the behalf of the Crown, granted to George Maule, Esq., who now petitioned for a transfer of the sum of £1891, and the dividends which had accumulated upon it.

THE MASTER OF THE ROLLS [SIR THOMAS PLUMER]. The question, I think, is, whether this will vests the absolute property of the legacy in the legatee. If it do give the absolute property, the right of disposing of it, or its devolution upon his representatives would follow as a matter of course, unless there be something else which cuts down the gift; nothing but that, can prevent the legal consequences of property from ensuing.

It seems to me, that I cannot put an interpretation on the words of this will, by considering that it is very likely that the testator was referring to other circumstances; to the imbecility of his son, or to the effect of the Scotch law. It is probable that he may have contemplated these circumstances; but being bound to take this as the will of a domi-

ciled English subject, I must construe it without reference to them, and determine the consequences of what appears on the face of the will itself.

Now every word he has used tends to vest the legacy. First it is given to be paid at twenty-five; if it stopped there, it would clearly be vested, the time of payment not being annexed to the substance of the gift; it then proceeds, "or at any time betwixt the age of twenty-one and twenty-five;" this was only to accelerate the payment; the executors were to pay it before the first period if they thought fit; the interest, in the mean time, is to be applied to his maintenance: another feature of vesting. If the bequest had stopped here, then, if he had died between twenty-one and twenty-five, or even during his minority, it would, according to the cases, have been vested in him; but the event renders it unnecessary to consider what would have been the consequences of his dying under age.

The legatee then acquired an absolute interest; and then comes the second part of the bequest, by means of which, you must endeavor to get it back again; you must say, that if he does not dispose of it, it is to return from him; but I do not recollect any instance of a will, where an absolute property is first given, with a condition, that if the party does not make use of it, it shall go over. But it was necessary to argue it to that extent.

This differs from a power, and a remainder over in default of its exercise: the right of disposing of the legacy is given him, not in terminis, but as a consequence of property. How does he acquire the power? It is not given as a power, but follows from the property being his.¹¹ The testator assumes that he would have a right to it at

¹¹ In *The Attorney-General v. Hall* (3d July, 1731) Fitzg. 9, 314, W. Kel. 13, the testator gave to his son and the heirs of his body, all his real and personal estate, to his and their own use; and in case his son should die leaving no heirs of his body living, he gave all and so much of his estate as his son should be actually possessed of at the time of his death to the Goldsmiths' Company, for certain charitable uses; and he directed them, not to give his son any trouble during his life concerning his estate. The son suffered a recovery of the real estate, and it was held by Lord Chancellor King, Sir J. Jekyll, M. R., and Reynolds, C. B., that as to the personal property, "the limitation over was void, as the absolute ownership was given to Francis Hall, the son; for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore he had a power to dispose of the whole, which power was not expressly given him, but it resulted from his interest." [In Fitzg. 321, this sentence follows: "The words that give an estate tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over." In W. Kel. 16 (with which accords 2 Eq. Cas. Ab. in marg.), we have in addition the following: "In regard the ownership and property of the personal estate was vested in Francis Hall, and not the use only; this was held to be a void limitation to the Goldsmith's Company. It is giving a man a sum of money to spend, and limiting over to another what does not happen to be spent." To this the reporter adds: "And so note a difference between a devise of chattels real and personal."—*Ed.*] See, also, *Brian v. Cawsens*, 2 Leon. 68; *Flanders v. Clark*, 1 Ves. 9; 3 Atk. 509; *Bland v. Bland*, Prec. in Ch. 201, n. (*Ed. Finch*), and 2 Cox, 349; *Le Maître v. Banister*, Prec. in Ch. 201, n.; *Beachcroft v. Broome*, 4 T. R. 441; *Wynne v.*

twenty-five; therefore, if he should have received it, and not have disposed of it, the capital in solido being his property, and remaining in his hands, was to go over to another. But if you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. It is quite a novel attempt to separate the devolution of property from the property itself.¹²

DOE d. STEVENSON v. GLOVER.

(Court of Common Pleas, 1845. 1 C. B. 448.)

Ejectment by the lessee of the customary heir of Ann Stevenson claiming under the will of Mordecai Glover, the father, against Mordecai Glover, the son.¹³

TINDAL, C. J. This case appears to me not to fall within the doctrine that has been relied on by my Brother Gaselee for the purpose

Hawkins, 1 Bro. C. C. 179; *Strange v. Barnard*, 2 Bro. C. C. 586; *Pushman v. Filliter*, 3 Ves. 7; *Bull v. Kingston*, 1 Mer. 314.—*Rep.*

¹² Accord: In *re Wilcocks' Settlement*, 1 Ch. D. 229; *Perry v. Merritt*, 18 Eq. 152; *Henderson v. Cross*, 29 Beav. 216; In *Bowes v. Goslett*, 27 L. J. Ch. 249, the same rule was applied to leaseholds.

The same result was obtained in the following cases: *Lightburne v. Gill*, 3 Br. C. P. 250 (die unmarried or intestate); In *re Yalden*, 1 D., M. & G. 53 (die without leaving issue and without having disposed of the sum by will or otherwise).

In *Watkins v. Williams*, 3 Macn. & G. 622, at 629, Lord Chancellor Truro said: "Now, it is a rule that, where a money fund is given to a person absolutely a condition cannot be annexed to the gift, that so much as he shall not dispose of shall go over to another person. Apart from any supposed incongruity, a notion which savours of metaphysical refinement rather than of any thing substantial, one reason which may be assigned in support of the expediency of this rule is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not: since, if the person to whom the absolute interest is given left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not. Another reason may be, that it would be contrary to the well being of the party absolutely entitled to lead him profusely to spend all that was given him, which in many cases might be all that he had in the world; for although, indeed, he might provide against leaving himself destitute by buying an annuity yet even if he did this it might be at the expense of those for whom he might be under a moral obligation to make some provision. In *Ross v. Ross*, Sir Thomas Plumer with reference to such limitations observed in effect that one consequence of permitting such limitations over would be, that if the party entitled to the absolute interest had not spent the money, 'and were to die indebted to any amount, his creditors would be excluded from it;' the validity of this reason may be doubtful, as it may perhaps be said, that a man might properly be deemed to have spent the amount of debts which he has contracted, and which he has laid himself under an obligation to pay."

¹³ The case is sufficiently stated in the opinion of the Chief Justice.

of showing that the provision in the will of Mordecai Glover, the father, upon which the claim of the lessor of the plaintiff is founded, is in the nature of a condition that is repugnant to, and incompatible with, the prior absolute gift to Mordecai Glover, the son. Strictly and properly it is an executory devise, cutting down the interest which the son was to take, upon the happening of certain events, which have happened. The only question, therefore, for our consideration is, what was the intention of the testator. Upon that point, also, the case appears to me to be free from doubt. After giving to his wife an estate for life in all his customary or copyhold and real estates, the testator proceeds: "And, from and immediately after her decease, then I give and devise all and singular my aforesaid messuages, lands, &c., unto my son Mordecai Glover, and his heirs and assigns forever, to hold to him and his heirs and assigns forever; but, in case my said son Mordecai Glover shall happen to depart this life without leaving any issue of his body lawfully begotten then living, or being no such issue, and he my said son shall not have disposed and parted with his interest of, in, and to the aforesaid copyhold estate and premises, then, and in such case, I give and devise the same customary or copyhold messuages, &c., and real estate, unto and to the use of my illegitimate daughter Ann Stevenson, and of her heirs and assigns forever." The words "parted with," which are in apposition to, seem to me to be explanatory of, the prior and more general word "dispose," and clearly to indicate a disposition or parting with the estate by the devisee, by a conveyance that was to have its complete effect and operation in his lifetime. If "parted with" had been the sole phrase used, it could only have been satisfied by a conveyance by a deed executed by the party in his lifetime: and, when we find the two expressions thus coupled together, I think we cannot give a more extended interpretation to the word "disposed" than the sentence would have been susceptible of if that word had not been found in it. But, even if it had rested upon the word "disposed," I should have inclined to hold, upon the principle that a will is ambulatory, and speaks only from the time of the testator's death, that a devise of the estate in question was not a disposing of it within the meaning of this will. The fair inference arising from the whole scope of the will tends to the same conclusion. The testator, in the first place, gives the estate to the son and to his heirs, should he have any; and he gives him full power to dispose of it in his lifetime. But he goes on to evince, in the event of his son dying and having no issue, a natural desire that the estate should go to his illegitimate daughter, provided his son's wants should not have made it necessary for him to part with it in his lifetime. And this was by no means an unreasonable mode of dealing with the property. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

COLTMAN, J. I am unable to perceive any objection to the gift over in this case, as an executory devise. There is nothing in it that is

repugnant to, or inconsistent with, the prior devise: nor does it operate any restraint on alienation; on the contrary, it expressly recognizes the power of the son to alien the estate during his lifetime. Then comes the question whether or not the son has disposed and parted with the estate, according to the intention of the testator. Construing those words grammatically, they clearly point to an act to be done, and to take effect, in the lifetime of the son. The words are—"in case my said son shall not have disposed and parted with his interest of, in, and to the aforesaid copyhold estate and premises, then and in such case I give and devise the same customary or copyhold messuages, &c., and real estate, unto, and to the use of, my illegitimate daughter Ann Stevenson, and of her heirs and assigns forever." To what period do these words "disposed and parted with" apply? Clearly, to the time of the son's death: and at that time he had not done anything to divest the estate out of him. The construction, therefore, upon which the lessor of the plaintiff relies, is evidently the true one. And this construction leads to no incongruity or absurdity: it is a very rational and proper mode of disposing of the estate. If, as was suggested by my Brother Cresswell, the son, having no children, should wish to dispose of the estate in his lifetime, the testator leaves him at full liberty to do so; but, in the event of his not having exercised that power, and dying childless, the intention of the testator was, that his own illegitimate daughter—whom he was under a moral obligation to provide for—should have the estate, and not that the son should have power to dispose of it by will, in the manner he has assumed to do.

CRESSWELL, J. I am entirely of the same opinion. It has hardly been denied that the disposition in favor of the testator's illegitimate daughter was a good executory devise, in the first instance. There was no condition that was repugnant to, or inconsistent with, the prior devise to the son. The son might have prevented the devise over from taking effect, by disposing of the property in his lifetime. But, in the event of his not exercising that power, the estate is given over, and nothing remains for him to part with by his will.

ERLE, J. I also am of opinion that the plaintiff is entitled to judgment. The intention of the testator evidently was, to give to his son absolute dominion over the estate, provided he chose to exercise that dominion in his lifetime, but not to leave to him the selection of the object of his bounty by his will. Such appears to me to have been the intention of the testator; and I think the words he has used are incompatible with any other construction. The restriction imposed upon the power of alienation became effectual by the son dying seised. For these reasons, I am of opinion that the case of the defendant, who claims under the son's will, fails.

Judgment for the plaintiff.¹⁴

¹⁴ See, also, *Andrews v. Roye*, 12 Rich. (S. C.) 536.

HOLMES v. GODSON.

(Court of Chancery, 1856. 8 De Gex, M. & G. 152.)

THE LORD JUSTICE TURNER.¹⁵ The plaintiffs in this case claim to be entitled to certain real estates devised by the will of Thomas Yates Ridley under a conveyance from Thomas Yates Ridley, the son of the testator and a devisee under his will.

The testator by his will, after giving his wife his plate and so on, proceeded thus: "I give and bequeath unto my dear wife Jane, and Richard Godson, Esq., and the survivor of them, and the executors, administrators, and assigns of such survivor, upon trust that they shall with all convenient speed call and convert into money all such parts of my residuary estate as do not consist of money or security for money, upon trust for my son Thomas Yates Ridley to vest in him on his attaining the age of twenty-one years; but in case my said son shall not live to attain a vested interest therein, then in trust for my dear wife Jane during her natural life." Then there is a disposition of books, prints, and manuscripts in favor of the son. Then there is a bequest of the advowson at Heysham in trust for the benefit of the son. Then follows this clause: "But in case my dear son Thomas Yates Ridley shall not live to attain the age of twenty-one years, or having attained the age of twenty-one years shall not have made a will, I hereby direct my said executors or trustees to sell all my property both real and personal at their discretion, and to invest the proceeds for the benefit of my said wife Jane for her natural life, and after her death all the said investment I bequeath to my friend Richard Godson, Esq." There is a codicil to the will, by which the testator devises all his property, both real and personal, to his wife and Mr. Godson to carry into effect the trusts of his will created, and to sell his real property to pay his debts or for the advancement of his son.

Now, upon the construction of this will and codicil, I think it reasonably clear that the real estates vested in the son at the age of twenty-one years, which he attained. The testator gives "all such parts of his residuary estate as do not consist of money or securities for money." Whatever doubt there might have been upon those words if they had stood by themselves as to whether they would extend beyond a disposition of the personal estate only, that doubt is, I think, removed by the ulterior clause in the will, by which the testator has said, that in case his son shall not live to attain twenty-one, or having attained twenty-one shall not have made a will, he directs his executors and trustees to sell all his property both real and personal. It is, I think, quite plain that the testator in that clause meant to dispose, in the

¹⁵ As the opinion of Turner, L. J., sufficiently gives the facts, the separate statement in the report is here omitted, as is also the concurring opinion of Knight-Bruce, L. J.

"all property, not
money or securities"
means land, not
conveyance

event of the son dying under twenty-one, of the property which the son was to take if he attained twenty-one, and that the disposition extends to all the testator's property both real and personal. I think, also, that the words of the will are sufficient to vest the fee in the son upon his attaining twenty-one.

The sole question, therefore, on the plaintiff's title is, whether the fee which was thus vested in the son was defeated and the estate carried over to the widow and Mr. Godson by the event which happened of the son having afterwards died without having made a will. I am of opinion that it was not.

This is in terms a disposition of real estate in favor of other devisees in the event of a devisee in fee dying intestate, and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate, the estate shall go to his heir; and this disposition tends directly to contravene the law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad; and the cases which were cited in the argument appear to me to be conclusive upon the point.

In addition to those cases which were referred to, there is the case of *Lightburne v. Gill*, 6 Bro. P. C. 36, to which my learned brother has referred, and which I have before me, where there was a sum of £500 which the testator left to his daughter, to which he was entitled under a settlement, and all the rest of his worldly goods, effects, and substance real and personal to dispose of as she should think fit. But if his said daughter should die unmarried or intestate, then what was thereby left to her should go to and be equally divided among the children of his brother the Rev. Stafford Lightburne. The daughter having died intestate, the bill was filed in the Court of Chancery by the children of the brother, claiming to be entitled under the disposition over in the event of the daughter dying unmarried or intestate, and it was held that the bill could not be maintained. The bill was dismissed, there was an appeal to the House of Lords, and the House of Lords confirmed the decree dismissing the bill.

It was objected to these cases and to *Ross v. Ross*, 1 Jac. & W. 154. and others which I do not think it necessary to go through, and to this case of *Lightburne v. Gill*, that they all referred to personal estate. But, upon this question, I confess myself unable to see the distinction between cases relating to personal and cases relating to real estate. Such dispositions of personal estate are void because they are inconsistent with the absolute interest and defeat the course of devolution which the law has provided. Upon what ground can it be held that the same principle does not reach to the like dispositions of real estate? I should feel great difficulty in maintaining such a distinction even if authority were wanting upon the point; but authority is not wanting upon it.

*Question: Is son
having died intestate
will. Was estate
divested (as to real
estate?)*

I may refer to the case of Muschamp v. Bluet, in Sir John Bridgman's Reports (J. Bridg. 132); although the case is not exactly in point in this case, yet I find some observations which are of great importance, as it strikes me, bearing upon the present question. There was this clause in the will: "And, as touching my lands at Tottenham, my son Matthew is joint purchaser with me of the most, and the rest of all my houses and land there which is freehold I give to Henry and Michael Lock upon this condition, that if they shall sell it to any man but to Matthew Lock my son, then he to enter upon it as of gift by this my will." The question arose first, whether the fee passed under the disposition to Henry and Michael. Cases are gone into on that subject affecting such dispositions by grant. Then the court enters into the question of the effect of this in a devise, and says: "But I agree that in case of a devise, although the apt words to make an estate of inheritance to pass are omitted" (the devise was merely to Henry and Michael without any words of inheritance), "yet, if the intent of the devisor does appear by any express matter contained in the will, an estate of inheritance shall pass, for it is sufficient to pass the inheritance. If one deviseth land to another in perpetuance, the devise by these words shall pass an estate in fee. So, if one devise land to another to give, dispose, or sell at his pleasure, this is an estate in fee-simple." Then there follows this: "But yet the law hath restrained such intent. For, first, it ought to be agreeable to law and not repugnant to it; for, although in Scholastica's Case, Plowd. 403, in the comment, it is said that a will is like to an Act of Parliament, yet a will cannot alter the law or make a new form of an estate, which is not allowed by the rules of law, as an Act of Parliament is, and so adjudged in the Common Bench, Hil. T. 37 Eliz., between Jermin and Ascot, Coke's Reports, in Corbet's Case, 1 Rep. 85a, that by a devise a man cannot give an estate and determine part thereof by a condition and make the residue to continue. And if land be devised to one in tail he cannot determine the estate as to the devisee himself, and yet preserve the estate to the issue. And, 28 & 29 Hen. 8, Dyer (Anon. Dyer, 33), if land be devised to one in fee, and if he does not perform such an act, the land shall remain to another, the remainder is void, for no such remainder can be limited by the rules of law."

In another part of the same report there is a reference to Baker's Case, cited J. Bridg. 137, in which it is said, "A devise to the husband and wife, with remainder to their two sons, upon condition that if they or their heirs go about to alien, &c., is a fee-simple; also for the heirs being restrained to alien, does show fully that the heir shall have the land, for otherwise he cannot alien it."

But there is another very much more important case, for which we are indebted also to the great research and knowledge which Mr. Lee has brought to our aid in the present case. I refer to the report in Serjeant Hill's manuscript, and which is really a most important case

in my view of it as bearing on the present case. It is the case of Guliver v. Vaux, 8 De G., M. & G. 167. In that case Thomas Turney was seised in fee and made his will on the 29th of December, 1712, "and therein devised the premises to Thomas Turney his second son, and his heirs, provided he should live to attain the age of twenty-one years and not otherwise, and charged the estate with £350 payable to the testator's daughter Dinah Turney at her age of twenty-four. And if his said son Thomas Turney should die before twenty-one, then he devised the premises to his eldest son Tawyer Turney and his heirs when he should attain the age of twenty-one years, and charged the estate with £550 payable to his daughter Dinah at her age of twenty-three. And if it should so happen that his son Thomas and his son Tawyer should both die before they should severally attain the age of twenty-one years, then he devised the premises to Dinah Turney and her heirs, and gives his wife the profits of the premises till her children should attain to their several ages above expressed, and after that gives her an annuity of £100 a year for life issuing out of the estate. Then follows this clause: "And for prevention of any difference which may hereafter arise concerning the inheritance of my real estate, in case it shall so happen that all my three children shall depart this life without leaving issue lawfully begotten and born of any of their bodies and without appointing the disposal of the same, then and in such case I give to Ann my wife £500 yearly over and above the £100 already mentioned, payable out of my said estate. Also I give £10 yearly to the ministers and churchwardens of Cransfield to be disposed in charitable uses. Also I give all my said lands unto my loving cousins Robert Perrott, Richard Perrott, Thomas Dell, and Robert Dell." The sons and the daughter all died under twenty-one, and all died without making any disposition of the estate and in the terms of this will without appointing the disposal of the same. The devisees, however, brought ejectment, and upon that two questions appear to have arisen: first, whether according to the true construction of the will the sons and the daughter took estates tail or estates in fee; and secondly, supposing they did take estates in fee, then, whether the executory devise over in the event of their all dying without leaving issue lawfully begotten and without appointing the disposal of the same was a good executory devise. All the judges, Lord Chief Justice Willes, Mr. Justice Abney, and Mr. Justice Burnett, agreed in opinion it was a fee in favor of the son; and then came the question, whether the executory devise over was good. Lord Chief Justice Willes and Mr. Justice Abney delivered their opinions that the executory devise was good upon this ground, that it fell within the period allowed by law. That was the opinion which they gave in the first instance. Mr. Justice Burnett, however, agreeing that the sons and the daughter would take in fee and that the case was one of executory devise, and agreeing also that the executory devise would take effect within a limited period, addressed himself to this question,

what was the effect of the clause in the will by which the executory devise was made to depend upon the sons and the daughter dying without appointing the disposal of the estate? and he expressed himself thus: "But I am clearly of opinion that this condition or contingency" (it is very important, perhaps, to observe those words) "annexed to the estate of the children, and precedent to that of the devisees' estate, is a void condition, and consequently the devise dependent on it can never take place. A condition or contingency repugnant to the estate devised must be void. Thus, a devise to one in fee upon condition that he shall not alien is void. So a devise in fee, upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, is void, because repugnant to the estate devised. So feoffment in fee, upon condition that feoffee's daughters shall not inherit, is void, because repugnant to the nature of the estate. What is the condition here? That if Thomas dies without issue, his heirs shall not take by descent but by appointment; whereas a devise to a man's heir-at-law, or grant to heirs, is void and he will take by descent. In this case, therefore, a devise in fee upon the condition that his heirs shall not take by descent unless he specially appoints them is a void condition, and consequently the devise subsisting on that condition is void." Then the case concluded thus: Lord Chief Justice Willes and Mr. Justice Abney both changed their opinion and concurred with Mr. Justice Burnett in the opinion he expressed. There cannot be a higher authority than that case, either as applicable to the present or with reference to the weight which it derives from the judges by whom it was decided.¹⁶

These cases of *Muschamp v. Bluet*, *Gulliver v. Vaux*, *Ware v. Cann*, 10 B. & C. 433, referred to, are all cases of real estate, and they seem to me clearly to prove that, upon this point, there is no distinction between the cases relating to real and personal estate. In truth, the decisions in both cases turn, as I apprehend, on this: the law has said, that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void.

In the argument of this case, great reliance was placed, on the part of the defendants, on the case of *Doe v. Glover*, 1 C. B. 448; but in that case the court seems to me to have proceeded upon the ground, that the devise over was not repugnant to or inconsistent with the prior devise, and the court, therefore, certainly did not intend to disturb the previous authorities on the principle on which they proceeded. The devise was there a devise in fee, and in case the devisee should not have parted with or disposed of the same, then over. The court was of opinion that he could not, under that, dispose of it by will,

¹⁶ As in accord with *Gulliver v. Vaux*, see *In re Dixon*, L. R. [1903] 2 Ch. 458; *Green v. Harvey*, 1 Hare, 428 (leaseholds); *O'Callaghan v. Swan*, 13 Vict. L. R. 676.

but that the testator meant, unless there was a parting with or disposition of the estate by deed in the lifetime of the first devisee, the devisees over would take, and the executory devise over to them would be good. I may observe, too, that the attention of the court seems hardly to have been drawn to the point, that the devise over, as it was construed, took away the testamentary power which was incident to the fee first devised. Not one word seems to have fallen from the court or from counsel in the course of the argument as to the effect of that decision being to contravene the rule of law by which every devisee in fee has a testamentary power. But it is plain, on looking at the cases, that if a man says the estate shall go over if you do not dispose of it by deed; he says, you shall not have that power which the law gives of disposition by will. That point seems not to have been drawn to the attention of the court, and, I will venture to add that, if that case of *Doe v. Glover* is to be considered as conflicting with the other authorities, I think that the other authorities, and especially the case of *Gulliver v. Vaux*, ought to prevail against it.

Doe v. Glover
Doubtful

Another case was referred to, *Borton v. Borton*, 16 Sim. 552, where the disposition was to the daughter, to be made subject to her disposition; and then there followed a power to her to dispose of the property by will. But that case proceeded entirely on the particular words of the will. The Vice-Chancellor of England evidently considered the words "to be subject to her disposition thereof," as meaning to be subject to her testamentary disposition and as referring to the ulterior power of testamentary disposition given to her. The case, therefore, depends entirely upon the particular language of the will, and without saying whether it is consistent or inconsistent with the case of *Doe v. Thomas*, 3 A. & E. 123, and the principle to which Mr. Justice Coleridge referred in *Doe v. Thomas*, it is not material to the present case.

My opinion therefore is, that the answer to this case must be in favor of the plaintiffs.¹⁷

¹⁷ Accord: In re *Mortlock's Trust*, 3 K. & J. 456 (personal property); *Moore v. Sanders*, 15 S. C. 440, 40 Am. Rep. 703.

In *Barton v. Barton*, 3 K. & J. 512, W. Page Wood, Vice Chancellor, on the authority of *Holmes v. Gordon*, held that after an absolute freehold interest in realty a gift over on the first taker dying intestate was void. He said: "It is unfortunate that a decree was allowed to be made in this cause, without discussion, in the face of an authority which shews that, as to personal estate at least, a gift over in the event of the legatee dying intestate, is repugnant and void. It has been since decided in the case of *Holmes v. Godson*, determined by the Lords Justices in March, 1856, that a like construction is to be put upon a similar devise of real estate; and that, whether the subject of the gift be real or personal property, a gift over in the event of the decease and intestacy of the party to whom an absolute interest is given by the will, is repugnant and void."

Godson

SHAW v. FORD.

(Chancery Division, 1877. 7 Ch. Div. 669.)

William Shaw, by his will, dated the 31st of March, 1836, devised as follows:

"I do hereby give, devise, and bequeath unto my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike, all and every of those my thirteen dwelling-houses situate in Wood Street and Perry Bank, Lane End, in the parish of Stoke-upon-Trent, together with a pew in the south aisle of Lane End Church, to have and to hold subject to the following conditions. First, it is my will and desire that none of the afore-mentioned houses or lands, with the exception of my large garden in Perry Bank, be disposed of either by division, assignment, transfer, or sale, without the written consent and approbation of each and every of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, their heirs, assigns, or representatives. Secondly, it is my will and desire that if need be, the afore-mentioned garden be sold to meet contingent expenses; and furthermore, it is my will and desire that, until the before-mentioned distribution of the property is made, the rents and proceeds shall come into one common fund, and be divided equally amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, namely, at Midsummer and Christmas, first deducting all reasonable and necessary charges for the proper maintenance and good repair of the afore-said property which repairs are to be deducted out of the rents. Furthermore, it is my will and desire that, if there should be no lawful distribution of this my property during the natural life of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, it shall then devolve to the children lawfully begotten of them my four sons. And, in case any of these my four sons should die without issue, then it is my further will and desire that the half-yearly share of the rents so possessed or intended to be possessed by them or him shall in that case devolve to the widow or widows of such deceased son or sons, to be by them received and enjoyed so long as they retain their widowhood, and afterwards it shall devolve to the survivor or survivors of my other sons, that is to say, to my grandchildren and to their heirs and assigns, to be divided equally amongst them, share and share alike * * * And, as to all the rest, residue, and remainder of all my estate and effects whatsoever and wheresoever not hereinbefore effectually disposed of, I do hereby give, devise, and bequeath the same to be equally divided amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike." And the testator appointed his sons Thomas Shaw and John Shaw executors of his will. The testator died in August, 1837, and his will was afterwards proved by the executors. All the four sons survived him. By a deed dated the 4th of October, 1838, and made between Jesse

Shaw and Eleanor his wife of the first part, John Shaw of the second part, William Shaw of the third part, Thomas Shaw of the fourth part, and Frederick Bishop of the fifth part, and duly acknowledged by Eleanor Shaw, Jesse Shaw (with the written consent of Thomas, John, and William) granted, and Eleanor Shaw released to Bishop and his heirs, the undivided share of Jesse Shaw under the will of the testator in the thirteen dwelling-houses, with the land thereunto belonging, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. And by the same deed Thomas Shaw (with the written consent of John, William, and Jesse) granted unto Bishop and his heirs all the undivided share of Thomas under the will of the testator in the same hereditaments, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. William Shaw died in 1846 intestate, leaving the plaintiff George Shaw, his eldest son, and three other children him surviving. John Shaw, by his will, dated the 3d of February, 1851, devised all his real estate to trustees on certain trusts, and he died on the 4th of November, 1853. Thomas Shaw, by his will, dated the 14th of September, 1858, devised his real estate to trustees on certain trusts for the benefit of his wife and children, and he died in 1859.

The bill in the suit was filed in April, 1874, by George Shaw against grandchildren and great-grandchildren of the testator, and it prayed that the rights and interests of all parties interested in the thirteen houses, with the land attached thereto (other than the garden at Perry Bank), devised by the testator's will, might be ascertained and declared by the court; that the houses might be sold under the direction of the court, and the proceeds of sale divided among the persons interested therein according to their respective interests, or that a partition of the property might be made.

FRY, J. The question in this case arises on the will of a testator of the name of William Shaw, and it is shortly this: whether or not a certain executory devise is valid or invalid, the plaintiff asserting its invalidity, and some of the defendants asserting its validity. [His Lordship stated the provisions of the will, and continued:]

Now, the first question is what estate do the four sons take in this specifically devised property, before we come to that portion of the will which gives it over in the event of there being no lawful distribution? In my opinion the sons take estates as tenants in common in fee simple. I think that it is clear they take, if at all, as tenants in common, because they are to take "share and share alike." The only question which requires any attention is, whether they take for life or in fee simple. I am of opinion that the expression of the testator's desire that none of the houses be disposed of either "by division, assignment, transfer, or sale without the written consent of each and every of the four sons, their heirs, assigns, or representatives," shows that the testator considered the heirs of the four sons as having an estate in the property, which they could only have in the event of its being a fee

simple estate. There is, in my opinion, a devise of this particular property to the four sons as tenants in common in fee.

Then comes the devise over which I have already read. It will be observed that the terms are, "if there should be no lawful distribution of this my property during the natural life of these my four sons," and then it is given over in a certain way the details of which I will not repeat.

Now, it is to be observed that the period during which the contingency there referred to may arise is "the natural life of the four sons," that is to say, the period of the joint lives of all the four sons. The next inquiry is, what is the nature of the event which constitutes the contingency upon which the executory devise is to take effect. It is if there is no lawful distribution of the property amongst the four sons, in other words, in the absence of a partition during their joint lives. Now the right of all the tenants in common of an estate is, if they so think fit, to enjoy it, not in severalty, but as tenants in common of an undivided estate; and therefore the contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate.

The next inquiry is, at what period is that executory devise over to take effect, if at all. The answer is that it is to take effect at the death of each of the four sons. It is quite true, as I have already pointed out, that the period during which it may arise is that of the joint lives, and therefore it will take effect with regard to the son who dies first at the very moment when the contingency is determined; but with regard to the other sons the contingency will be determined at an earlier period than their deaths, though the devise will come into operation at the death of each of them respectively.

Now that being so, I have to inquire what are the general principles of law applicable to such a case? They may, I conceive, be stated in this way. *Prima facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver v. Vaux*, 8 D. M. & G. 167, n.; *Holmes v. Godson*, *Ibid.* 152; and *Ware v. Cann*, 10 B. & C. 433. Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there

again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley v. Peixoto*, 3 Ves. 324; *Ross v. Ross*, 1 Jac. & W. 154; and *In re Yalden*, 1 D. M. & G. 53. It is true that in some of the earlier cases, such as *Doe v. Glover*, 1 C. B. 448, and *Watkins v. Williams*, 3 Mac. & G. 622, a distinction was taken between realty and personalty, but that was overruled in *Holmes v. Godson*, and it never had anything in the nature of principle or reason to support it. I think, therefore, that these exceptions to the general rule are well established.

That being so, it only remains to be observed that the executory devise in the present case is within both of these exceptions. It is within the first, because, as I have pointed out, although the period during which the contingency is to be determined is that of the joint lives of the four sons, the time at which the devise over is to take effect is the death of each of the sons, that is, the moment when the estate devolves. It takes effect at the moment of devolution, but at no other time, and altering, as every executory devise must alter, the course of devolution, it is bad upon that ground. It is equally bad under the second exception, because the event upon which it is to take effect is the exercise of a right which is incident to the estate in fee simple already given to the tenants in common, namely, the right to enjoy without alienation. It is bad as being a gift over upon the exercise of that right.

For these reasons I hold that the plaintiff's contention is correct. I make a declaration to the effect that the devise over is bad, and that the four sons took estates as tenants in common in fee simple. There will be a decree for sale and distribution of the fund.¹⁸

¹⁸ See, also, *In re Jones*, [1898] L. R. 1 Ch. 438; *Lloyd v. Tweedy*, [1898] 1 Ir. 5 (gift over of what remains at the first taker's death); *In re Jenkins' Trusts*, 23 L. R. Ir. 162; *May v. Joynes*, 20 Grat. (Va.) 692.

JACKSON v. ROBINS.

(New York Court of Errors, 1819. 16 Johns. 537.)

THE CHANCELLOR [KENT].¹⁹ This is an action of ejectment brought by, or on behalf of Catharine Neilson, formerly Catharine Duer, and one of the daughters of Lord Stirling.

It appears, by the special verdict, that Lord Stirling was, on the 1st of January, 1771, seised in fee, of a tract of 3,000 acres of land in Walkkill, in the now county of Orange, and of which the premises in question are a part. That in that year, Ann Waddell recovered a judgment against him, for £7,790 of debt, and which judgment, upon the death of Ann Waddell, was revived by scire facias, in 1775. That Lord Stirling died in 1783; and, in 1788, the executors of Ann Waddell, undertook to revive and enforce the judgment against the representatives of Lord Stirling. A scire facias was, accordingly, sued out of the Supreme Court in that year, directed to the sheriff of New York, and commanding him to give notice to the heirs of Lord Stirling, and to the tenants of the lands in his bailiwick, which were bound by the judgment, to show cause, if any they had, why the debt should not be levied on those lands. To this writ of scire facias the sheriff returned, that he had made known to Mary Watts and Catharine Duer, who were daughters and heiresses of Lord Stirling, to appear in the Supreme Court, and show cause, if any, why the debt should not be levied on those lands. The sheriff further returned, that there were no other heirs of Lord Stirling nor any other tenants, or any lands in his bailiwick, bound by the judgment. The heirs did not appear according to the summons, but made default, and judgment was thereupon awarded, that the executors of Waddell should have execution against those heirs of the lands which were of Lord Stirling, in 1771, and in their hands and possession. In the same year, execution issued upon the judgment so revived, to the sheriff of Ulster, commanding him to levy the debt and costs of the lands in his bailiwick, whereof Lord Stirling was seised in 1771, and in the hands and possession of those heirs. The sheriff stated, that he had seized certain lands which were of Lord Stirling, and of which he was seised in 1771, in the hands and possession of those heirs, and sold them to John Taylor. The premises in question were part of the lands so seized and sold, and John Taylor, in 1794, conveyed them to Samuel Harlow, who entered into possession, and in 1795, sold them to the father of the present defendant, who continued in possession from 1795 to 1814, when he died, and the estate descended to the defendant, as his son and heir at law.

From this state of facts, it appears that here has been an actual bona fide possession, under the sheriff's deed, of 25 years, and it is 31

¹⁹ The facts are stated in the opinion of the Chancellor.

years since Catharine Duer was personally summoned, as one of the heirs of Lord Stirling, to show cause why the judgment debt against Lord Stirling should not be levied. The defence set up against this action is twofold, and consists, 1. Of a title under the sheriff's deed: 2. Of a legal protection under the Statute of Limitations. If this defence should prove ineffectual, then the lessor of the plaintiff, Catharine Neilson, as one of the daughters and heirs of Lord Stirling, would be entitled to an undivided moiety of the premises. But she sets up a claim to the whole land, not as heir, but as devisee under her father. Lord Stirling, by his will, devised "all his real and personal estate, whatsoever, unto his wife Sarah, to hold the same to her, her executors, administrators and assigns; but in case of her death, without giving, devising, and bequeathing by will, or otherwise selling or assigning the said estate, or any part thereof, then he devised all such estate, or all such parts thereof as should so remain unsold, undevised or unbequeathed, unto his daughter Catharine Duer, to hold the same to her, her executors, administrators and assigns." The claim, however, whether as heiress, or as devisee, is still under Lord Stirling, and subject to the judgment of Ann Waddell. In whatever shape Catharine Duer, now Catharine Neilson, may put forward her claim, she still is the very person who was personally summoned in 1788, to show cause why that judgment should not be levied, and who, by her silence and default, admitted she had nothing to say.

None of the facts in the case, are the subject of dispute. The existence and validity of the judgment debt, at the time of the scire facias, and of the sheriff's sale, is not questioned. That the premises were owned by Lord Stirling, in 1771, and legally bound by the judgment, is not denied: that they were unoccupied in 1788, and that there was no actual tenant upon the land to summon, is granted. Neither the original judgment, nor the judgment upon the scire facias, nor the execution thereon, have ever been impeached, either by a writ of error, or by application to the Supreme Court, on the ground of irregularity. They all stand, to this moment, and after a lapse of upwards of thirty years, as valid proceedings, upon record. The defence, therefore, in any view of the case, is very imposing: and if, in the face of all these facts, the claim of the heir or devisee could be sustained in an action of ejectment, against the present defendant, I should apprehend that it would communicate a very injurious insecurity to title under judgment and execution.

1. The first point to be considered is, whether the defendant has not a good title under the sheriff's deed.

[This part of the opinion is omitted. The learned Chancellor was of opinion that the defendant had a good title under the sheriff's deed.]

If I am correct on this branch of the defence, it would be unnecessary to go farther. The judgment of the Supreme Court must be affirmed. But, perhaps, my opinion may not meet with the entire

concurrence of the court, on this point; and as the other head of the defence arising upon the Statute of Limitations, occupied the largest and most intricate part of the argument of the counsel, I should not feel satisfied with myself, if I did not pay some attention to so learned a discussion.

If Lady Stirling took an estate in fee under the will of Lord Stirling, then at her death, Mrs. Neilson would have been entitled, as one of her heirs, to an equal undivided moiety of all her interest in the premises. But if Lady Stirling took a fee, then an adverse possession commenced when Harlow entered into possession under John Taylor, in 1794, and the Statute of Limitations began to run against her, for she was then under no disability. When the Statute once begins to run, it continues to run until the twenty years have expired, and, therefore, not only Lady Stirling, but all who claim under her by will or by inheritance, were bound in 1814, and before the commencement of this suit. The question, therefore, as to what estate Lady Stirling took under the will, becomes material only by its influence upon this other question of the Statute of Limitations; and it was quite entertaining to see how industriously and profoundly the counsel were obliged to labor upon the one question merely to bring it to bear upon the other.

This question is also supposed to have been decided by this court in the former cause of Jackson v. Delancy, 13 Johns. 537. But, I apprehend, that the decision of this court in that case does not rest at all upon this point, and I barely mentioned in the opinion which I then delivered, that Lady Stirling did take a fee under Lord Stirling's will, and that the devise over to his daughter Catharine Duer was not a good limitation by way of executory devise. I relied for this upon the decision of the Supreme Court in Jackson v. Bull, 10 Johns. 19, and observed, that nothing had been urged to show why that decision was not to be regarded as correct. It is that decision, then, and not the one in this court, which I think governs this question. If that decision be sound, then, according to the principle of it, Lady Stirling did take an estate in fee; and, notwithstanding all that has been said or suggested to the contrary in the court below (vide 15 Johns. 171, 172), I am obliged still to be of the opinion, that it was a well-founded decision.

Suffer me, for one moment, to re-examine its foundations. *Redit labor actus in orbem.*

The testator, in that case, devised to his son Moses, and to his heirs and assigns forever, a lot of land, and then added, that in case his son should die without lawful issue, the property he died possessed of, he gave to his son Young. Moses, the son, did die in possession of the property, and without lawful issue, but he devised it by will, to his wife and others, under whom the plaintiff claimed, in opposition to the devise over to the other son.

The counsel for the plaintiff, contended, that the limitation over by way of executory devise, was void, because repugnant to the absolute power of disposal given by the will to Moses, who was thereby enabled to defeat it. The court unanimously acceded to that principle, and cited authorities in support of it, and gave judgment for the plaintiff.

The first case that the court then relied upon, was that of The Attorney-General v. Hall, Fitzg. 314, decided in 1731 by Lord Chancellor King, assisted by the Master of the Rolls and Chief Baron Reynolds. Hall, the testator, owning real and personal estate, gave it, by will, to his son, and to the heirs of his body, and if he should die, leaving no heirs, then he gave so much of the real and personal estate as his son should be possessed of at his death, to the Goldsmiths' Company at London, for charitable purposes. A limitation over for such a purpose had strong claims upon the protection of a court of chancery, and I hope that I may be excused for making, as a passing remark, that the will awakens interesting associations from another circumstance, which is, that Sir Isaac Newton was one of the executors. The son alienated the real estate by a common recovery, and bequeathed the personal estate by will to his wife, and died without issue. The question arose between the wife, claiming under the will, and the Goldsmiths' Company claiming by virtue of the limitation over on the event of the son dying without issue. The case was fully and ably argued, and there was no distinction made between the real and the personal estate, as to the validity of the limitation over. The court were unanimously of the opinion, that the Goldsmiths' Company had no valid claim, and that the limitation over was void, because the absolute ownership had been given to the son; for the property was given to him and the heirs of his body, and the company were to have no more than he should leave unspent, and, therefore, he had a power to dispose of the whole. The words that gave him an estate tail in the land, gave him the entire property in the personal estate, and nothing remained to be given over by the testator.

The point of that case then was, that where an estate is given to a man, and the heirs of his body, with a power of disposal, at his own will and pleasure, it carries with it an absolute ownership, repugnant to any limitation over, and destructive of it. The court did not make any distinction between the real and personal estate, and say, that the limitation over was good as to the one, and void as to the other. They said, generally, that the limitation over in the will was void, because the testator gave the son an unqualified power to spend the whole.

The other case that the court relied on in Jackson v. Bull, was Ide v. Ide, 5 Mass. 500, decided in the Supreme Court of Massachusetts, in 1805. There the testator gave by will, to his son, and to his heirs and assigns forever, certain real and personal estate, and then added,

that if the son died without heirs, the estate which he should leave was to be equally divided between two other persons. The son did die without leaving heirs, and the question arose between those claiming the real estate under the limitation over, and those claiming it under a conveyance from the son. The opinion of the court was delivered by the late Ch. J. Parsons, whose character, as a lawyer and a judge, is held in universal reverence. He cited and relied upon the case of *The Attorney-General v. Hall*, and said, that "whenever it is the clear intention of the testator that the devisee should have an absolute property in the estate devised, a limitation must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised, at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift." He then applied the rule to the case before him, and observed, that "the absolute unqualified interest in the estate devised, was given to the son, which was inconsistent with the limitation over, and, consequently, the limitation was void."²⁰

The error, in the case of *Jackson v. Bull*, said the learned counsel, was in applying the English case to the real estate, when it was applicable only to chattels. But the Supreme Court of Massachusetts were then in the same error, for they equally so applied it. "The limitation over," says Chief Justice Parsons, "makes no distinction between the real and personal estate, operating only on such part of either, as the first devisee should leave." In both of those cases, the devise was of real and personal estate in the same sentence, and the same limitation over was created as to each; and neither the English, nor the Massachusetts court, admitted any difference in the rule of construction, or in the operation of the power of alienation, whether applied to the limitation of the real or of the personal estate.

I do not know that either of those two last decisions have ever been questioned in any court, or by any author. They were pronounced by the highest judicial authorities; and Lord Hardwicke (1 Ves. 10) gives his sanction to the accuracy of the English case. *Beachcroft v. Broome*, 4 Term, 441, decided in the K. B. in 1791, is in confirmation of the doctrine of the prior case. That was the case of a devise to B. and his heirs, and if he die without having settled, or otherwise disposed of the estate, or without leaving issue of his body, then the devise over. B. sold the premises in fee, and died without issue, and the question was, whether the purchaser took an estate in fee, and the K. B. held clearly that he did. The decision is

²⁰ 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, 3 N. E. 316, 771, 53 Am. Rep. 166; *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.

entirely conformable to the doctrine in *The Attorney-General v. Hall*, and *Ide v. Ide*, and *Jackson v. Bull*; but a single expression of Lord Kenyon is seized upon, and great reliance was placed upon it by the counsel for the plaintiff in this cause. Lord Kenyon said (and it must have been in loose conversation on the bench), that if the case had turned on the question whether that was an estate tail in B., he should have thought it extremely clear that on failure of the first limitation, the second ought to have taken effect as an executory devise. Perhaps, the meaning of Lord Kenyon is not to be clearly understood. It was an observation not required by the decision, nor applicable to the point; but let it mean what it may, are we to permit such a loose remark to be of any weight or consideration, in opposition to the deliberate and solemn judgments of the courts? It is enough, I apprehend, merely to mention such a dictum, and then to pass it by in silence.

If we now apply these cases to the will of Lord Stirling, we cannot but be struck with their perfect and controlling application. He does, in the first place, devise and bequeath unto his wife Sarah, all his real and personal estate whatsoever, to hold the same to her, her executors, administrators and assigns. This was a gift in fee. The word estate, in a will, carries the land and all the testator's interest in it. It is *genus generalissimum*, said Lord Holt, Countess of Bridgewater v. Duke of Bolton, 1 Salk. 236, and includes all things real and personal. The words all his estate are, in a will, descriptive of his fee; and in a subsequent case, *Barry v. Edgworth*, 2 P. Wms. 523, the Master of the Rolls, referring to this opinion of Holt, said, that the law was then settled on the point, and that the word estate comprehended not only the thing, but the interest in it; and as it had been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it. So again, Lord Mansfield observed, *Roe v. Harvey*, 5 Burr. 2638, that the word estate in a will, carried everything, unless tied down by particular expressions. And in a subsequent case, *Holdfast v. Marten*, 1 Term Rep. 411, Mr. J. Buller said, that the word estate was the most general word that could be used, and words of restraint must be added to make it carry less than a fee. And lastly (for I will not fatigue myself with further citations on the point), Mr. J. Paterson, of the Supreme Court of the United States, declared, *Lambert v. Paine*, 3 Cranch, 134, 2 L. Ed. 377, that the word estate was the most general, significant, and operative word, that can be used in a will; and it comprehends both the land and the inheritance.

We may say, then, that Lord Stirling, by the first part of his will, gave an estate in fee to his wife. So he, also, repeated this gift of a fee, by the next clause in the will, when he admits expressly, that she has the power and the right to give, devise, and bequeath, or sell or assign the estate, or any part thereof. This power, of itself, is an attribute of ownership, and carries with it a fee. Thus, as early as 6

Eliz., Dalison's Rep. 58, it was held by the judges, that if a man devises land to his wife, to dispose of and employ it upon herself and her son, at her pleasure, she takes a fee. So again, Lord Coke says, Co. Lit. 9, 6, that if a man devises land to another, to give and to sell; this amounts to a devise in fee; for, in a will, the word heirs is not necessary to create an estate of inheritance. There are many other cases to the same effect, which I need not particularly mention (Moor. 57; 2 Atk. 102; 2 Johns. Rep. 391), and we may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases. *Tomlinson v. Dighton*, 1 Salk. 239; 1 P. Wms. 149, s. c.; *Crossling v. Crossling*, 2 Cox, 396; *Reid v. Shergold*, 10 Ves. 370; *Goodtitle v. Otway*, 2 Wils. 6.

The question then occurs, was the limitation over to Mrs. Duer valid, after the creation of such an estate in fee. The words of the will were, that "in case of the death of his wife, without giving, devising, and bequeathing by will, or otherwise selling or assigning the estate, or any part thereof, he doth give and devise all such estate as should so remain unsold, undevised, or unbequeathed to his daughter, Lady Catharine Duer," &c. This limitation over, must be either as a remainder, or as an executory devise, and it is impossible that it should be either, upon any known principles of law. No remainder can be limited after an estate in fee, and, therefore, if a devise be to A. and his heirs, and if he die without heirs, then to B., the remainder is repugnant to the estate in fee, and void. *Preston v. Funnell*, Willes' Rep. 164; *Pells v. Brown*, 2d point, Cro. Jac. 590. Nor can the limitation over operate by way of executory devise, because the power to dispose of the estate by will or deed, which Lord Stirling gave to his wife, is fatal to the existence of that species of interest. It is a clear and settled rule of law, that an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance. It cannot be created, and it cannot live under such a power in the first taker. "These limitations," says Mr. J. Powell, *Scatterwood v. Edge*, 1 Salk. 229, "make estates unalienable, for every executory devise is a perpetuity, as far as it goes, that is to say, it is an estate unalienable, though all mankind join in the conveyance." Vide also, 2 *Fearne*, p. 51, by Powell; 2 *Saund.* 388, d. note. We are obliged, therefore, to have recourse to the explicit and settled doctrine, in the cases of *The Attorney General v. Hall*, and of *Ide v. Ide*, and of *Jackson v. Bull*, and say, that an absolute ownership or capacity to sell, in the first

taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void.

Lord Stirling clearly intended to give his wife an estate in fee. The words amount to demonstration of that intention. If she sold the land, she was not accountable for the proceeds. She could not be chargeable with waste, and she might mortgage, or encumber the land, for that is included in the right to give, and sell, and assign. And when he attempted to engraft an executory devise or limitation over, upon a fee with such an absolute power of control, he did what was incompatible with his other and principal intention, and which the courts must, of necessity, reject as repugnant and void.

There is not a case to be found, in which a valid executory devise was held to subsist under an absolute power of alienation in the first taker. I have looked at the cases so industriously collected by the plaintiff's counsel, and there are none of them that reach this point. All executory devises may be said, in some degree, to depend upon the will or discretion of the owner of the precedent estate. If a devise be to A. in fee, but if he die without issue living at his death, then over to B., it is in his volition and power (morally speaking), not to marry, or to marry, and have issue, and so avoid the devise over. So, if the limitation over be made to depend upon the contingency, that the first taker marry without the consent of B., or marry a prohibited person, he may, undoubtedly, avoid marrying without the requisite consent, or avoid marrying against the prohibition, and so defeat the limitation. But these distinctions have nothing to do with the simplicity and good sense of the general rule we are discussing. The first taker, in these special cases, has not an absolute discretion and free agency, within the meaning of the rule. The sound doctrine on the subject is, that an executory devise under the salutary checks provided for it, is a stable and unalienable interest, and the first taker has only the use of the land or chattel, pending the contingency mentioned in the will; and he cannot convert the property to his own use, and defeat the subsequent estate by a voluntary alienation. This is the rule for which we contend, and it was not so with Lady Stirling. She could give and devise, and she could sell and assign the estate when, and to whom, and for what purpose she pleased. She was a free moral agent, and an absolute and independent owner, in respect to the estate. This is what we understand by a right, incompatible with an executory devise, and this is what we are to understand by the books, when they speak of a limitation over as being void, because inconsistent with such an absolute power and dominion in fee.

But it is time that this discussion should draw to a close. The result of my inquiry, is a belief that the defendant has a good title under the judgment and execution, and that if he had not, he is, nevertheless,

protected by the Statute of Limitations, because Lady Stirling was seised in fee, so as to enable the Statute to run against her, when the adverse possession commenced, in 1794. Upon either ground, if correct, the judgment must be affirmed. During the examination of this subject, I have not been insensible to the weight of the inquiry, and more especially, as one of the judges of the court below seems to think the law in favor of the claim. The counsel for the plaintiff, and one of them a son of a lessor of the plaintiff, have, indeed labored the points, in their argument annexed to the case, as well as at this bar, with a diligence and painful anxiety, and, no doubt, with a sincere conviction, that has excited my sympathy. The descendants of Lord Stirling appear to feel, that a rich inheritance has been injuriously snatched from their enjoyment, but I think it was fairly lost by the inability or neglect of their ancestor, or his representatives, to redeem the encumbrance. And if the law was with the plaintiff, would not our sympathies be as properly directed to this defendant, whose father was a bona fide purchaser under the execution, and cultivated the premises as his own for 20 years, and died in possession, and transmitted the fruit of his labor to his son? The truth is, that judges are bound to declare the rules of law strictly, without regard to consequences. They must follow the conclusions of the understanding, and not the dictates of the heart. If the argument on the part of the plaintiff has made a more favorable impression upon others than it has upon me, I shall be perfectly contented. I am, however, obliged to say, as the case strikes me, that the law is with the defendant, and that the judgment ought to be affirmed.

This being the unanimous opinion of the court, it was, thereupon, ordered, adjudged and decreed, that the judgment of the Supreme Court be affirmed, and that the plaintiffs in error pay to the defendant in error, fifty dollars and fifteen cents, for his costs and charges, in and about his defence in this court; and that the records be remitted, &c.

Judgment of affirmance.²¹

WILLIAMS v. ELLIOTT.

(Supreme Court of Illinois, 1910. 246 Ill. 548, 92 N. E. 960, 138 Am. St. Rep. 254.)

CARTWRIGHT, J. John Laughrin died on March 11, 1901, leaving a last will and testament dated February 26, 1884, which was admitted to probate in the county court of Jo Daviess county. By the will he devised about 260 acres of land in said county to his wife, Margaret Laughrin, for life, and devised the remainder after the said life estate as follows: "Subject to the provisions of the said second clause of my

²¹ Contra: *Andrews v. Roye*, 12 Rich. 536 (1860).

will and the rights of my wife as therein specified, I give, devise and bequeath unto my niece, Phœbe W. Price, and unto my children, Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, share and share alike, all my estate, real, personal and mixed, of every name and kind and wherever situated, that exists after the decease of my wife, aforesaid, to have and to hold the same unto the said Phœbe W. Price, Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, and their heirs and assigns forever. But in case the said Phœbe W. Price shall not dispose of the said estate devised to her, by will or otherwise, before her death, and should die without issue, seised of said estate, then said estate herein by this will devised to said Phœbe W. Price shall go to and vest in the said Mary Fitzsimmons, Montana Laughrin and Rachael Laughrin, share and share alike, to be held by them and their heirs and assigns forever." Rachael Laughrin, one of the daughters, became the wife of Alvin O. Elliott, and died on November 10, 1899, intestate, leaving her husband and her children, True Elliott and Edna Elliott, surviving her. The testator left surviving him Margaret Laughrin, his widow; Montana, his daughter, who had been married, and whose name was then Montana Williams; Mary Fitzsimmons, his daughter; Edna Elliott and True Elliott, his grandchildren; and Phœbe W. Price, his niece—devisees under the will; the grandchildren taking the place of their mother by virtue of the statute. Phœbe W. Price died intestate in June, 1903, without having disposed, by will or otherwise, of the land devised to her, and she left her sister, Eliza Green, her only heir at law. Margaret Laughrin died on February 15, 1907, and her life estate terminated.

On May 15, 1909, Montana Williams filed her bill in the circuit court of Jo Daviess county, alleging that the title to said lands had become vested in herself and Mary Fitzsimmons, Edna Elliott, and True Elliott in fee simple, making Eliza Green and all other parties interested defendants, and praying for partition. Eliza Green answered, alleging that Phœbe W. Price became seised, by virtue of the will, of an estate in fee simple to an undivided one-fourth of the lands, subject to the life estate of the widow; that the limitation over in case she should die without issue, seised of the estate and not having disposed of the same by will or otherwise, was void; and that said estate was then vested in the said defendant, Eliza Green, as only heir at law of said Phœbe W. Price. Eliza Green also filed a cross-bill, making the same averments and praying for partition accordingly. The chancellor sustained exceptions to the said answer and a demurrer to the cross-bill, and ruled said defendant to file a sufficient answer instanter. She stood by her answer and cross-bill and refused to answer further, whereupon the original bill was taken as confessed by her, and the cause was referred to the master in chancery. Upon the coming in of the report of the master, the chancellor found and decreed in accordance with the allegations and prayer of the original bill. Eliza

Green sued out a writ of error from this court to bring the record here for review, and joined her codefendants with her as plaintiffs in error by virtue of the statute. The parties having all been brought into court, an order of severance was entered, and Eliza Green prosecutes the writ of error alone.

By the will the testator devised to his niece and his three daughters, and their heirs and assigns, forever, the real estate in question in equal shares, subject to the life estate of his wife, Margaret Laughrin. This devise was in fee simple, but was followed by a provision that the estate devised to Phœbe W. Price should go to the three daughters in equal shares, in fee simple, if the said Phœbe W. Price should not dispose of said estate, by will or otherwise, before her death, and should die without issue, seised of said estate. If the executory devise was valid, the plaintiff in error, Eliza Green, has no interest in the real estate; but, if it was void, the undivided one-fourth descended to her as the heir at law of Phœbe W. Price.

Although an estate in fee simple is devised, it may be limited by a subsequent valid provision that the estate shall go over to others upon the happening of a certain contingency. The estate, when so limited, is still a fee, for the reason that it will last forever if the contingency does not happen; but so long as it is possible that the contingency may happen it is a base or determinable fee. One of the contingencies upon which such a limitation may lawfully rest is the death of the first devisee without issue, and so far as the executory devise in this case depended upon the death of Phœbe W. Price without issue it was valid: *Ackless v. Seekright, Breese*, 76; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Strain v. Sweeny*, 163 Ill. 603, 45 N. E. 201; *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210, 55 L. R. A. 701; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163.

There is, however, an equally unquestioned rule of law that an executory devise cannot be created if the estate devised to the first devisee is such that he can, by virtue of his ownership, alienate the estate in fee simple. 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. 4 Kent's Com. 10; *Smith v. Kimbell*, supra. 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. If there is an absolute power of disposition in the first devisee, the limitation over is void as a remainder, because of the preceding fee, since a remainder implies something left, and there can be nothing left after a devise in fee simple. It is also void as an executory devise, because the limitation is inconsistent with the absolute estate or power of disposition. 4 Kent's Com. 270; 2 Redfield on Wills, 69; *Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Hamlin v. United*

States Express Co., 107 Ill. 443; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751.

The majority of the court in the case of *Burton v. Gagnon*, 180 Ill. 345, 54 N. E. 279, did not agree that a simple devise to the heirs at law of the testator, who were his two children, coupled with the limitation over, carried with it a power of alienation free from the limitation, as stated in the opinion filed; but the decision is authority for the doctrine that where there is an absolute power of disposition an attempted executory devise is void. By the will in this case Phoebe W. Price had an absolute power of disposition of the estate devised to her, by will or otherwise, as she might choose, freed from the limitation over, and the attempted executory devise was based upon the contingency that she should be seised of the estate at her death and should not have disposed of the same, by will or otherwise. The attempted executory devise was therefore void, and she was vested with an estate in fee simple in the lands, subject only to the life estate of the widow.

In the case of *Friedman v. Steiner*, 107 Ill. 125, there was a devise of the rest and residue of the estate to the testator's wife and unto her heirs and assigns, forever, to the total exclusion of any and all person or persons whatsoever, but upon the condition that, if she should die intestate and without surviving lawful issue, said estate should be converted into money by the executor and paid as directed by the will. The court recognized the rule that an executory devise is void where there is an absolute power of disposition given by the will, but adjudged that the widow had not only a determinable fee, but 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 court found in the will the power annexed to the estate, and, of course, a power of sale added to an estate does not increase the estate. *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. In determining the estate of Mrs. Steiner the court held that one who is merely the owner of a base fee can convey no more but that she had power to convey in fee simple, or declining to exercise the power, might convey the determinable fee which she held. Her power to convey in fee simple was not regarded as an incident of her ownership, but was a power distinct from the right of property.²²

²² *Hubbard v. Rawson*, 4 Gray (Mass.) 242 (Devise in trust for Lucy absolutely "if said Lucy should make any disposition by will or other writing of said property, which she is at liberty to do, he pay, convey and deliver over said trust property to such person or persons as she may name; and if she does not make any such disposition, that he pay, convey and deliver over said trust fund, or what may remain in his hands, to her children, to be equally divided between them, meaning hereby that he shall pay and distribute what may remain of said fund at her decease, in case she make no will, in the same way and manner the same would have been distribut-

In *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, the court said that so far as the opinion in the *Friedman Case* announced a doctrine different from the established one concerning the power of the owner of a determinable fee to make a conveyance it had not been approved, and in the case then being considered it was held that the language, "if not disposed of by *Mary Maria Yates*," could not be construed to give her an unqualified power of disposition or any power whatever, and that

ed had she died intestate, sole and unmarried, to her children, if she leave any, and if not, to such as would inherit when the intestate leaves no children." In holding the gift over to the children valid, the court, by *Dewey, J.*, said: "In the view we take of the case, this part of the devise cannot be treated as a nullity. The cases, cited by the plaintiff, of *Ide v. Ide*, 5 Mass. 504, and *Newhall v. Wheeler*, 7 Mass. 189, are not parallel cases, and the same reasons do not exist here, as existed in those cases, for holding the conveyance to be that of an absolute title. * * * The result to which we come is, that *Mrs. Morris* had only an equitable fee simple contingent, liable to be defeated upon her dying before her husband, in case the estate was not conveyed by her order, and she had made no disposition of the property by will or other writing; that it was competent for the testator to make the devise over; and that, the estate given to *Mrs. Morris* having terminated by her death, her children held the land as purchasers by force and effect of the will of *Daniel Rawson*, and not as an estate acquired by inheritance from their mother.")

Randolph v. Wright and Wife, 81 Va. 608 (Devise to A. absolutely "should either son die without a will or lawful issue, the surviving son must heir all the property given by me to him." The court in holding the gift over upon the death of one son without issue valid, said by *Lacy, J.*: "Upon the best consideration we can give this case we are of opinion that, while it is true that the power of disposal by will or otherwise is incident to an absolute fee simple estate, and therefore adds nothing when annexed, which was not already an incident inhering in that degree of estate; yet that the power of absolute disposal by will is not an incident inhering in an estate for life only, nor in a defeasible fee, nor in any limited estate; and that in this case if the power of disposition had not been granted by the will it would not have been an incident inhering in the limited estate granted, to wit, a defeasible fee, liable to be defeated and determined by the happening of a contingency of the failure of issue, which contingency actually happened, and determined such limited estate; and that the power of disposing by will did not annex an incident of the estate already granted, and therefore to be held to be nugatory, but did annex a power not otherwise granted, and not otherwise attached to the estate granted; a power of appointment by will, added to an estate devised subject to an express limitation, whereby such estate is defeated and determined upon the contingency of his dying without issue. Such an estate can be held to be an absolute estate in fee simple only by disregarding the plain words of the will, to say nothing of that regard to the intention of the testator, to be gathered from the whole will, and then followed as the polar star in all effort to construe the wills of the dead. It is plain in this case that the intention of the testatrix was, and the plain and clear effect of the words used is, to be held to devise to her son *Edward* an estate liable to be defeated and determined upon his dying without issue. That contingency happened. The power of appointment was never exercised.")

See, also, *Eaton v. Straw*, 18 N. H. 320.

It is clear that where there is a gift to A. for life, with power to appoint by deed or will and in default of appointment to B., the gift over to B. is valid. In so holding in *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. 762, the court, by *Holmes, J.*, said:

"The testator's wife, *Mary Jacks*, took a life estate coupled with a power, and the limitation to his sister, *Lydia Hobbs*, was valid. *Ayer v. Ayer*, 128 Mass. 575, 577; *Smith v. Snow*, 123 Mass. 323; *Kuhn v. Webster*, 12 Gray,

Welsh v. Woodbury
144 Mass 542

counsel in the case did not so contend. In the Friedman Case, and perhaps other cases, an executory devise depending upon intestacy and the failure of issue has been considered valid; but there has been no one 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.

The decree is reversed, and the cause is remanded to the circuit court, with directions to overrule the exceptions to the answer of the plaintiff in error, Eliza Green, to overrule the demurrer to her cross-bill and require an answer thereto, and to proceed further in accordance with the views expressed in this opinion.

Reversed and remanded, with directions.²³

3. The suggestion which has been made, that it is hard to distinguish between enjoyment for life with absolute power of disposition, and absolute ownership (Bradly v. Westcott, 13 Ves. 443, 451), is met by these cases, and by the testator's clear expression of his intent to give an estate for life only. See, also, Kelley v. Meins, 135 Mass. 231, 234; Anon. 3 Leon. 71, pl. 108; 13 Ves. 453; Reith v. Seymour, 4 Russ. 263; Sugd. Powers (7th Ed.) 123-125. And the technical doctrine of Kelley v. Meins is avoided by this technical distinction. For the ground of Kelley v. Meins and that class of cases, whether concerning personal or real estate, is that the limitation over is an attempt to take away one of the incidents of ownership, and to say that, if the owner does not dispose of his property in his life or at his death, it shall devolve otherwise than as the law has provided. This objection does not apply to a remainder after a life estate, even when the life estate is coupled with a power.

Kelley v. Meins
135 Mass 231

"The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of Kelley v. Meins, as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate, coupled with a power. Cases supra; Surman v. Surman, 5 Madd. 123; In re Thomson's Estate, 13 Ch. D. 144; Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23. See Ross v. Ross, 1 Jac. & W. 154, 158; Cuthbert v. Purrier, Jac. 415, 417; Green v. Harvey, 1 Hare, 428, 432."

²³ Accord: Combs v. Combs, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359; Armstrong v. Kent, 1 Zab. (21 N. J. Law) 509.

In Hall v. Robinson, 3 Jones, Eq. (56 N. C.) 348, the limitations were to A. absolutely, but if he dies "leaving no will nor issues" then over to B. In holding the gift over valid the court, by Pearson, J., said: "The only difference between the present case and the ordinary cases of conditional limitations and executory devises and bequests is that here the future contingent estate is made to depend, not only upon the event of the death of the taker of the determinable fee under age, and if of age without leaving issue, but upon the additional event of his dying intestate, so as to make three instead of one, or two, contingencies; but there is no inconsistency between the existence of this contingent estate and the estate of the first taker; for, in order to make an absolute inconsistency, which the rule requires, the first taker must have the absolute estate, or a general power of disposition, so as to leave nothing in the testatrix capable of being given over to a third person. We are of opinion that the limitation over was valid."

CHAPTER II
FORFEITURE ON ALIENATION OF ESTATES FOR LIFE
AND FOR YEARS

LOCKYER v. SAVAGE.

(Court of Exchequer, 1733. 2 Strange, 947.)

The plaintiffs brought a bill as assignees of a commission of bankruptcy against Norris, to have an account of the personal estate which the bankrupt's wife's father died possessed of, he being a freeman of London.

The defendants insisted, that by articles between the bankrupt and Freeman and his daughter, previous to the marriage, she had in consideration of £4000 advanced by the father in his lifetime, released her right to any further demand out of the personal estate; and that the £4000 was settled to the use of the bankrupt for life, but if he failed in the world, the trustees were not to pay the produce to him, but apply it to the separate maintenance of the wife and children.

Upon the hearing two points were ruled: 1. That a child of full age might, for the consideration of a present advancement, bar herself of the customary share. And that it was stronger in the case of a child who had a right, than in the case of an intended wife, which had been allowed. 2 Vern. 665. 2. That the provision for her maintenance in case the husband failed, was good against creditors; it not being a provision out of the bankrupt's estate, but the settlement of her own fortune. Abr. Equ. Cas. 53, 54. And though it was objected, that the profits were forfeited by the act which was to vest the separate right in the wife, viz., bankruptcy; and when two rights concur, fortior est dispositio legis quam hominis: yet the court compared it to the case of a lease, where the lessee is restrained from assigning without consent of the lessor, and the assignment has always been held to be void. The bill was dismissed with costs. Strange pro defendente.

ROE d. HUNTER v. GALLIERS.

(Court of King's Bench, 1787. 2 Term R. 133.)

In this ejectment a special verdict was found before Gould, J., at the last assizes at Hertford, which stated that John Hunter being seised in fee of the premises in question, demised the same by two several leases dated 24th December, 1778, to Green, who for some time before had been and afterwards continued to be a dealer in horses, for twenty-one

years from Michaelmas, 1778, at rack rents for both farms of £150 a year, without any fine or other consideration than the yearly rents; in each of which leases is contained the following proviso: "that if the said yearly rents thereby reserved, or either of them, or any part thereof, shall be behind or unpaid for twenty days next after the respective days of payment, being lawfully demanded; or if the said J. Green, his executors, or administrators, shall assign over the indenture of lease or assign or let the premises thereby demised, or any part thereof, to any person whatsoever for any time or times whatsoever, without the license or consent of the said J. Hunter, his heirs, and assigns, first had or obtained in writing under his or their hands for that purpose; or if the said J. Green, his executors, or administrators, shall commit any act of bankruptcy within the intent and meaning of any Statutes made or to be made in relation to bankrupts, whereon a commission shall issue, and he or they shall be found or declared to be a bankrupt or bankrupts; or if he or they shall make any composition with his or their creditors for the payment of his or their debts, though a commission of bankrupt doth not issue, or if he or they shall make any assignment of his or their effects in trust for the benefit of his or their creditors; that then and from thenceforth in any of these cases it shall and may be lawful to and for the said J. Hunter, his heirs, and assigns, into the said demised premises to re-enter, and the same again to have, repossess, and enjoy, as in his or their former estate, anything therein contained to the contrary notwithstanding." It is then found that counterparts of the said leases were executed. That the two farms after such demise and before the bankruptcy of Green were improved by the bankrupt £30 per annum. It then stated the act of bankruptcy; that a commission issued thereon on 3d February, 1787; that Green was duly found and declared a bankrupt; and that the defendants afterwards entered into the premises, and were possessed as assignees under the commission and the usual assignment; upon whom the said John Hunter afterwards entered. But whether, &c.

ASHHURST, J. The only question is, whether a proviso in a lease, that if the lessee commit an act of bankruptcy, or, in other words, do any of those acts upon which a commission of bankrupt may be sued out, the landlord shall have a right to re-enter, be legal or not? The general principle is clear, that the landlord, having the jus disponendi, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable. Then is this proviso contrary to any express law; or so unreasonable as that the law will pronounce it to be void? That it is not against any positive law is admitted; and no case has decided it to be illegal. In the case of Lord Stanhope against Skeggs, the court were divided in opinion upon the question which arose there; therefore that is no authority either way: but considering what the ground of that difference was, it is some authority in support of this proviso; for the doubt arose upon considering whether a clause

of restraint could operate upon executors to prevent them from assigning land which was expressly leased to the original tenant and his executors, eo nomine, when that was the only means by which they could exercise their trust. Now that doubt does not occur in this case, this question turning on a different point. This proviso then not being against any express authority of law, it remains to be considered whether it be void or unlawful as against reason or public policy; now it does not appear to me to be against either. First, it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases; ejectments are every day brought on a breach of such covenants. The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by any act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present, because the consequence of the bankruptcy is an assignment of the property into other hands. Perhaps it may be more necessary for the landlord to guard against this latter event, as there is greater danger to be apprehended by him in this than in the former case. Persons who are put into possession under a commission are still less likely to take proper care of the land than a private assignee of the first tenant. Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection on that head. On the whole therefore I am of opinion that this is a valid proviso; and, the lease having been forfeited by the tenant's becoming a bankrupt, the lessor of the plaintiff is entitled to recover.

BULLER, J., after commending the conciseness of the special verdict, and recommending it as an example in future, said, the question lies in a very narrow compass; whether a proviso in a lease for twenty-one years, that it shall be void if the lessee become a bankrupt, be good in law? The defendant's counsel has commented much upon the different parts of this proviso. I cannot say whether any part of it may or may not be objectionable with reference to the Statutes concerning bankrupts; we are now to decide upon the construction of a proviso at common law, and not on any Statute. There is a great difference between them: Lord Chief Justice Wilmot took the distinction in a case before him in the Common Pleas, in which his Lordship said, where the question depends on a Statute, that mows down all before it, and it acts like a powerful tyrant that knows no bounds: but the common law operates with a more lenient hand; it roots out that which is bad, and leaves that which is good. The question here is, whether this proviso be good according to the principles of the common law as to that part of it on which this question arises, namely, the act of bank-

ruptcy, which is the only point necessary to be considered. The cases cited by the defendant's counsel have not the least analogy to the present question. That which was cited from *Equity Cases Abridged* proves nothing to this purpose. It was there taken for granted that a clause to prevent alienation by the tenant was good; but the court considered that the particular alienation in question was not within the terms of the covenant, because the covenant only extended to the act of the party, and that was an alienation in law, for the assignment was by virtue of a Statute. This case has also been argued on general principles of inconvenience, because the possession of an estate on such terms enables tenants to hold out false colors to the world. But that sort of observation does not apply to the case of land; for a creditor would not rely on the bare possession of the land by the occupier, unless he knew what interest he had in it. If he were desirous of knowing that, he must look into the lease itself; and there he would find the proviso that the tenant's interest would be forfeited in case of his bankruptcy. The stock upon a farm may indeed induce a credit; but that will not govern the present case. It is next urged that this is equivalent to a proviso that the lease shall not be seized under a commission of bankrupt; the defendant's counsel having first supposed the lease to be granted absolutely for a certain term, and then that a subsequent proviso is added to that effect. Such a proviso as that indeed would be bad, because it would be repugnant to the grant itself: but here there is an express limitation that the lease shall be void upon the fact of the lessee's becoming a bankrupt. It is clear that the landlord in this case parted with the term on account of his personal confidence in his tenant; that is manifestly the case in all leases where clauses against alienation are inserted. The landlord perhaps relies on the tenant's honesty; or he approves of his skill in farming, and thinks he will take more care of the farm than another; and therefore he has a right to guard against the event of the estate's falling into the hands of any other person, who may not manage it so well as the original tenant. Suppose a lease were made for twenty-one years, on condition that the tenant shall so long continue to occupy the land personally; there could be no objection made to such a condition, for the personal confidence is the very motive of granting the lease; and that is like the present case. *Lord Stanhope's Case* does not apply at all to this. In the first place, the court were equally divided, and therefore the case is of no authority. In mentioning this, I do not mean to say, or even to insinuate, that the opinion which I then held was right. But there is a great difference between the two cases: for there the lease was granted to the tenant, his executors, and administrators: they were to take as such, which gave rise to the doubt in that case; and *Lord Mansfield* there said, the difficulty is, that, as by the terms of the lease the executors were to take, the subsequent proviso that they should not assign seems to be repugnant to the grant itself. Again, that was not a husbandry lease

for twenty-one years, like the present, but for forty-one years; and there may be great reason for a distinction between the two terms; for if such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity. But the principal ground is, that this is a stipulation not against law, not repugnant to anything stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which I think it was competent for the lessor to make.

GROSE, J. The question is, whether the landlord may not stipulate that he will let his land only to the tenant, or to such assignee of the tenant as the landlord shall approve of. I know of no Statute or case which says that such a stipulation is bad. The defendant's counsel has called to his assistance the 21 St. Jac. 1, but that has never been construed to extend to lands, it only relates to goods and chattels. The argument of the tenant's obtaining credit by holding out false colors, does not apply to the case of land, but merely to goods; for a man does not get credit merely from the occupation of land, but from the interest which he has in it; in order to know which it is necessary that the creditor should see the lease, which, when produced, would show that the estate would be defeated upon the tenant's becoming a bankrupt. Therefore the argument derived from the credit which the tenant is likely to get by being in possession of the land, can have no weight in this case. As to the inconvenience which it has been contended will arise from establishing the validity of this proviso, it rather bears the other way; for this cannot be determined to be illegal on any principle which would not equally extend to leases which are every day granted in large towns, restraining the assignment of houses to persons exercising obnoxious trades; that not only diminishes the value of the particular house so assigned, but also the adjoining houses, belonging probably to the same landlord.

Judgment for the plaintiff.

SHEE v. HALE.

(Court of Chancery, 1807. 13 Ves. 404.)

John Mootham by his will, dated in March 1803, gave and bequeathed all the residue of his real and personal estate to trustees, upon trust, to pay to his son John Mootham the yearly sum of £200, clear of all deductions, during the term of his natural life, or until such time as his said son should actually sign any instrument, whereby or in which he should contract or agree to sell, assign, or otherwise part with, the same or any part thereof, or any way charge the same, or any part thereof, as a security for any sum or sums of money, to be advanced or lent to him by any person or persons whomsoever, or in any other

manner whatever charge or dispose of such annuity, or any part thereof, by anticipation; or whereby or in which he should authorize or empower, or intend to authorize or empower any person or persons whomsoever to receive such annuity, or any part thereof, except only as to the then next quarterly payment, after such authority or power should be given: such annuity or annual sum to be paid to his said son John Mootham by four equal quarterly payments; and he declared his will to be, that in case his said son should at any time sign or execute any such instrument or writing for the purposes or any of the purposes aforesaid, (except as aforesaid,) then and from thenceforth the same, and every part thereof, should cease to be paid or payable to him; and should sink into the general residue of his personal estate.

By a codicil, dated the 27th of December, 1803, the testator bequeathed the residue of his estate and effects to the same trustees, upon trust to pay the interest and produce thereof unto his wife Elizabeth, during her life; and after her decease directed them to transfer such residuary personal estate to other persons.

The testator died on the 6th of July, 1804. John Mootham, the son, being in confinement for debt, took the benefit of an Insolvent Act, passed on the 30th of July, 1804; and the annuity of £200 under the will of his father was inserted in the schedule of his property delivered in, and signed by him.

The bill was filed by the assignees under the Insolvent Act, claiming the annuity. The answers raised the question, whether the annuity was forfeited and sunk into the residue.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT]. The intention of the testator, to make this annuity personal to his son, cannot be doubted. The question is, whether that intention is sufficiently expressed. He has gone awkwardly about it, by expressing particular acts. His son was not to have this as a fund of credit. The testator supposed he had sufficiently guarded against that. It appears to me, that the son has done an act within this will, to authorize or empower others to receive this annuity. This differs from the case of the bankrupt.¹ The bankrupt had not done anything. The insolvent debtor was not in a situation to be compelled to part with this annuity. He might have enjoyed it for his life. The signing of the petition and schedule appear to me to be clear acts. As to the intention there can be no doubt.

¹ See, also, *Dommett v. Bedford*, 6 T. R. 684 (1796), where the annuity ceased upon the bankruptcy and attempted transfer by the annuitant.

ROCHFORD v. HACKMAN.

(Court of Chancery, 1852. 9 Hare, 475.)

A claim, filed by William James Rochford and Martha Ann his wife against Hackman and another, the personal representatives of William Rochford, the testator in the cause,—English the assignee under the insolvency of Richard Rochford the elder, the son of the testator, and Richard Rochford the younger, the son of Richard Rochford the elder, for the purpose of having the trusts of the will of the testator, so far as respected the sum of £1900 Consols, executed under the direction of the court, and to have one moiety of that sum transferred to the plaintiffs, and the other moiety secured in court for the benefit of the parties interested therein. The plaintiff Martha Ann Rochford was one of the children of Richard Rochford the elder, the insolvent, and had attained twenty-one. The defendant Richard Rochford the younger was his only other child, and was still an infant.

William Rochford the testator, by his will, dated the 15th of August, 1822, gave and bequeathed the residue of his personal estate to Samuel Groves and Thomas Hackman, upon trust, to permit and suffer or authorize and empower his wife to receive the income for her life, and after her decease, as to one fourth part of the residue, upon trust, to pay to, or permit and suffer, or authorize and empower, his son Richard Rochford (the insolvent) to receive the income for his life, and after his decease to transfer and pay the same to the child, if only one, and if more than one, unto, between, or amongst the children of his son Richard, share and share alike, to be vested interests in such child or children, as and when he, she, or they respectively should attain twenty-one, with survivorship as to the shares of children dying under twenty-one, and with a direction that the income of the shares of the children, or so much thereof as the trustees should think fit, should be applied for their maintenance during their minorities; and as to the other three fourths of the residue, after the death of the wife, the testator declared similar trusts,—as to one fourth, in favor of his son James and his children; as to another fourth, in favor of his son William and his children; and as to the remaining fourth, in favor of his son John and his children. And he then provided, that, in case any or either of his said four sons should die without leaving any child or children him or them surviving, or, being such, in case all of them should happen to die under the age of twenty-one, that the part or share, parts or shares, intended for such of his said son or sons so dying as aforesaid, and his or their respective issue as aforesaid, should be divided into as many shares as should be equal to the number of his son or sons who should be then living, or, being then dead, should have left a child or children living at his or their death or respective deaths; and thereupon, such shares should be and remain upon such

trusts for his said surviving other sons and their children respectively as were thereinbefore declared with respect to the original shares. And the will contained the following clause: "And my further will is, and I do hereby expressly declare and direct, that in case my said wife, or any of my said four sons, shall in any manner sell, assign, transfer, encumber, or otherwise dispose of or anticipate all or any part of her, his, or their share and interest of and in the said dividends, interest, and annual proceeds aforesaid, then and in such case, and from and immediately after such alienation, sale, assignment, transfer, or disposition shall be made, the said several bequests so hereinbefore made to or in trust for him and them as aforesaid shall cease, determine, and become utterly void to all intents and purposes, as if the same had not been mentioned in or made part of this my will, and as if my said wife or either of my said sons were dead."

The testator died in September, 1831; and his wife in October following. Two of the sons, William and John, subsequently died without leaving any issue.

The residue of the testator's estate was invested in the purchase of £3800 Consols, and the moiety of that sum (which was the subject of the claim), in the events that had happened, stood limited by the will to Richard Rochford, the insolvent, and his children. Richard Rochford, the insolvent, received the dividends of this moiety up to the 10th of October, 1850; but, on the 14th of December, 1849, being then a prisoner in actual custody for debt in the debtors' prison for London and Middlesex, he presented his petition to the Court for Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the Act 1st & 2d Vict. c. 110. By an order of that court, dated the 17th day of December, 1849, his estate and effects were vested in the provisional assignee, and by a subsequent order of the same court the defendant English was appointed to be the assignee under the insolvency. It was admitted at the bar, that in the schedule filed by Richard Rochford in the Insolvent Court, especial reference was made to his life interest in a moiety of the residue under the testator's will, and to the provisions of the will with reference to the assignment of that interest.

THE VICE-CHANCELLOR [SIR GEORGE JAMES TURNER]. In the circumstances of this case it is contended by the plaintiffs, and the defendant Richard Rochford the younger, that the insolvent's life interest in the £1900 Bank Three per Cent. Annuities has ceased, and that they have become presently entitled to that fund in equal shares: as to the share of the plaintiffs absolutely, and as to the share of the defendant Richard Rochford the younger, contingently on his attaining twenty-one; but the defendant English, on the other hand, insists that he is entitled to the income of the £1900 Consols during the remainder of the life of Richard Rochford the insolvent.

In determining this question, the first point for consideration ap-

pears to me to be, whether there are any fixed rules by which the court can be guided in its determination; and upon examining the cases upon the subject, I think it will be found that there are two such rules: First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given; and secondly, that although a life interest may be expressed to be given, it may be well determined by an apt limitation over.

That property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift, appears to me to be well settled by the cases of *Brandon v. Robinson*, 18 Ves. 429; and *Graves v. Dolphin*, 1 Sim. 66. In both those cases there were gifts for life, with provisions which were directed against alienation, but in neither of them was there any proviso for determining the life interest, or any gift over in the event of alienation; and the court in each of those cases held that the life interest continued; and these cases are not, so far as I am aware, contravened by any other authority.

That, in cases where a life interest is expressed to be given, it may be well determined by an apt limitation over, is, I think, equally well settled by many authorities; *Wilkinson v. Wilkinson*, 3 Swanst. 515; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & My. 364; *Kearsley v. Woodcock*, 3 Hare, 185; *Martin v. Margham*, 14 Sim. 230; *Brandon v. Aston*, 2 Y. & C. C. C. 24; and *Churchill v. Marks*, 1 Coll. 441.

It was insisted, however, at the bar, that a further rule was to be deduced from the cases, namely, that a limitation over was in all cases essential to the determination of the life interest; and the case of *Dickson's Trust*, 1 Sim. N. S. 37, was relied on for that purpose. For the reasons which I shall presently give, I do not think it necessary now to decide that point; but it may be well to observe upon it, that I do not understand the case of *Dickson's Trust* to have decided that the life interest would not be well determined by a proviso for cesser, though not accompanied by a limitation over; and that I do not think that any such rule is to be collected from the cases. The true rule I take to be this: The court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect that intention from the whole will, looking to the primary disposition, for the purpose of seeing to what extent the interest is given, and to the ulterior disposition, for the purpose of seeing to what extent and in what events the primary disposition is defeated. If, on the one hand, the court, upon this examination, finds that there is a limitation over, and that it meets the event which has occurred, it is plain that the testator did not intend the life

interest to continue in that event, and it ceases accordingly, as in the cases to which I have referred; but, if, on the other hand, the court, upon the examination, finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues, as in *Lear v. Leggett*, 1 Russ. & My. 690, and *Pym v. Lockyer*, 12 Sim. 394. This view of the cases appears to me to remove all difficulty upon them, and it falls in with the case of *Dommett v. Bedford*, 6 T. R. 684, in which the life interest was held to cease upon the proviso for cesser without any gift over. I think, indeed, it would be difficult to hold that any greater effect can be due to the limitation over than to the express declaration of the testator that the life interest should cease.

Some observations which fell from Lord Eldon upon this question in the leading case of *Brandon v. Robinson*, 18 Ves. 429, appear to me to have been to some extent misapprehended, and I will venture therefore to make some few observations upon that case. Lord Eldon, in that judgment, first observes, that a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien (*Id.* 432, 433); and the distinction between the two cases is obvious. In the former case the disposition could not possibly endure beyond the bankruptcy. In the latter, it would, if the law did not allow the proviso, or if the proviso was not couched in terms calculated, in the events which happened, to defeat the life interest; but I do not understand Lord Eldon to say, that the law does not allow the proviso. On the contrary, he expressly says, that if the proviso be so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assigns can have it beyond the period limited; and we have here, therefore, his distinct opinion that upon a proviso so expressed the life interest would cease. He then passes to the case of *Foley v. Burnell*, 1 Bro. C. C. 274, and to the old form of trusts for the separate use of married women, for the purpose of showing that the power of disposition accompanied the interest unless an available restriction was imposed; and he then proceeds to the particular case which he had under his consideration, and, having first shown that the life interest was the property of the bankrupt, goes on to inquire whether there was enough in the will to show that it could not be assigned under the Commission of Bankruptcy; on which he observes, that, "to prevent that, it must be given to some one else," meaning, as I understand the judgment, not that in all cases there must be a gift over to prevent the assignees from taking; but that, under the provisos of that particular will the assignees must take in the absence of such a gift over; as was clearly the case, according to the tenor of the previous part of his judgment, there being no proviso determining the life interest; and that this was Lord

Eldon's meaning is, I think, apparent, both from what precedes and what follows upon the passage in question; for in what precedes he refers to the provisions of the whole will, and in what follows he adverts to the question whether the restrictions contained in the will could be construed into a limitation giving the interest to the residuary legatee. Lord Eldon's judgment in *Brandon v. Robinson* does not, therefore, appear to me to go to the extent of deciding that in all cases there must be a gift over in order to determine the life interest.

In the present case, however, I do not, as I have already observed, think it necessary to determine that question. I am of opinion that the testator in this case has not merely provided for the cesser of the life interest, but has made a valid gift over; and I think so for this reason: According to the general rule, some effect must, if possible, be given to all the words of a will; and I see no effect which can be given to the words which follow on the cesser of the life interest, unless they be construed to operate the limitation over, for the cesser or determination of the life estate was effected by the previous provisions.

Some observation was made in the course of the argument upon the terms in which this limitation over is expressed, "as if the same had not been mentioned in or made part of this my will, or as if my said wife, or either of my said sons were dead;" but on looking at the previous provisions of the will, I think there is no difficulty in understanding what the testator here intended. In the event of any of the sons dying without leaving children, he had given over their fourths to the other sons and their children; and what I take him to have meant by this clause is, that the words "as if the same had not been mentioned in the will" should apply to the event of there being no children, and the words "as if they were dead" to the event of there being children. I am also of opinion that the event has occurred on which this limitation over was to take effect. I think the case in that respect is completely governed by *Shee v. Hale*, 13 Ves. 404; *Martin v. Margham*, 14 Sim. 230; *Brandon v. Aston*, 2 Y. & C. C. C. 24; and *Churchill v. Marks*, 1 Coll. 441; and is not affected by *Lear v. Leggett*, 1 Russ. & My. 690, and *Pym v. Lockyer*, 12 Sim. 394; the alienation in the two latter cases being compulsory, and in the former voluntary.

A learned text writer has, I observe, expressed some doubt upon the soundness of this distinction between compulsory and voluntary alienations; but I see no reason for the doubt. It cannot, I think, be said that a man has alienated when the alienation is made by the act of the law and not by his own act; and if he has not alienated, there is no breach of the condition, and the life estate is not determined. The conclusion, therefore, at which I have arrived in this case is, that the life interest of the insolvent is determined; and the remaining questions then are, whether the capital ought now to be divided, and how the income of it from the date of the insolvency is to be dealt with.

I think that the capital cannot now be divided; for I think that the determination of the life interest does not alter the class who are to take the capital, and that any after-born child of the insolvent attaining twenty-one will be entitled to share in it. The object of the proviso is to determine the life interest as to the beneficial enjoyment of the insolvent; and to hold it to be determined so as to alter the rights of his children would be to carry it beyond its object. The result, I think, is, that the plaintiff Mrs. Rochford has a vested interest in a moiety of the £1900 Consols, and the defendant Richard Rochford has a contingent interest in the other moiety; but that both these interests would open, so as to let in any after-born children of the insolvent: and this being the result, I think that Mrs. Rochford is entitled to receive the interest of her moiety. The case, in this respect, seems to me to stand upon the same footing as the case of a vested interest liable to be divested, and in that case the party entitled to the vested interest is, as I apprehend, entitled to the income. The income of the other moiety must, I think, be accumulated.²

² See *Hurst v. Hurst*, 21 Ch. Div. 278 (1882).

For cases where the settlor settles his own property upon himself for life, with a provision of forfeiture in alienation, see *Higinbotham v. Holme*, 19 Ves. 88 (1812); *Lester v. Garland*, 5 Sim. 205 (1832); *Synge v. Synge*, 4 Ir. Ch. 337 (1855); *In re Pearson*, 3 Ch. Div. 807 (1876); *In re Holland*, [1901] 2 Ch. 145, [1902] 2 Ch. 360; *Phipps v. Ennismore*, 4 Russ. 131 (1829); *Brook v. Pearson*, 27 Beav. 181 (1859); *Knight v. Browne*, 30 L. J. Ch. N. S. 649 (1861), 4 L. T. R. N. S. 206; *In re Detwold*, 40 Ch. Div. 585 (1889).

CHAPTER III
RESTRAINTS ON THE ALIENATION OF ESTATES OF
INHERITANCE

PIERCY v. ROBERTS.

(Court of Chancery, 1832. 1 Mylne & K. 4.)

Thomas Roberts, by his will dated the 18th of January, 1829, bequeathed to his executors the sum of £400 upon trust, to pay, apply, and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of his son, Thomas Jortin Roberts, in such smaller or larger portions, at such time or times immediate or remote, and in such way or manner as they the said executors, or the survivor of them, or the executors or administrators of such survivor, should in their judgment and discretion think best: and, after bequeathing to his executors the further sum of £400 upon similar trusts, for the benefit of his son John Prowting Roberts, the testator proceeded as follows: "And, in case of the deaths of either or both of my said sons, Thomas Jortin and John Prowting, before the whole of the said several sums of £400 and £400, and the interest thereof respectively, shall have been paid or applied for the purposes aforesaid, then I will and direct that the unapplied part or parts thereof respectively shall sink into and become part of my residuary personal estate, and go and be applied therewith as hereinafter mentioned:" and the testator thereby appointed his wife, Ann Roberts, his residuary legatee, and the said Ann Roberts and John Jortin executors of his said will.

The testator died in July 1829, and in May 1830 the testator's son Thomas Jortin Roberts took the benefit of the Insolvent Debtors' Act. Previously to May 1830, Thomas Jortin Roberts had received several sums from the executors, amounting in the whole to £156; and since that period, and before the filing of the bill, he had received several other sums, amounting together to £112. The bill was filed by the assignee of the insolvent's estate against the executors of the testator, to recover the legacy of £400 and the interest thereof, or so much thereof as remained unpaid at the time of the discharge of the legatee under the Insolvent Debtors' Act.

THE MASTER OF THE ROLLS [SIR JOHN LEACH]. The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee; or whether it may remain in the hands of the executors, to be applied, at their discretion, for the benefit of the

legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment.

A preliminary objection was taken to this suit by the defendants, on the ground that it had been instituted without the consent of the major part in value of the creditors, at a meeting convened by advertisement for that purpose, as required by the 1 G. 4, c. 119. The bill alleged, that the plaintiff had been duly authorized to institute the suit with such consent, but this allegation was not proved; and it was objected at the hearing, by the defendants, that the consent of the creditors not being proved, the bill must be dismissed.

His Honor would not allow the suit to be stopped by this objection, but directed the point to be argued on a future day.

On this day (Nov. 12) the point was accordingly argued by Mr. Bickersteth, for the plaintiff, and by Mr. Pemberton, for the defendants.

THE MASTER OF THE ROLLS said he had a strong recollection of having been spoken to by Chief Baron Alexander on this point. His opinion was very much in favor of the plaintiff. By the clause in question the legislature plainly intended to benefit the creditor; not to give an advantage to the debtor. If the suit were successful, the creditors would take the benefit; if it were unsuccessful through the fault of the assignee, they would have their remedy against the assignee. As it was desirable, however, that the rule should be uniform, he would not decide the point without conferring with some of the judges of the common law courts.

On this day (Dec. 14) his Honor delivered judgment to the following effect:

I have had the opportunity of conversing with some of the judges at common law upon the point, and their impression is, according to the inclination of opinion which I expressed at the hearing, that the provision made in the Statute is to be considered as made for the benefit of the creditors alone, and that it is not competent to the defendants to take advantage of the objection that the suit has been instituted without the consent of the creditors. Upon the whole, I do not now hesitate to decide that this suit can be well sustained by the assignee, and that he is entitled to the decree sought by this bill.

If there be collusion between the plaintiffs and defendant in a suit instituted by the assignees without the previous consent of the creditors, the judgment of the court will bind the interest of the creditors; but the assignees, in such case, take upon themselves the responsibility that the suit has been properly instituted and properly conducted.

BAGGETT v. MEUX.

(Court of Chancery, 1846. 1 Phil. 627.)

On the hearing of an appeal in this case from the decree of Vice-Chancellor Knight Bruce¹ the argument turned chiefly on the question, whether a clause in restraint of alienation, annexed to a legal devise, in fee, of real estate to a married woman for her separate use, was effectual during the coverture.

THE LORD CHANCELLOR [LORD LYNDHURST], after disposing of the other points of the case in a few words, said, with respect to this: After the case of Tullett v. Armstrong, 4 My. & Cr. 377, there can be no doubt about the doctrine of this court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal.² The power of a married woman, independent of the trust for separate use, may be

¹ See 1 Coll. 138, where a detailed statement of the case will be found.—*Rep.*

² Where, however, gifts of vested personal property or of money are made directly to a married woman, with a restraint on alienation, it seems to be assumed that, if the subject of the gift is paid to her, she may deal with the property, and the clause against anticipation will be practically ineffective. The question therefore arises whether the subject of the gift must not remain in the hands of the trustee, who is directed to pay it over. In Gray's Restraints on Alienation (2d Ed.) § 131b et seq., the cases are summarized as follows:

"(1) When the settlor or testator shows an intention that the property shall continue in the hands of trustees, and there is a clause against anticipation, a married woman will not be entitled to have the property transferred to her, although her interest be absolute; that is, the courts will, in the case of a married woman, give that effect to the intention of the settlor or testator, which on the ground of public policy, they refuse to give in the case of other persons. Re Benton, 19 Ch. D. 277; Re Spencer, 30 Ch. D. 183; Re Grey's Settlements, 34 Ch. Div. 85, 712; Tippetts & Newbould's Contract, 37 Ch. Div. 444. See Re Bown, 27 Ch. Div. 411; Re Wood, 61 L. T. N. S. 197.

"(2) When there is a direction to pay and divide moneys and securities, after an intervening life estate or other intervening interest, into the hands of a married woman, and that her receipt alone shall be sufficient discharge, the clause against anticipation will be considered as meant to be confined to the continuance of the life or other interest, and as intended to restrain anticipation of the trust property only during that period. Re Sykes's Trusts, 2 J. & H. 415, § 127, ante; Re Croughton's Trust, 8 Ch. D. 460, § 131, ante; Re Bown, 27 Ch. Div. 811; Re Holmes, 67 L. T. N. S. 335. See Re Hutchings, 58 L. T. N. S. 6. The case of Re Caskell's Trusts, 11 Jur. N. S. 780, § 129, ante, seems contra." In re Coombes, W. N. (1883) 169, supports the same rule.

"(3) When there is an immediate gift to a married woman, and yet there is a clause against anticipation, what is to be done? Here are two irrecon-

different in real estate from what it is in personal: but a court of equity having created in both a new species of estate, may in both cases modify the incidents of that estate.

Appeal dismissed, with costs.³

ANDERSON v. CARY.

(Supreme Court of Ohio, 1881. 36 Ohio St. 506, 38 Am. Rep. 602.)

This action was commenced on December 26, 1874, by the plaintiff, in the Court of Common Pleas of Ashland County, to subject certain real estate, as the property of Thomas C. Cary, to the satisfaction of certain alleged liens, by mortgage and levy of execution, which the plaintiff claimed to have secured for certain indebtedness of said Thomas to him. The liens claimed by plaintiff are upon the undivided half of a certain tract of land devised to said Thomas and his brother, Charles L. Cary, by the eighth item of the will of their father, George W. Cary, executed in the year 1867, at which time both Thomas and Charles were minors, Charles, the younger, being about fourteen years of age.

The defendants are said Thomas and Charles, Mary Elizabeth Cary, their mother, and widow of said George W. Cary, and divers others, claiming liens on said undivided half of said lands. The principal

cilable provisions, and yet the settlor or testator was apparently unconscious of the inconsistency."

In a number of cases the court has refused to order the transfer of the fund to the married woman. *Re Ellis's Trusts*, 17 Ch. D. 409; *Re Currey*, 32 Ch. D. 361; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Sarel*, 10 Jur. N. S. 876. In *re Spencer*, 30 Ch. D. 183, the married women were not allowed to have accumulations of income paid over to them. Compare *In re Taber*, 51 L. J. N. S. Ch. 721.

³ See, also, *Bell v. Bair*, 89 S. W. 732, 28 Ky. Law Rep. 614 (1905); *In re Dawbin*, 12 Vict. L. R. 477 (1896); *In re Adamson*, 2 N. S. W. St. R. Eq. 67 (1902). In *Jeanneret v. Polack*, 15 N. S. W. R. Eq. 192 (1894), it was held that a contract by a married woman to convey her separate estate when she should become discoverd was in violation of the restraint on alienation attached to her separate estate, and unenforceable.

A fortiori, the restraint when attached to a married woman's separate equitable interest for life is valid, and an attempted alienation in defiance of the restraint is void. *Jackson v. Hobbouse*, 2 Mer. 483 (1817); *Bateman v. Faber*, L. R. [1897] 2 Ch. 223, L. R. [1898] 1 Ch. 144.

But after the death of the husband the widow and those entitled after her death may join in requiring a termination of the trust and the payment of the principal to the widow. *Barton v. Briscoe*, Jac. 603 (1822).

But if the trust is not so terminated, and the widow marries again, the clause against anticipation again becomes operative. *Tollett v. Armstrong*, 4 Myl. & Cr. 377 (1840). As to the law on this point in Pennsylvania, see *Gray*, *Restraints on Alienation* (2d Ed.) § 276.

The restraint on alienation attached to a married woman's separate estate is clearly effective, though it is created by the act of the woman in settling her own property upon herself. *Clive v. Carew*, 1 J. & H. 199 (1859); *Arnold v. Woodhams*, L. R. [1873] 16 Eq. 29.

defence, however, is made by Charles L. Cary, who claims to be the owner of the entire tract free from all encumbrances, as will hereafter appear.

The claim of the plaintiff, James Anderson, may be stated thus: On January 1, 1872, Thomas C. Cary, being then of full age, in consideration of money loaned, executed to the plaintiff his promissory note for \$1,500, payable in one year, with interest at the rate of eight per cent.; and to secure the payment thereof executed (with his wife) a mortgage upon the undivided half of said tract of land, which was duly recorded in Ashland County, where said lands were situate. Afterwards, in December, 1874, the plaintiff obtained judgment on said note by confession, under a cognovit, against said Thomas, in the Court of Common Pleas of Richland County, and caused execution thereon to be levied on said undivided half.

Thereupon, the mortgages having been executed by said Thomas upon his interest in said lands, and other executions against him having been levied thereon, this suit was brought to marshal liens and sell the property to satisfy the same.

After the commencement of this action, and after service of summons, to wit: on March 22, 1875, by contract in writing, Thomas C. agreed to sell and convey his undivided half of said lands to Charles L., in consideration whereof Charles L. agreed to pay to Thomas the sum of \$7,125, to be applied chiefly to the satisfaction of the debts of said Thomas, which he had secured by mortgage or judgment liens on said premises. In this contract, however, the lien of the plaintiff (if lien he had) was postponed to junior liens, so that the purchase-money was exhausted before the claim of plaintiff was satisfied.

By this contract of purchase Charles claims that, under the will of his father, by which alone the estate of Thomas in said lands was created, his right to the undivided half devised to Thomas is indefeasible and unencumbered by any lien or claim in favor of the plaintiff.

In the Court of Common Pleas judgment was rendered against the plaintiff, whose petition was dismissed. From this judgment the plaintiff appealed to the District Court, where the case, with an agreed and certified statement of facts, was reserved for decision in this court.

McILVAINE, J. The decision of this case depends on the construction and effect to be given to the last will and testament of George W. Cary. The question to be decided is, did the plaintiff, by his mortgage from Thomas C. Cary, or by his levy upon the same premises, acquire a lien thereon? The plaintiff claims that the interest or estate of Thomas C., devised to him in the eighth item of his father's will, as to the farm on which the testator resided, was subject to a lien under both the mortgage and execution; and that the subsequent sale of this interest or estate, by Thomas to Charles, did not displace the lien either of the mortgage or the levy. These claims of the plaintiff

are contested by Charles. What, then, was the true intent of the testator? And, what, the force and effect of this devise?

The provisions of the will which at all affect the question before us are as follows:

“Item Fourth.—I give and bequeath to my beloved wife, Mary Elizabeth, the sum of six hundred dollars, to be paid out of my personal estate, one hundred dollars of the same to be paid over to her out of the first moneys collected by my executor.

“Item Fifth.—I give and bequeath to my two sons, Thomas C. Cary and Charles Lincoln Cary, the residue of moneys and the proceeds of my obligations after giving the legacies aforesaid, the same to be divided equally between them, share and share alike.

“Item Sixth.—The balance of my personal estate, consisting of personal property, farming implements, stock, cattle, sheep, and all other property, personal, except one top buggy and such surplus of grain on hand as shall not be needful for the purposes of the farm, which are to be sold by my executor, I give and bequeath to my wife aforesaid, and to my children before named for the purposes of carrying on my farm, until my oldest son, Thomas C. Cary, arrives at full age, they, the said family, to use the said property in common for the purposes of carrying on said farm and enjoying the proceeds of the same, and when my oldest son arrives at the age of majority, then I desire that my said daughter, Mary Elizabeth, shall sell her interest in the said property so held in common to my said wife and sons, before named. Then the said Mary to have for her said interest in said last named property the appraised value of such property as has been appraised and such property as has been accumulated from said farm during said period, prior to the said majority of said Thomas, to be equally divided, and the said Mary Elizabeth to be paid such amount for her interest as shall be agreed upon between them, she to sell to them, the said sons and my said wife, her interests in said property as aforesaid.

“Item Seventh.—I give and bequeath to my said wife all my household and kitchen furniture, beds, bedding of every kind whatever, and when my said son Thomas shall have arrived at the age of majority as aforesaid, from and after that time I give and bequeath and so direct that my said wife shall have in lieu of dower one-third of the rents and profits of the farm on which I now reside in Green township aforesaid, as long as my said wife shall remain my widow, and in the event of her marriage then I order and direct that she shall forfeit her said dower as aforesaid, and in lieu thereof I direct that my two sons, Thomas and Lincoln, shall pay to her the sum of twenty-five hundred dollars, one thousand of which shall be paid within sixty days after such marriage and the balance in three equal annual payments without interest. This last item and the six-hundred-dollar item and the former provisions made in the foregoing specifications are to be in lieu of all her dower in

all my real estate, including three hundred and twenty acres of land I own in the State of Iowa.

"Item Eighth.—I give and bequeath the farm on which I now live, of two hundred and eighty-five acres, to my two sons, Thomas and Lincoln, upon the following conditions: 1. I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, except in the sale to one another as aforesaid. I also give and bequeath to my two sons aforesaid, two hundred and forty acres of land lying in the south-east corner of Fayette County, Iowa, which I received by deed from Richard Probert, and the same is now on record in said county; also eighty acres of land in Chickasaw County, Iowa, which I received by deed from A. H. Crawford."

What estate in the home farm did the testator intend, by the eighth item, to give to his sons? By section 55 of the Wills Act of 1852, in force when this will was made, it was provided, "every devise of lands, tenements and hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." The estate of the devisor in these lands was an absolute fee simple. By other provisions in this will, it is clear that the testator intended that, from the majority of Thomas, his widow, so long as she remained a widow, should have one-third of the rents and profits of said farm. Whether the right thus given to the widow was an interest in the land, or an interest in the rents and profits as such, it is quite clear to our minds that the fee simple absolute, subject to the right of the widow, passed to the sons, as fully and amply as the testator "could lawfully devise" it. It is true, the testator coupled with the devise the words: "Upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, except in the sale to one another as aforesaid." But by these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach; there is no limitation over in favor of any one; and if a forfeiture for the benefit of his heirs was intended, the devisees, being two of his three heirs, would each have inherited a third part; so that, as heir of the testator, Thomas C. had full power to charge one-third of the land by mortgage to the plaintiff. But there is no indication in the will, or in the circumstances of the testator, that he intended, in any event, to die intestate as to this property; while, on the other hand, it seems clear to us that the testator intended, in all events, that his sons should take

this farm, subject to the rights given to their mother, to have and to hold the same to them and their heirs forever. Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although sui juris, from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age—each and both of which purposes are repugnant to the nature of the estate devised.

By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force. *Hobbs v. Smith*, 15 Ohio St. 419.

Of course, we do not deny that the owner of an absolute estate in fee simple may by deed or by will transfer an estate therein less than the whole, or may transfer the whole upon conditions, the breach of which will terminate the estate granted, or that he may create a trust whereby the beneficiary may not control the corpus of the trust, or even anticipate its profits. But as we construe this will, nothing of the kind has been here attempted. The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation, and not the devise, must be for that reason declared void.

It is contended on behalf of defendant, Charles L. Cary, that by this devise an estate in trust, until the younger son should arrive at the age of thirty-one, was created for the benefit of the widow and children of the testator. That such was the effect of the so-called "conditions," when construed in connection with other clauses of the will. We do not so understand the will.

When the elder son, Thomas, arrived at age, the daughter ceased to have any right whatever in the devised premises.

The right of the widow to one-third the rents and profits of the farm was not affected by the arrival of Charles at thirty-one years of age, and did not affect the absolute character of the devise to the sons. If she took during widowhood one-third of the lands, the sons took a vested remainder in that portion, and a present vested estate in the other two-thirds. If her right was to rents and profits as such, and the same was made a charge upon the lands, the estate of the sons nevertheless vested in them and for their own benefit, subject to the encumbrance. The relation of trustee and cestui que trust existed between them in no proper sense. The grantees of the sons would have stood in the same relation to the widow. No relation of personal confidence or trust was created, but one growing out of property rights alone—strictly legal rights. Whatever may have been the desire of the testator as to his widow remaining on this farm after the majority of the elder son, it is

quite clear that the rights of the devisees were not made to depend on that event. The personal relations of the members of his family were not provided for after the arrival of Thomas at age, but their property rights, respectively, were defined; and the rights of neither were subjected to the control or supervision of the other. There was no trust created.

If we could find in this devise a trust in favor of the widow, until Charles should arrive at thirty-one years of age (and certainly there was none before, if not after), so that no absolute estate vested in the sons previous to the termination of such trust estate, or if we could find a condition which prevented the vesting of the fee for such limited period, or a condition subsequent upon the happening of which the estate devised could be defeated, a different conclusion, no doubt, would be reached.

But the case before us, is the devise of an absolute fee, with a clause restraining the alienation and encumbering of the estate for a limited period, intended, no doubt, for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this State, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view we have taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may restrain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple.

Decree for plaintiff.⁴

⁴ See, also, *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102 (1845); *Keyser's Appeal*, 57 Pa. 236 (1868); *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Kessner v. Phillips*, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005.

BOSTON SAFE DEPOSIT & TRUST CO. v. COLLIER.⁵

(Supreme Judicial Court of Massachusetts, 1916. 222 Mass. 390, 111 N. E. 163.)

Bill in equity, filed in the Probate Court on November 25, 1914, by the trustee under the will of Maturin M. Ballou, late of Boston, for instructions as to whether, under the ninth clause of the will, set out in the opinion, a distributive share of Franklin B. Ballou should be paid to him or to his trustee in bankruptcy, the defendant Forrest F. Collier.

In the Probate Court, where the suit was heard upon the pleadings and an agreed statement of facts, Grant, J., ordered a decree directing that the share be paid to Franklin B. Ballou. On appeal from that decree the case was reserved for this court by Braley, J., upon the pleadings and the agreed statement of facts. The material facts are stated in the opinion.

BRALEY, J. The testator, in the ninth clause of his will, provided: "It is my will that every payment of income or principal hereinbefore directed or devised to be made shall be made personally to the persons to whom they are devised or upon their order or receipt in writing, in every case free from the interference or control of creditors of such persons, and never by way of anticipation or assignment."

By other clauses he left the residue of his estate in trust to pay to his widow and to his son Murray R. Ballou, in equal shares, the net income for life and upon the death of his son the income coming to him is to be divided equally among his surviving children or the issue then living of deceased children until the first child reached or would have reached, if living, the age of forty, but in any event not before twenty-one years after the son's death, when the principal is to be distributed in equal shares among the then surviving children and the issue then living of any deceased child.

The widow is still living, but Murray R. Ballou has died, leaving three children and the issue of a deceased child surviving, among whom full distribution has been made except as to Franklin B. Ballou, a son, who at the date of filing the petition was more than forty years of age.

But as he had been adjudged a bankrupt before distribution, the respondent, his trustee in bankruptcy contends, that although a discharge has been granted he is entitled to the share coming to the bankrupt because a testator cannot nullify a bequest of an absolute legal interest in personal property by a provision that the legatee's interest shall not be alienated, nor taken for his debts.

It is urged that the restriction is repugnant to the gift or bequest,

⁵ The consideration of this case might well be postponed until after the consideration of *Clafin v. Clafin*, post, p. 698.

and the English rule undoubtedly is: "That if property is given it must remain subject to the incidents of property and it could not be preserved from the creditors unless given to some one else." Brandon v. Robinson, 18 Vesey, 433.

But in Lathrop v. Merrill, 207 Mass. 6, 9, 92 N. E. 1019, from which this proposition is taken, it is also said: "On the other hand it must be taken now to be settled in this commonwealth that in case of the devise of an equitable fee in land or the bequest of an equitable interest in personal property the rule which originated in Broadway Nat. Bank v. Adams, 133 Mass. 170 [43 Am. Rep. 504], obtains, and limitations against alienation and forbidding the property to be taken for the debts of the devisee or legatee are valid. Claffin v. Claffin, 149 Mass. 19 [20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393]; Young v. Snow, 167 Mass. 287 [45 N. E. 686]; Danahy v. Noonan, 176 Mass. 467, 57 N. E. 679; Hoffman v. New England Trust Co., 187 Mass. 205 [72 N. E. 952]; Dunn v. Dobson, 198 Mass. 142 [84 N. E. 327]."

It is nevertheless now pressed in argument that this court never has gone so far as to say that an equitable fee can be placed beyond the reach of creditors. The reasoning in Broadway Nat. Bank v. Adams, 133 Mass. 170, 173 [43 Am. Rep. 504], is not thus limited. Said Chief Justice Morton, speaking for the court: "We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or limitation over, or by giving his trustees a discretion as to paying it. He has, the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate, which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder * * * and take more than he has given. * * * It is argued that investing a man with apparent wealth tends to mislead creditors and to induce them to give him credit. The answer is that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment."

The trust in question is not within the rule against perpetuities or open to the objection of the accumulation of property by corporations or ecclesiastical bodies of which the common law was exceedingly jeal-

ous. And whether income or principal is placed beyond the power of alienation or of attachment, the result to creditors of the beneficiary is merely a question of degree.

The owner, of course, cannot settle his property in trust, putting his right to the income which is reserved to himself for life beyond the reach of creditors. If, however, the founder is not the debtor, the property held in trust is not the debtor's except in so far as the founder has provided. *Pacific Nat. Bank v. Windram*, 133 Mass. 175, 176.

We are manifestly dealing with a rule of property which there is every reason to believe has been accepted and acted upon by the bar, settlors and testators for thirty-three years, since the leading case stating the law governing the creation of equitable estates was decided. It therefore becomes necessary to review our own cases subsequent to *Broadway Nat. Bank v. Adams* in order to determine whether there has been any departure from the doctrine enunciated in that case, which has been referred to and followed in: *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Foster v. Foster*, 133 Mass. 179; *Forbes v. Lothrop*, 137 Mass. 523; *Potter v. Merrill*, 143 Mass. 189, 9 N. E. 572; *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320; *Claflin v. Claflin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376; *Slattery v. Wason*, 151 Mass. 266, 23 N. E. 843, 7 L. R. A. 393, 21 Am. St. Rep. 448; *Billings v. Marsh*, 153 Mass. 311, 26 N. E. 1000, 10 L. R. A. 764, 25 Am. St. Rep. 635; *Wemyss v. White*, 159 Mass. 484, 34 N. E. 718; *Nickerson v. Van Horn*, 181 Mass. 562, 64 N. E. 204; *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88; *Huntress v. Allen*, 195 Mass. 226, 80 N. E. 949, 122 Am. St. Rep. 243; *Dunn v. Dobson*, 198 Mass. 142, 84 N. E. 327; *Berry v. Dunham*, 202 Mass. 133, 88 N. E. 904; *Lathrop v. Merrill*, 207 Mass. 6, 92 N. E. 1019; *Shattuck v. Stickney*, 211 Mass. 327, 97 N. E. 774; and *Hale v. Bowler*, 215 Mass. 354, 102 N. E. 415. We do not propose, however, to comment on all of them.

In *Claflin v. Claflin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393, the bequest was one-third of the residue of the personal estate to trustees in trust, "to sell and dispose of the same and to pay the proceeds thereof to my son in the manner following, viz.: \$10,000 when he is of the age of twenty-one years; \$10,000, when he is of the age of twenty-five years, and the balance when he is of the age of thirty years." The trustees paid over the first \$10,000, and thereupon the son, claiming that he had the entire beneficial interest both in the income and the property itself, brought a bill in equity to obtain the residue. It was held that the testator had a right to impose restrictions, and there was no reason why his intention should be thwarted, and that the provisions of the will should be carried out.

The gift comprised not only income, but principal; and it is significant that when referring to *Broadway Natl. Bank v. Adams*, the court say: "The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this. * * *

In *Huntress v. Allen*, 195 Mass. 226, 80 N. E. 949, 122 Am. St. Rep. 243, the testator created a trust for the benefit of his children giving absolute discretion to the trustees as to payment of income until the youngest child should reach twenty-five, the property then to be divided among those surviving and the issue of any deceased child, with a provision that the share of any child in the body or income of the fund should not be liable to or for his or her debts or subject to trustee process. It is stated in the opinion that the exemption of the shares of the children from interference by creditors was valid and enforceable.

In *Dunn v. Dobson*, 198 Mass. 142, 84 N. E. 327, after reference to the rule of the common law, it was said, *Broadway Nat. Bank v. Adams* and *Clafin v. Clafin* decided: "That in creating an equitable estate a donor may carve out and create such equitable rights in property as his fancy may dictate and his imagination devise, without regard to the rights appertaining to the several estates known to the law. This conclusion was stated to rest on the doctrine that in such a case the donor 'does not give them an absolute estate and then impose restrictions and conditions repugnant to the estate, but gives an ownership qualified by the directions' adopted by the donor; see *Barker, J.*, in *Young v. Snow*, 167 Mass. 287, 288, 289 [45 N. E. 686]." "This must be taken to be a settled rule of property not now to be questioned."

We have already referred sufficiently to *Lathrop v. Merrill*, 207 Mass. 6, 92 N. E. 1019, which reiterates the same doctrine, and expressly affirms *Dunn v. Dobson*.

The testator in *Shattuck v. Stickney*, 211 Mass. 327, 97 N. E. 774, devised and bequeathed one-seventh of the residue of his estate "to my said executors as trustees for my nephew * * * and I authorize and direct my said executors as such trustees to invest the said share, both the principal and the income thereof as it shall accrue, with full authority to them to sell and to reinvest the said principal and income as often as they may deem it expedient for the interest of the trust. Whenever, and not before, they shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said [nephew] any part or the whole of the accumulation of the said trust. If any balance of such trust fund shall be remaining in the hands of my executors as such trustees upon the death of said [nephew] then, in that event, the same shall be paid by them as follows. * * *

The opinion holds that "accumulation" meant the fund accumulated, and included both the original principal and the increase from arrears of income, and that the trustees were empowered in their discretion to pay a part or the whole to the nephew. "The reasons which induced

the testator to place the share of this nephew beyond the control of himself and of possible creditors do not appear. It may be significant that the case of *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, had been recently published at the date of the will, but it is quite enough that the testator intended to treat alike all of his heirs, including this unmarried nephew, and that the restraints upon the nephew's power to control his one-seventh portion was placed there solely for his benefit. It is also apparent that the testator regarded as this nephew's share the original fund and any income the trustees might deem it best to withhold from him and reinvest. Throughout item ten the testator treats this share, including the original principal as well as the accumulated income, as a single fund, not only for purposes of investment, but also for those of distribution."

It would seem beyond question from this examination, that if words are given their ordinary meaning, a trust of the nature under discussion has been repeatedly recognized and conformed to until the legal principle involved has become a safe and well-established rule affecting the practical administration of justice.

If as the respondent argues a change is advisable, taking away or limiting this testamentary power, it should come through legislative action and not by overruling or substantially modifying our former decisions. *New England Trust Co. v. Evans*, 140 Mass. 532, 545, 4 N. E. 69, 54 Am. Rep. 493; *Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 471, 475, 13 L. Ed. 220.

We have not deemed it requisite to discuss cases from other jurisdictions. The validity of such trusts is recognized by the great weight of American authority. *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; *Olsen v. Youngerman*, 136 Iowa, 404, 113 N. W. 938; *Wagner v. Wagner*, 244 Ill. 101, 91 N. E. 66, 18 Ann. Cas. 490; *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; *Maryland Grange Agency v. Lee*, 72 Md. 161, 19 Atl. 534; *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358; *Hardenburgh v. Blair*, 30 N. J. Eq. 645; *Mattison v. Mattison*, 53 Or. 254, 100 Pac. 4, 133 Am. St. Rep. 829, 18 Ann. Cas. 218; *Siegwarth's Appeal*, 226 Pa. 591, 75 Atl. 842, 134 Am. St. Rep. 1086; *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Shelton v. King*, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086; 39 Cyc. 240, 241, 242, and cases cited in the notes; 3 Ann. Cas. 588, 1 Ann. Cas. 221, and *Perry on Trusts* (6th Ed.) § 386a.

The decree of the probate court, that the bankrupt is entitled to his share of the estate of his grandfather in the possession of the petitioner, should be affirmed.

Ordered accordingly.⁶

⁶ See, also, *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985, 50 L. R. A. (N. S.) 632 (1911); 7 Ill. L. R. 445.

CHAPTER IV

RESTRAINTS ON THE ALIENATION OF ESTATES FOR
LIFE AND FOR YEARS

BRANDON v. ROBINSON et al.

(Court of Chancery, 1811. 1 Rose, 197.)

Stephen Goom, by his will, bearing date the 1st of August, 1808, devised and bequeathed to the defendants, Robinson and Davies, all his real and personal estate upon trust, to sell and dispose of the same; and after payment of his debts, and some few legacies, upon trust to divide the residue of the produce of such sale, amongst his children, Thomas Goom, William Goom, Mary Wright, Esther Fuller, Elizabeth Goom, Stephen Goom, and Margaret Goom; and he directed that the eventual share and interest of his son Thomas Goom, of and in his estate and effects should be laid out in the public funds, or on Government securities at interest, by and in the names of his trustees during his life; and that the dividends, interest, and produce thereof, as the same became payable, should be paid by them, from time to time, into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand; to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease, the principal of such share, together with the dividends and interest, and produce thereof, should be paid and applied by his trustees, unto and amongst such person or persons, as in a course of administration would be entitled to any personal estate of his said son Thomas Goom, and as if the same had been personal estate belonging to his said son, and he had died intestate.

The testator died shortly after the date of the will.

On the 15th of June 1811, a commission of bankrupt issued against Thomas Goom, under which the plaintiff was the surviving assignee. The bill prayed, that the will might be established; that the clear residue of the estate and effects might be ascertained; and that the plaintiff might have the benefit of such part, as in the character of assignee he should be found entitled to. To this bill there was a general demurrer, that the plaintiff had no right or title.

THE LORD CHANCELLOR [LORD ELDON]. Without doubt a testator may limit his property, until the object of his bounty shall become bankrupt; but it is equally clear, that if he give it for life, he cannot take away the incidents to that estate. The difference is very great be-

tween giving an interest to a person while he shall remain solvent, and then over; and giving it for life. If there be a limitation over in the event of insolvency or bankruptcy, then neither the person so becoming bankrupt or insolvent, nor his assignees, can take any benefit beyond the terms of the will. In the case which arose upon Lord Foley's will, 6 Ves. 364, it was argued, and I thought admitted, that if the estate went to the sons as property in them, all the consequences must attach.

In regard to property given to the separate use of married women, the directions originally were, that the money was to be paid into their proper hands, and their receipts alone to be a discharge; it was held that a married woman might dispose of property so given to her, and that her assignee might take it, as this court would compel her to give her own receipt, in affirmance of her own contract. In Miss Watson's Case, the words, and not by anticipation, were introduced by Lord Thurlow: his reasoning was this; I do not hereby take away any of the incidents of property at law; this interest which a married woman is suffered to take, is a creature of equity, and equity may modify the power of alienation.

But it is quite different if the power is for life; supposing that the bankrupt makes out, that he never has an interest, till he attends personally; the act of his receipt being absolutely necessary: yet if he was never to attend, or to give that receipt, and arrears were to accumulate, it is clear that those arrears would be assets for his debts. It is not enough that the testator has said, the fund shall not be transferred; in order to prevent that, it must be given over to somebody else. Unless therefore by implication, it falls into the residue, it is an equitable interest, to which the assignees are entitled.

As to the principal fund after the death of the bankrupt, the conclusion is different; the intention of the testator is, "this is my gift my personal estate," not that of the bankrupt's; to go as my property to certain persons whom I point out by the description of his, the bankrupt's next of kin. This demurrer must be overruled.¹

GREEN v. SPICER.

(Court of Chancery, 1830. 1 Russ. & M. 395.)

Robert Pinning the elder, by his will, devised certain real estates to John Spicer and Daniel Robertson, and their heirs and assigns, "upon trust to let and manage the same, and receive the rents, issues, and profits thereof, and to pay and apply the same rents, issues, and profits to or for the board, lodging, maintenance, and support, and benefit of my son Robert Pinning at such times and in such manner as

¹ S. C. 18 Ves. 429.

they shall think proper, for and during the term of his natural life; it being my wish that the application of the rents and profits for the benefit of my said son may be at the entire discretion of the said John Spicer and Daniel Robertson, and the survivor of them, and the heirs and assigns of such survivor, and that my said son shall not have any power to sell or mortgage, or anticipate in any way the same rents, issues, and profits, or any rents, issues, and profits, dividends or interests, derived under this my will."

Robert Pinning the younger had taken the benefit of the Act for the Relief of Insolvent Debtors; and the bill was filed by the assignee, praying that he might be declared entitled to the rents and profits of the devised hereditaments during the life of Robert Pinning the younger.

THE MASTER OF THE ROLLS [SIR JOHN LEACH]. The question in the cause is, whether the testator's son Robert Pinning takes any estate or interest, under the will, other than by the exercise of the discretion of the trustees.

Robert Pinning takes a vested life estate of which the trustees cannot deprive him by any exercise of their discretion: they are bound to apply the rents, issues, and profits for the benefit of Robert Pinning, and their discretion applies only to the manner of the application.

Decree for the plaintiff.

SNOWDON v. DALES.

(Court of Chancery, 1834. 6 Sim. 524.)

By a deed-poll of the 7th of December 1821, after reciting two indentures by which J. Crosby assigned two mortgage-sums of £1,000 each, to trustees upon such trusts, &c. as he should appoint: It was witnessed, and Crosby did thereby appoint that the trustees should stand possessed of those sums, in trust for himself for life, and, after his decease, in trust to pay thereout £500 and £700 to his wife's daughters, Susannah Hepworth and Anne Thompson, respectively; and, as to the remaining £800, in trust, during the life of John Doughty Hepworth, his wife's son, or during such part thereof as the trustees should think proper, and at their will and pleasure but not otherwise, or at such other time or times, and in such sum or sums, portion and portions as they should judge proper and expedient, to allow and pay the interest of the £800 into the proper hands of the said J. Doughty Hepworth, or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel and other necessaries; but so that he should not have any right, title, claim or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, and so as no creditor of his should or might have any lien or

claim thereon in any case, or the same be, in any way, subject or liable to his debts, disposition or engagements; and, in case he should marry and leave a widow him surviving, then, after his decease, to pay the interest to his widow during her life, for her separate use, in such manner as the trustees should judge proper: and Crosby thereby declared and appointed that a proportionate part of the interest should be paid up to the day of the decease of J. D. Hepworth and his widow; and that, from and after the decease of him or his widow, the £800 and all savings or accumulations of interest, if any, should be in trust for his children in equal shares, with benefit of survivorship on any of them dying under 21; but, if he should have no child who should attain 21, then one moiety of the £800, and all savings and accumulations of interest, if any, should be upon such trusts, &c. as Anne Thompson should appoint, and, in default of appointment, in trust for her absolutely; and that the other moiety should be in trust for Susannah Hepworth absolutely: and the trustees were empowered to apply the interest and capital of the shares of J. D. Hepworth's children, for their maintenance and advancement respectively.

Crosby died in October 1822. In April 1832 J. D. Hepworth became bankrupt. The trustees had paid or applied the interest of the £800 to him or to his use, down to the time of his bankruptcy.

The bill which was filed, by the assignees, against the bankrupt and his infant children, and against the trustees and Anne Thompson and Susannah Hepworth, prayed that the plaintiffs might be declared to be entitled to the bankrupt's life-interest in the £800, for the benefit of his creditors, and that the trustees might be decreed to pay, to the plaintiffs, the interest of the £800 become due since the bankruptcy and to accrue due during the bankrupt's life.

The defendants put in a general demurrer.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL]. It is plain that the grantor did intend to exclude the assignees: and that object might have been effected if there had been a clear gift over.

But the question is whether there is anything in the deed that amounts to a direction that the trustees shall withhold the payment of the interest and accumulate it, during the lifetime of J. D. Hepworth, if they shall think fit. Although the words: "savings and accumulations," as they first occur, might bear that construction; yet taking the whole of the instrument together, I think that the better construction is that those words do not enable the trustees to withhold and accumulate any portion of the interest during the life of J. D. Hepworth.

Declare that the plaintiffs are entitled to the bankrupt's life-interest in the £800.

LORD v. BUNN.

(Court of Chancery, 1843. 2 Younge & C. Ch. Cas. 98.)

By an indenture of settlement dated the 30th March, 1822, Thomas Lord duly appointed and conveyed a freehold messuage and lands situate in the Edgware-road to Mathew Norton and David Henderson and their heirs, upon trust for the settlor for his life, with remainder to his wife for her life, and after the decease of the survivor of them upon trust to pay or permit Thomas Lord, the son of the settlor, to receive the clear rents and profits of the premises for his life; provided always that, in case any commission of bankrupt should be issued against the said Thomas Lord the son, whereupon he should be found or declared a bankrupt, or in case he should make any composition with his creditors for the payment of his debts, though a commission of bankrupt should not issue, or should make any conveyance of his estate and effects for the benefit of his creditors, or should be discharged under any insolvent or other Act or Acts of Parliament then already or thereafter to be made or passed for the relief or benefit of insolvent debtors, then and in such case notwithstanding the trusts aforesaid they the said trustees, their heirs or assigns, should, during the life of the said Thomas Lord the son (subject to the life estates of the said Thomas Lord the settlor and Amelia Elizabeth his wife), stand and be possessed of the said hereditaments and premises upon trust to apply, lay out, and expend the clear surplus rents, issues and profits thereof in and towards the maintenance, clothing, lodging and support of the said Thomas Lord the son, and his then present or any future wife, and his children, or any of them, or otherwise for his, her, their or any of their use and benefit, in such manner as they the said trustees, or the survivor of them, or the heirs or assigns of the survivor, should in their or his discretion think proper; and from and immediately after the decease of the survivor of them the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and Thomas Lord the son, upon trust that they the said trustees, their heirs and assigns, should, during the life of the widow of the said Thomas Lord the son, if he should leave any, pay, apply and dispose of the surplus of the said rents, issues and profits unto such person or persons, and for such intents and purposes as any such widow, notwithstanding any future coverture, should from time to time (but not by way of anticipation) by any writing, as therein mentioned, under her signature appoint; and in default of such appointment, into her own proper hands for her sole and separate use; her receipts to be sufficient discharges: and from and immediately after the decease of the survivor of them, the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and the said Thomas Lord the son, and his widow, if he should leave a widow, upon trust for all and every the children of the said Thomas Lord the son,

who being a son or sons should live to attain the age of twenty-one years, or who being a daughter or daughters should live to attain that age or be married, which should first happen, in equal shares and proportions, if more than one, as tenants in common and not as joint tenants, and for their several and respective heirs and assigns forever; and in case there should be but one such child, then upon trust for such one or only child, his or her heirs and assigns forever.

By an indenture bearing even date with the preceding indenture, certain leasehold property situate in the New Road was duly assigned by Thomas Lord, the settlor, to the same trustees, their executors, administrators, and assigns, to hold upon trusts similar to those declared by the before-mentioned indenture, allowing for the difference of tenure of the respective properties.

Thomas Lord the settlor, and Amelia Elizabeth his wife, died many years since, leaving Thomas Lord, the son, surviving them. Thomas Lord, the son, married, and had several children.

The original trustees, under the indentures of settlement, having been discharged from their trusts, two persons, named respectively Bunn and Burgoyne, were duly appointed trustees in their room.

Some time after the Stat. 1 & 2 Vict. c. 110 came into operation, Thomas Lord, the son, was committed to the Queen's Bench prison, charged in execution for debt, at the suit of one Silver. Satisfaction not having been made for the debt within twenty-one days after such committal, application in pursuance of the above-mentioned Act was made by the creditor to the Court for Relief of Insolvent Debtors for the usual vesting order, and such order was accordingly made in July, 1841. Silver was a few months afterwards appointed by the Insolvent Debtors' Court assignee of the estate and effects of the insolvent.

The trustees having, under these circumstances, refused to pay to any person the rents and profits of the property comprised in the indentures of settlement, a bill was filed in January, 1842, by the children of the insolvent, one of whom, a daughter, had attained her age of twenty-one, and the insolvent's wife, the mother of those children, against the trustees, the assignee under the Insolvent Act (Silver), and the insolvent, praying that the trusts of the indentures of settlement might be carried into execution, the rights of all parties therein ascertained, and the rents and profits secured.

By an order of the Insolvent Debtors' Court, dated the 19th May, 1842, the insolvent, having duly complied with the provisions of the 75th section of the Statute 1 & 2 Vict. c. 110, was discharged from custody; and the fact of such discharge was brought before this court by supplemental bill.

The cause now came on for hearing, the principal question being as to the manner in which the rents and profits of the settled property

were to be disposed of during the lifetime of Thomas Lord, the son, from the time of his insolvency.

THE VICE-CHANCELLOR [SIR J. L. KNIGHT BRUCE]. According to my construction of the instruments and the Act of Parliament, the right of those who were to take in substitution for the husband's life estate, does not arise till the actual discharge of the husband under the Insolvent Act. The rents of the property, therefore, until such discharge, formed part of the husband's estate, and belong to his assignee.

It has been admitted on the part of the assignee, and the admission must be entered by the registrar, that what was required under the Act of Parliament to be done to obtain the order of the 19th May, 1842, was done, and that thereupon Thomas Lord obtained his discharge. That being admitted, I am of opinion, that the trust from the time of the discharge took effect in favor of the husband, wife, and children, or some of them.

With regard to the question which has been agitated, whether the discretionary power created by the settlement yet remains in the trustees, I am of opinion that it does. In the first place, I think that, upon the true construction of the whole settlement together, the meaning to be collected is, that a discretion was to be vested in the trustees of the settlements for the time being. It would, I think, be *hæsiō in litera* if I were to hold otherwise. Assuming that these trustees were duly appointed in the room of the former trustees, I think that the discretionary power created by the settlements is vested in them. It has been suggested, that, as one of the objects who are to take in default of the execution of the power, has become an insolvent, the discretionary power is gone. I apprehend, however, that the discretionary power has not gone from the trustees. If an individual have a power over an estate, which estate, in default of execution of the power, is vested in others—as, if the person having the power be A., and the persons to take in default of execution be B. and C., it is immaterial in the consideration of A.'s right to execute the power, what may have become of the interest of B. and C., because it is a mere defeasible interest. The assignee can only take such defeasible interest as the bankrupt had. No authority has been stated to me which seems to have proceeded upon a contrary notion, and I think that the trustees have a right under the power to appoint in favor of the insolvent and his wife, or in favor of the children, or any of them, with or without the insolvent and his wife or either of them.

I am also of opinion upon these settlements (without saying what might be done under other settlements), that any benefit which the bankrupt may take will belong to his assignee.

YOUNGHUSBAND v. GISBORNE.

(Court of Chancery, 1844. 1 Coll. 400.)

Francis Duckinfield, by his will, dated the 17th June, 1823, gave certain real estates to trustees, upon trust to levy and raise yearly, during the life of his brother John William Astley, one annuity or yearly sum of £400; and, in case of his death in the interval between any of the days therein mentioned for payment thereof, then a proportional part thereof up to the time of death. And he directed, that the annuity and proportional part aforesaid should be held by his said trustees, upon trust for the personal support, clothing, and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge, anticipate, or otherwise encumber the same, nor to his creditors under a commission of bankruptcy or any Act for the relief of insolvent debtors, or to his own control, contracts, debts, or other engagements. And the testator declared, that the said annuity should be paid to his said brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate, or otherwise encumber the same, or until any other person or persons might claim the same; and from and after such attempt or claim, the same should be applied by his said trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of his said brother, and for no other purpose whatsoever.

The testator died in July, 1835, and the trustees duly paid the annuity to John William Astley up to the 25th December, 1841.

On the 31st of May, 1842, John William Astley took the benefit of the Insolvent Debtors Act, and the plaintiffs, as his assignees, instituted this suit for the purpose of obtaining the annuity.

THE VICE-CHANCELLOR [SIR J. L. KNIGHT BRUCE]. I wish to be understood as not giving any opinion, whether the two cases cited by Mr. Beales are, or are not, materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case, I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.

Considering the language of the will and the state of the authorities, I think it reasonable that the costs should be paid out of the fund.²

² Cf. *Bland v. Bland*, 90 Ky. 400, 14 S. W. 423, 9 L. R. A. 599, 29 Am. St. Rep. 390 (1890).

In re COLEMAN.

(Court of Chancery, 1888. 39 Ch. Div. 443.)

Alfred Coleman, by will dated the 5th of August, 1875, gave his residuary estate to trustees upon trust to pay the income to his wife during widowhood, "but in the event of her death or second marriage then I direct my said trustees to apply such rents, interest, dividends, and annual proceeds in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years, and on his or her attaining that age then I direct my said trustees to distribute the whole of my said estate between my said children in such shares and proportions as my said wife, if then living, shall by deed or will appoint, or if dead, then equally between all my children then living, the shares of any females to be for their sole and separate use and free from the control, debts, or engagements of any husband."

The testator died on the 17th of May, 1880, leaving a wife and four children. The widow died in May, 1884, without exercising the power of appointment. At her death two of the children, of whom John Soy Coleman was the eldest, had attained twenty-one. The other two were minors at the time of these proceedings, the youngest being in the seventh year of his age at the widow's death.

On the 13th of April, 1886, John Soy Coleman, who was resident in Australia, sold and assigned absolutely to David Henry "all and singular the part or share, and all the income, property, moneys, securities, estates, and interests to which the said J. S. Coleman was or is entitled to, or which he may at any time hereafter become entitled to under the said will of his said father, the said Alfred Coleman, deceased, or in any other manner howsoever by reason of his decease, and all stocks, funds, and securities in or upon which the same, or any part thereof, were or are, or is now, or shall or may at any time hereafter be invested, and all interest to become due in respect thereof."

From the death of the widow the trustees had applied the income in equal shares for the benefit of the four children, paying one-fourth directly to each of the two adults. In June, 1886, formal notice of the above assignment was given to the trustees, with a request by D. Henry and by J. S. Coleman that the payments might thenceforth be made to Henry. The trustees were advised not to make any further payments in respect of J. S. Coleman without the sanction of the court. They continued to apply three-fourths of the income for the benefit of the children other than J. S. Coleman, and kept the remaining fourth in hand.

In March, 1887, Henry took out an originating summons to have it decided whether the gift of capital to the children was contingent on their being alive at the period of distribution, and if so, whether J. S.

Coleman had an interest in the income which would pass by his assignment.

The summons were heard before Mr. Justice North on the 8th of February, 1888.

Everitt, Q. C., and Clayton, for Henry: There is a complete trust for the benefit of a person *sui juris*, the benefit of that is capable of assignment notwithstanding that the trustees here are under the terms to apply the subject of the trust themselves: *Rippon v. Norton*, 2 Beav. 63; *Green v. Spicer*, 1 Russ. & My. 395; *Kearsley v. Woodcock*, 3 Hare, 185; *Younghusband v. Gisborne*, 1 Coll. 400. Here the trustees have in effect appropriated the income of three quarters to three of the children, and one quarter to J. S. Coleman; if appropriation is required to complete the title of the assignee nothing more can be necessary than what has been done.

NORTH, J. I think here the trust created was a good trust, and that the assign, until the youngest child attains the age of twenty-one, is not entitled to have anything paid over to him.

I am asked, on the authority of certain cases, to deal with the question as if there had been a separate single trust for one person, but I think the cases referred to have nothing whatever to do with the present. In *Kearsley v. Woodcock* and *Younghusband v. Gisborne* there was a trust for the benefit of the persons entitled, and that being so, there was an interest which passed to the assignees. The present case seems to me entirely distinct. Here there is a gift after the death or the second marriage of the widow, in these words, "to apply such rents, dividends, interest, and annual proceeds in and towards the maintenance, education and advancement of my children in such manner as they shall deem most expedient, until the youngest of my said children attains the age of 21 years," and then there is a trust for division, when that time comes, among those who are living at that time. It seems to me there is a trust there under which the trustees may, if they like, exclude one person altogether; and they certainly have power, if they please, to apply unequal portions of the income for the maintenance of the children as they may deem necessary or desirable. There is a trust to do this in such manner as they shall deem most expedient, and "most expedient" means most for the benefit of the children for whose benefit the income is to be applied. In my opinion it is necessary to apply the rents for these children's benefit, and if the trustees think it expedient to apply more for a daughter than a son, or more for an elder child than for a younger child, it is in their discretion to do so, and in such manner as is most expedient.

There are some observations of Vice-Chancellor Shadwell in the case of *Godden v. Crowhurst*, 10 Sim. 642, 656, which seem to me to apply. He says: "Then the property is given for 'the maintenance and support of my said son, and any wife and child or children' (which

is the event that has happened) 'he may have, and for the education of such issue or any of them, as they, my said trustees for the time being, shall, in their discretion, think fit.' Now there is nothing, in point of law, to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied; and there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions, to tradesmen, to supply the son and the wife and the children with all that was necessary for maintenance; and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son, simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children, and, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything; but the consequence is that, if the trust was a perfect trust for accumulation, for the second period, the whole of the accumulated fund will, at the end of that period, be applicable for the maintenance and support of the son, the wife and the children collectively, and the assignees have no interest at all."

Under these circumstances I am of opinion that the assign is not entitled to call upon the trustees to hand over to him the one-fourth share of the income. It is said that it has been appropriated to the share of the son. I do not so understand from the evidence. There is no dispute about the application of three-fourths of the income. That has been applied for the benefit of the persons as to whose interest there is no dispute, who have not assigned, but inasmuch as a question has been raised as to anything that may be coming to the son, who has assigned, that money has been very properly and wisely kept in hand until that dispute has been settled.

Under these circumstances it seems to me that there is a good and valid trust to apply such part of the income as the trustees may think fit for the maintenance, education, and advancement of the children (including the son in question, if they think it expedient). Then I think this further follows—if they in the exercise of that discretion appropriate a part of it to him for his benefit, and propose to apply it for his benefit by handing it over to him, I think that would be an interest which would pass by the assignment, but if, instead of doing that, they think fit to apply it in some other way for his benefit, then in my opinion the assignee does not take the benefit of that provision by way of maintenance, or whatever it is, at all.

The order as drawn up declared that no child of the testator is entitled, prior to the time when the youngest of his children attains the age of twenty-one years, to payment of, or has a transmissible interest in, one-fourth share or any part of the income of the residuary estate of

the said A. Coleman, or the proceeds thereof, and that the plaintiff has no claim, present or future, prior to that event, against the trustees of the will of the said A. Coleman for income, and that the trustees are entitled to employ the income for the benefit and maintenance of the children, including the said J. S. Coleman, at their absolute discretion.

Henry appealed from this decision. The appeal was heard on the 10th of August, 1888.

Everitt, Q. C., and Clayton, for the appellant: We say that each child takes a vested interest in one-fourth of the income, and whatever comes in the way of property to an adult who is *sui juris* can be assigned. In *Rippon v. Norton*, 2 Beav. 63, under a very similar trust to the present, the assignee in insolvency of one of the beneficiaries was held entitled to an aliquot share.

[COTTON, L. J. That case does not help us, for no reasons are given.

FRY, L. J. I do not see my way to supporting the decision.]

In *Lord v. Bunn*, 2 Y. & C. (Ch.) 98, it was held that the trustees had a discretion, and they had a power of excluding any of the objects of the trust, but that so far as the insolvent took anything it would go to his assignee.

[THE COURT here intimated a doubt whether more was meant than that whatever interest the insolvent had if the trustees did not exercise any discretion would go to the assignee.]

In *Godden v. Crowhurst*, 10 Sim. 642, the power was not exclusive, but the provision was for a man and his wife and children, who were all living together, and it was held that the man's assignee in bankruptcy was not entitled to anything, but this was on the ground that the provision was not severable. In *Twopeny v. Peyton*, *Ibid.* 487, the trustees had power not to give the bankrupt anything, and on that ground his assignees could not take. In *Younghusband v. Gisborne*, 1 Coll. 400, a trust of income for the support, clothing, and maintenance of an adult was held to be a trust for his benefit, and to entitle his assignee in bankruptcy to the income. In this case *Godden v. Crowhurst* and *Twopeny v. Peyton* were disapproved of. There cannot be an inalienable provision for an adult *sui juris*.

[FRY, L. J. Suppose a person elected as an inmate to an almshouse with an allowance of provisions.]

That is not property coming under a deed or will. In *Green v. Spicer*, 1 Russ. & My. 395, where there was no power to apply otherwise than for the benefit of one person, the manner only being left discretionary, the income was held to pass to the assignee in insolvency. In *Hayes's Conveyancing*, 5th ed. vol. i. p. 506, it is stated that some conveyancers had thought that there could be an inalienable trust for the personal maintenance of a person *sui juris*, but the cases to which he refers show that there must be a power to give the property to some one else or it will pass to an assignee. The policy of the law is against

inalienable trusts. To allow maintenance to be inalienable would be against the policy of the law: *Tudor's Leading Cases on Real Property*, 3d ed. p. 978.

Decimus Sturges, for the infant children: The order does not seem to be happily worded, for a transmissible interest there certainly is, though only a contingent one. The case I make is this, that the assignor has no present property under the will, his interest in the capital is contingent, and until the youngest child attains twenty-one the income is held by the trustees upon trust to apply it for the benefit of the children as they think fit, so that no child is entitled to anything but what the trustees choose to give him. This is not like the cases where there was a vested gift with a discretionary power to take it away, still less is it like cases where there was a gift with a discretion as to the mode of its application.

[FRY, L. J. An assignment for value of whatever A. B. may take under the will of C. D., who is still living, passes whatever A. B. ultimately takes under the will of C. D. Why may not this assignment pass whatever J. S. Coleman may take under the exercise of the discretion of the trustees?]

I do not dispute that if the trustees pay him anything it would pass by the assignment, and that the payment therefore would be made to the wrong person, but I contend that the trustees might apply it for his benefit in other ways without being interfered with, e. g. in paying his bills. The case, I submit, is covered by authority: *Godden v. Crowhurst*; *Wallace v. Anderson*, 16 Beav. 533. The cases cited against me do not affect my position. *Lord v. Bunn* only decides that the assignee takes whatever the trustees determine to give to the assignor.

[FRY, L. J. Should you be satisfied with the following declarations:

1. That no child is entitled prior to the attainment of twenty-one by the youngest of the testator's children to the payment of any part of the income of the residuary estate.

2. That the trustees are entitled to apply the said income for the maintenance, education, or advancement of the children, including J. S. Coleman, in their absolute discretion.

3. That the plaintiff is entitled to no interest in the said income except such moneys or property, if any, as may be paid or delivered, or appropriated for payment or delivery by the trustees to the said J. S. Coleman.]

I should be satisfied with those declarations.

Page, for the trustees: We wish it to be decided whether we can send out goods to J. S. Coleman, and I submit that we may. Where a gift of income is for the benefit of the whole class with a discretion how it is to be applied, it has never been held that members of the class take a vested interest.

[FRY, L. J. A man may assign what he has not got, and the assignment becomes effectual if he gets it. If you send out goods to J. S. Coleman, why should not his assignee take them?]

No case goes so far as to make an assignment operate on what trustees may in their discretion allot to one of the objects of the trust: *In re Clarke*, 36 Ch. D. 348; *Official Receiver v. Tailby*, 18 Q. B. D. 25; 13 App. Cas. 523. The interest of J. S. Coleman in the capital is contingent: *Hilliard v. Fulford*, 42 L. J. (Ch.) 624; and *In re Parker*, 16 Ch. D. 44, is against vesting by reason of such a trust for maintenance as this.

Clayton, in reply. In *In re Parker* the trust was to apply the income or such part thereof as the trustees should think fit—here the trust is to apply the whole income.

COTTON, L. J. This is an appeal from an order of Mr. Justice North, and we think that some alteration in its terms is requisite. The contention of the appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half-a-crown to one of them. This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors, it is a power to the trustees to give to each child what they think fit, and if they cannot altogether exclude a child who has become bankrupt or assigned his interest, they can allot to him as little as they think desirable. Then does the assignment include every benefit which the trustees give to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment. I think that the declaration proposed by Lord Justice Fry is right, and I am of opinion that the trustees will not be at liberty to send over money or goods to J. S. Coleman.

The strongest cases referred to by the counsel of the appellant were *Green v. Spicer* and *Younghusband v. Gisborne*, but in these cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property, and an attempt was then made to prevent its being dealt with as his property if he became bankrupt. Here no property is given to J. S. Coleman, but only a discretion to the trustees to apply such part as they think fit of the income for his bene-

fit. This case, therefore, does not come within the principle of those cases, and I think that the declaration proposed by the Lord Justice Fry is right.

FRY and LOPES, L. JJ., concurred.³

TILLINGHAST v. BRADFORD.

(Supreme Court of Rhode Island, 1858. 5 R. I. 205.)

Demurrer to a bill in equity, filed by the plaintiff as assignee, under the "Poor Debtor's Act," of Hezekiah Sabin the younger, against him, and against Nicholas H. Bradford, trustee under the will of Hezekiah Sabin, Sen., of certain real estate situated in Westminster Street in Providence, held by said Bradford in trust for the benefit of said Hezekiah the younger.

The bill, in substance, set forth the will of Hezekiah Sabin, Sen., of the date of February 6, 1853, and his subsequent death; and it appeared, that in and by said will, the testator devised a certain undivided share of the real estate in question to Charles F. Tillinghast, Esq.—whose successor in the trust Bradford was stated to be,—“In trust, to hold the same, for the said trustee to receive the rents and profits thereof, and after paying therefrom all the taxes, repairs, insurance, and other charges thereon, to pay to my said son Hezekiah the net income thereof during his natural life, for his own use, and from and after his decease to convey the said portion of said real estate according to the provisions of the last will and testament of the said Hezekiah Sabin, Jr., and in default of such will, to his heirs at law;” and that after creating other trusts, in like terms, of his property, real and personal, to be administered by the same trustee for the benefit of his children, male and female, including said Hezekiah, Jr., the testator, in the 10th clause of his will, declared as follows: “Section 10th, I hereby declare it to be my will, that the payment of the rents, income, interest, or dividends, to be made by the trustee to my children in pursuance of the provisions of my will, shall be made to them from time to time, as the said rents, income, interest, or dividends accrue or may be received, and not in the way of anticipation, nor to their assigns, and that such payments shall be for their sole and separate use.” The bill further set forth, that whilst said Hezekiah Sabin, Jr., was entitled as aforesaid under the will of his father—being in danger of being committed to jail in a certain execution for rent, then out against him—he cited his creditors to appear to show cause why he should not take the poor debtor's oath; and, as the condition upon which he was entitled to be admitted to take the same, on the 24th day of November, 1856, executed to the plaintiff in fee an assignment of “all my (his) es-

³ See, also, *In re Bullock*, 60 L. J. Ch. N. S. 341 (1891).

tate, both real and personal, not exempt from attachment by law; to have and to hold the same in trust for the benefit of all my creditors in proportion to their respective demands."

The bill prayed, that Bradford might be decreed to pay the rents and profits of the trust property, as the same might accrue, to the plaintiff, for the benefit of the creditors of Hezekiah Sabin the younger, and that the plaintiff might be decreed to be entitled to receive the same for such purpose; that Bradford might be enjoined from paying over such rents and profits to Hezekiah Sabin the younger, or to others, and for further relief.

AMES, C. J. The demurrer to this bill is attempted to be supported, substantially, upon two grounds: First, that Hezekiah Sabin, Jr., had not such an equitable interest, under his father's will, in the trust property in question, that he could aliene the same to the plaintiff in trust for his creditors; and, second, that in legal intendment he did not, by the assignment executed by him under the Poor Debtor's Act, aliene the same to the plaintiff, upon such trust.

The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition, such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear, that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate,—alienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property,—and, so far as subjectiveness to debts is concerned, to the honest policy of the law,—as to be totally void, unless, indeed, which is not the case here, in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since *Brandon v. Robinson*, 18 Ves. 429; and in application to such a case as this, is so honest and just, that we would not change it if we could. Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice.

The other ground of demurrer taken, is equally without support. The difference between the prescribed terms of the assignment of an insolvent and a poor debtor, remarked upon by the counsel for the respondent, is verbal merely: the words "all my estate, both real and personal, not exempt from attachment by law," prescribed for the latter as descriptive of the subject of conveyance, being quite ample enough to include every equitable as well as legal interest in the real or personal property of the assigning debtor. The property excepted

from the assignment by the words "exempt from attachment," is clearly that expressly exempted from attachment by our Statute relating to that subject. It can hardly be supposed that the General Assembly intended that a man should be admitted to the poor debtor's oath, whilst rolling in the wealth of a trust estate, applicable by law to the payment of his debts.

It has been suggested, that if the points taken on demurrer be decided against the respondents, they will decline to answer over, and will submit to the decree asked; and we are requested, under such circumstances, by the respondent, Bradford, to allow him his costs and necessary expenses of defence out of the trust fund. As this is the first time that this question has come before the court, and the trustee has taken the speediest mode of bringing the question of his duty, under the circumstances, to a decision, we think it but reasonable, that submitting now to the decree asked by the plaintiff, he should be made whole out of the trust fund for his costs, and for necessary expenses in endeavoring to keep it applied according to the will of his testator. Demurrer overruled.

NICHOLS v. EATON.

(Supreme Court of the United States, 1875. 91 U. S. 716, 23 L. Ed. 254.)

Appeal from the Circuit Court of the United States for the District of Rhode Island.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will, she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest, and income of the trust-property to her four children equally, for and during their natural lives, and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition, that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable

to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust-fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given verbatim, as follows:

“Provided also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust-fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened.”

The daughter died soon after the mother, without issue, and unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of testatrix by a former husband), were the executors and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estates to Amasa M. Eaton should cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative pro-

vision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given verbatim, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

Upon a final hearing the Circuit Court dismissed the bill, and Nichols appealed to this court.

Mr. Justice MILLER, after stating the case, delivered the opinion of the court.

The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 433, "If property is given to a man for his life, the donor cannot take away the incidents of a life-estate."

There are two propositions to be considered as arising on the face of this will, as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon v. Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Demmill v. Bedford*, 3 Ves. 149; *Brandon v. Robinson*, 18 Id. 429; *Rochford v. Hackman*, 9 Hare; *Lewin on Trusts*, 80, ch. vii., sect. 2; *Tillinghast v. Bradford*, 5 R. I. 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. If the bankrupt devisee had a wife or child living to take under this branch of the will, there does not

seem to be any doubt that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in *Lewin on Trusts*, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to him and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. Page v. Way, 3 Beav. 20; Perry v. Roberts, 1 Myl. & K. 4; Rippon v. Norton, 2 Beav. 63; Lord v. Bunn, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. *Twopeny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, Id. 642.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far, any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopeny v. Peyton* and *Godden v. Crowhurst*, above cited from 10 Sim., seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no farther than to hold, that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition, that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing-line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them,"—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hill on Trustees, 486; Lewin on Trusts, 538; *Boss v. Goodsall*, 1 Younge & Collier, 617; *Maddison v. Andrew*, 1 Ves. Sr. 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general

Statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their Statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed Statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this

life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher v. Taylor*, 2 Rawle (Pa.) 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life-estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. * * * Nor is such a provision contrary to the policy of the law or to any Act of Assembly. Creditors cannot complain, because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship v. Patterson*, 7 Watts (Pa.) 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the instalments which they had promised to pay could not be diverted by his creditors to the payment of his debts; and Gibson, C. J., remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the

estate being vested in trustees, the son could not alienate. *Shankland's Appeal*, 47 Pa. 113.

The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashurst v. Given*, 5 Watts. & S. (Pa.) 323; *Brown v. Williamson*, 36 Pa. 338; *Still v. Spear*, 45 Pa. 168.

In the case of *Leavitt v. Beirne*, 21 Conn. 1, Waite, J., in delivering the opinion of the court, says, "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustees;" and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al. v. Handly et al.*, 10 Grat. (Va.) 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors v. Elliott & Co.*, 8 B. Mon. (Ky.) 56, the testator had directed his executors to pay for the support of Robert Pope the sum of \$25 per month. Robert Pope having been in the Rocky Mountains until the sum of \$225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of \$25 per month, or \$300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. After an examination of the Statutes of Kentucky and the general principles of equity jurisprudence on this subject, they hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of *Campbell v. Foster*, 35 N. Y. 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust-fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument

is largely based upon the special provision of the Statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any further examination into the decisions of the State courts. We have indicated our views in this matter rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel; such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also that, since his bankruptcy, the defendant, Amasa, has actually received \$25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent,—a will which, as we have shown, she had a lawful right to make,—the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

Decree affirmed.⁴

⁴ "It is a settled rule of law, that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."—Per Swayne, J., in *Nichol v. Levy*, 5 Wall. 433, 441, 18 L. Ed. 596 (1866).

BROADWAY BANK v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 170, 43 Am. Rep. 504.)

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof semi-annually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman v. Stiles*, 2 Pick. 460, 13 Am. Dec. 445; *Perkins v. Hays*, 3 Gray, 405; *Russell v. Grinnell*, 105 Mass. 425; *Hall v. Williams*, 120 Mass. 344; *Sparhawk v. Cloon*, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to

the nature of the estate granted. *Co. Lit.* 223a; *Blackstone Bank v. Davis*, 21 *Pick.* 42, 32 *Am. Dec.* 241.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and purity of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in *Sparhawk v. Cloon*, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the cestui que trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. *Brandon v. Robinson*, 18 *Ves.* 429; *Green v. Spicer*, 1 *Russ. & Myl.* 395; *Rochford v. Hackman*, 9 *Hare*, 475; *Trappes v. Meredith*, L. R. 9 *Eq.* 229; *Snowdon v. Dales*, 6 *Sim.* 524; *Rippon v. Norton*, 2 *Beav.* 63.

The English rule has been adopted in several of the courts of this country. *Tillinghast v. Bradford*, 5 *R. I.* 205; *Heath v. Bishop*, 4 *Rich. Eq. (S. C.)* 46, 55 *Am. Dec.* 654; *Dick v. Pitchford*, 1 *Dev. & Bat. Eq. (21 N. C.)* 480; *Mebane v. Mebane*, 4 *Ired. Eq. (39 N. C.)* 131, 44 *Am. Dec.* 102.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship v. Patterson*, 7 *Watts (Pa.)* 547; *Shankland's Appeal*, 47 *Pa.* 113; *Rife v. Geyer*, 59 *Pa.* 393, 98 *Am. Dec.* 351; *White v. White*, 30 *Vt.* 338; *Pope v. Elliott*, 8 *B. Mon. (Ky.)* 56; *Nichols v. Eaton*, 91 *U. S.* 716, 23 *L. Ed.* 254; *Hyde v. Woods*, 94 *U. S.* 523, 24 *L. Ed.* 264.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of

the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the cestui que trust which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *ius disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the

estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.⁵

Bill dismissed.

PACIFIC BANK v. WINDRAM.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 175.)

MORTON, C. J. The defendant, Mrs. Windram, after her marriage, being possessed in her own right of personal property, conveyed it to trustees by an indenture dated in March, 1879. The trusts declared by the indenture are, that the trustees are to pay the net income to her semi-annually during her life "upon her sole and separate order or receipt, the same not to be by way of anticipation," and to pay the principal to her children upon her death, or when, after her death, they arrive at the age of thirty years, except as to a sum not exceeding

⁵ Accord: *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719 (1887); *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (1902).

As to whether the restraint on alienation can be attached to a legal life estate, see *Gray*, *Restraints on Alienation* (2d Ed.) § 135 et seq.; also *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128 (1894).

In *Boston Safe Deposit & Trust Co. v. Luke*, 220 Mass. 484, 108 N. E. 64, L. R. A. 1917A, 988, it was held that where trustees were directed to pay a certain sum to the testator's daughter during her life, "said income to be free from the interference or control of her creditors," and where the equitable interest was assignable, yet her trustee in bankruptcy was not entitled to the income, but the trustee under the will was required to pay it to her. See, also, *Hull v. Palmer*, 213 N. Y. 315, 107 N. E. 653; *Siemers v. Morris*, 169 App. Div. 411, 154 N. Y. Supp. 1001; *Eaton v. Boston Trust Co.*, 240 U. S. 427, 36 Sup. Ct. 391, 60 L. Ed. 723.

twenty-five thousand dollars, over which she retains a power of appointment by will.

After this settlement in trust, she jointly with her husband borrowed a large sum of money of the plaintiff, and, as security therefor, assigned and transferred to the plaintiff, by an instrument in which her husband joined, all her right and interest to and in the income of said trust fund accruing under the said indenture. The object of this bill in equity, which is brought under the Gen. Sts. c. 113, § 2, cl. 11, is to reach and apply, in payment of the plaintiff's debt, the income to which she became entitled under the indenture after the assignment to the plaintiff. The provision that the trustees are to pay the net income to her upon her sole receipt, and not "by way of anticipation," is clearly intended to restrain the power of the cestui que trust to alienate the income in advance; and the case therefore raises the question, whether such restraint of alienation is valid as against subsequent creditors or purchasers with notice.

It was decided in the case of *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, that the founder of a trust for the benefit of another may by suitable provisions restrain the power of the cestui que trust to alienate the income by anticipation, and protect the income from the claims of his creditors until it is paid over to him. In that case, it was not necessary to consider whether a man could settle his own property in trust to pay the income to himself with a like restraint of alienation which would be valid. It seems to us that the two questions are quite different.

The general policy of our law is, that creditors shall have the right to resort to all the property of the debtor, except so far as the Statutes exempt it from liability for his debts. But this policy does not subject to the debts of the debtor the property of another, and is not defeated when the founder of a trust is a person other than the debtor. In such case, the founder, having the entire *jus disponendi* in disposing of his own property, sees fit to give to his beneficiary a qualified and limited, instead of an absolute, interest in the income. Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is, that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts.

To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy

will justify. No authorities are cited in favor of such a rule. In England it is the settled rule that the founder of a trust in favor of a third person (except married women) cannot, by a clause restraining alienation, put the income out of the reach of the creditors of the beneficiary. See cases cited in *Broadway National Bank v. Adams*.

In Pennsylvania, where the English rule is rejected, and the same rule, as to the power of a founder of a trust in favor of a third person, adopted by us in *Broadway National Bank v. Adams*, is upheld, the courts yet hold that a person cannot so settle his own property in trust, as to put his right to the income retained by him beyond the reach of his creditors, by a provision against alienation or otherwise. *Johnson v. Harvey*, 2 Pen. & W. (Pa.) 82, 21 Am. Dec. 426; *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517. See, also, *Lackland v. Smith*, 5 Mo. App. 153.⁶

It is true that a man, who is not indebted, may by a voluntary conveyance made in good faith transfer his property so as to put it out of the reach of future creditors. When a man transfers a trust fund, of which the income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his future creditors; but we are of opinion that his right to the income which he retains in himself may be alienated by him, is liable for his debts, and may be reached in equity.

Another question, not free from difficulty, arises in this case, and that is whether this rule applies in the case of a conveyance of her property in trust by a married woman. In England, where, as we have before said, the general rule is that restraints of alienation in wills or deeds are invalid, the Court of Chancery from the time of Lord Thurlow has recognized an exception to the rule in favor of married women. *Parkes v. White*, 11 Ves. 209; *Jackson v. Hobhouse*, 2 Meriv. 483; *Woodmeston v. Walker*, 2 Russ. & Myl. 197. Numerous other cases might be cited.⁷

⁶ Accord: *Requa v. Graham*, 187 Ill. 67, 58 N. E. 357, 52 L. R. A. 641 (1900).

In *Holmes v. Penny*, 3 K. & J. 90, 100, Sir W. Page Wood, V. C., said: "I will in this case first consider whether a deed, merely voluntary, is fraudulent against subsequent creditors, from the fact that it contains a trust to apply the interest of the property in such manner as the trustees should think fit, towards the benefit of the settlor or his wife or children. In such a case, the instrument being merely voluntary, the intention may have been to take the property from the creditors, and it may be requisite to have the transaction fully investigated; but, supposing the settlor to have parted bona fide, by the deed, with all the control over his property, and to have vested it in the trustees, in order to give them the absolute power to deal with it as they please for the benefit of himself or his wife or children, that could not be held to be fraudulent against subsequent creditors of the settlor, any more than if it were a settlement simply for the benefit of the wife and children of the settlor. The distinction is too thin to authorize the Court to decide, that, because the settlor may possibly derive some benefit under it, the settlement must therefore be fraudulent. That I conceive would be the law if this settlement were voluntary."

⁷ See ante, p. 650.

The reason of the exception is, that a married woman is not *sui juris*, and that such a restraint of her power of alienation is necessary as a protection to her against the coercion and influence of her husband.

By the common law of England, a married woman could not hold any separate property. The settlement upon her by means of a trust of an equitable separate estate, was the invention of equity, and the Court of Chancery allowed the clause against anticipation, in order to give full effect to the estate itself, and to secure to her, free from the influence of the husband, the benefit intended by the settler.

But the legislation of this Commonwealth has essentially changed the common law status of a married woman, especially in respect to her holding separate property. By our Statutes, a married woman is now enabled to take, hold, manage and dispose of property, to make contracts, and to sue and be sued, in the same manner as if she were sole. Pub. Sts. c. 147. Except as to dealings with her husband, she is made a person *sui juris*. The Statute intends, what it declares, that she shall hold her separate property in the same manner as if she were sole, with the same rights and privileges, and also subject to the same rules, responsibilities and liabilities, as a *feme sole*.

Courts of equity upheld the restraint of alienation in favor of a married woman because of her disability during coverture, and as an incident of the trust estate necessary for her protection. The Statutes having removed her disability, and having made unnecessary the creation of a trust estate, the incidents of the trust estate and the equitable rights growing out of it no longer remain in her favor. She is put upon the same footing as if she were a *feme sole*. She no longer needs any protection against the marital rights of her husband. It is argued that she still needs protection against his persuasion and undue influence. The Statutes have made such provisions as were deemed necessary to meet this danger, by providing that, upon her application to the Supreme Judicial Court, a trustee may be appointed, and she may thereupon convey her separate estate to the trustee upon such trusts and to such uses as she may declare. Pub. Sts. c. 147, § 13.

For these reasons, we are of opinion that the provision in the indenture of March, 1879, intended to restrain Mrs. Windram's power of alienating the income of the trust fund, is invalid; and that the plaintiff is entitled to the income after the assignment to it, or after notice thereof was given to the trustees, if they have paid it to Mrs. Windram before such notice.

We need not consider what effect the modification of the trusts made in September, 1880, may have upon the rights of other parties. By this modification, the trustees, instead of paying the income to Mrs. Windram, were to disburse it for her benefit, as they should see fit. It is clear that it would be a gross fraud to allow it to defeat the rights,

of the plaintiff under its prior assignment, and the presiding justice who heard the case rightly ruled that it was incompetent and immaterial as against the plaintiff.

The result is, that the plaintiff is entitled to a decree, the terms of which must be settled before a single justice.

Decree for the plaintiff.⁸

⁸ Accord: *Jackson v. Von Zedlitz*, 136 Mass. 342 (1884), settlement before marriage, but in contemplation of marriage; *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 39 L. R. A. 806, 67 Am. St. Rep. 334 (1898).

Contra: *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944 (1902).

CHAPTER V

INDESTRUCTIBLE TRUSTS OF ABSOLUTE AND INDE-
FEASIBLE EQUITABLE INTERESTS

SAUNDERS v. VAUTIER.

(High Court of Chancery, 1841. 1 Charg. & P. 240.)

See ante, page 214, for a report of this case.¹

OPPENHEIM v. HENRY.

(Court of Chancery, 1853. 10 Hare, 441.)

See ante, p. 268, for a report of this case.

SANFORD v. LACKLAND.

(United States Circuit Court for the District of Missouri, 1871. 2 Dill. 6,
Fed. Cas. No. 12,312.)

Appeal from the District Court of the United States for the Eastern District of Missouri.

The plaintiff is the assignee in bankruptcy of Wm. C. Hill. The defendants are Wm. C. Hill, Lackland and Clark, the executors and trustees named in the will of James B. Hill, and Edwards, trustee in a deed of trust for the benefit of Mathews, executed by William C. Hill on the property in controversy. The question in the case is, whether, subject to the Mathews' deed of trust, the assignee in bankruptcy is entitled to the interest and right of William C. Hill in the property held by the executors or trustees named in his father's will, consisting of stocks, notes, and real estate. The essential facts are these: In 1862, James B. Hill, the father, died, leaving five children, three sons and two daughters. His will, admitted to probate in March, 1862, so far as material to the present controversy, is in these words: "All the residue of my estate, real, personal, and mixed, I give, devise, and bequeath unto Rufus J. Lackland and William G. Clark, and to the survivor of them, as trustees, in trust, however, to manage, control, and improve the said estate; to receive and collect the debts due me;

¹ See, also, Wharton v. Masterman, L. R. [1895] App. Cas. 186.

to receive and collect the rents, issues, and profits of said property; to reinvest any money that may come into their hands as they may deem best or therewith improve any unimproved real estate, to rent or lease any portion of said real estate; and I do hereby invest them with full and complete authority to sell and convey in fee simple any of my real estate, and to reinvest the proceeds of such sales in other real estate, or otherwise, in their discretion, and in trust, as aforesaid, to manage, control, and keep together, my said property as one entire whole; and as I now have five children, to wit—James B. Hill, William C. Hill, Anna M. Hill, Frank W. Hill, and Mary Hill, upon the further trust, First, Until my children respectively arrive at the age of twenty-one years, or get married, to provide for their support, maintenance, and education out of said estate, which support, maintenance, and education is to be taken as part of the expenses of my estate; Second. My said trustees shall, out of my said estate, pay to each one of my children (if in their opinion such advancement shall not probably amount to more than the equitable share of such child in my estate) as they respectively arrive at the age of twenty-one years, the sum of ten thousand dollars as an advancement, and shall, from the time of such advancement, charge such child with interest thereon at the rate of six per cent per annum, if such advancement be made before the partition hereinafter mentioned; Third. When my eldest child shall arrive at the age of twenty-six years, or if he shall not so long live, then when the next oldest surviving child shall attain that age, my said trustees shall, with the approval of the Probate Court of St. Louis County, make a partition of all said trust estate among my said children, share and share alike, charging, however, in such division and partition, any child who may have received an advancement as before mentioned, with such advancement, with interest thereon from the time when received as part and portion of the share coming to such child, and upon such partition shall forthwith convey to such eldest child, if such eldest child be a son, the portion allotted to him in absolute property, but shall hold the shares and portions of the others of said children until they severally arrive at the age of twenty-six years; and as the sons severally arrive at that age they shall convey to them the share and portion allotted to such son in absolute property.” [And then follows a similar provision as to the share of the estate coming to the daughters.] “After the said partition shall have been made, my said trustees shall keep the portion and share of each of my children separate (except as before), with the rents, issues, and profits belonging to such portion.”

On January 29, 1870, James B., the eldest son, became twenty-six years of age, and thereupon the trustees in the will, with the approval of the Probate Court, made partition of all the property held in trust among all of the children, and there was an order of distribution in accordance with the terms of the will. The property allotted and set

apart to the said William C. Hill consisted of specified stocks in certain banks, promissory notes, and real estate, which are still in the possession and custody of the trustees. On July 6, 1870, William C. Hill executed a deed of trust on the property which had been allotted to him to Edwards, trustee for Mathews, to secure ten thousand dollars, which is yet unpaid. The trustees under the will advanced to William C. the ten thousand dollars on his becoming twenty-one years of age. On November 28, 1870, a petition for adjudication in bankruptcy was filed against him, and he was adjudged a bankrupt. The property in the hands of the trustees belonging to him is of the value of \$30,760, and he is now between twenty-four and twenty-five years of age.

The bill sets out the foregoing facts, and prays that the property in the hands of the trustees allotted to William C. Hill may, subject to the encumbrance of Mathews, be decreed to belong to the assignee in bankruptcy. The District Court overruled a demurrer to the bill, and entered a decree as prayed. The trustees and the bankrupt appeal.

Cline, Jamison & Day, for the complainant.

Slayback & Haussler, and Lackland, Martin & Lackland, for the defendants.

DILLON, Circuit Judge. The share of the bankrupt in his father's estate has been duly ascertained and set apart in severalty to him, but with the exception of the ten thousand dollars advanced on his attaining his majority is yet in the hands of the trustees, as he was not twenty-six years of age at the time he was adjudicated a bankrupt. By the bankrupt law, all the property of the bankrupt, with certain exemptions not necessary to be noticed, vests in the assignee (sec. 14); and if William C. Hill owned or had a beneficial interest in the property in the hands of the trustees, it passed under the bankruptcy. That he was the owner of the property which had been allotted to him under the will can scarcely admit of a doubt. The will directs a partition of the trust estate to be made among the children, and this has been done, but it also provides that the trustees shall hold the shares of the children until the sons shall severally arrive at the age of twenty-six years, when they are directed to convey to such son his portion in absolute property.

This is not the case of a legacy or gift to vest if the legatee shall arrive at a specified age which has not yet been reached. Nor is the devise or gift to the son made on any condition; there is no limitation over in case the son shall, before attaining the age of twenty-six, become a bankrupt. If William C. had not been adjudged a bankrupt, and had died intestate before reaching the age of twenty-six, can it be doubted that his heirs would have taken the estate? It has not been questioned, nor could it be, that he had the power to mortgage this property for the money borrowed of Mathews. If the intention of the testator was to prevent the property from being liable for the debts of his son, his will fails to express that intention. The testator might

have provided if the son should become bankrupt before reaching twenty-six, that his estate should then determine and go somewhere else; but he cannot give the beneficial interest and annex to it the inconsistent condition that it shall not be liable for the debts of the devisee. And in fact the father has not attempted to do this. The estate is given, and the only limitation expressed in the will is that the trustees shall hold it and its accumulations until he shall reach the specified age. The trustees have no beneficial interest in the estate they hold. By operation of the bankruptcy, William C. Hill has no longer any interest in it. It belongs to and is vested in the assignee for the benefit of creditors. The trustees now hold the property in trust for the benefit of these creditors, and as the strict execution of the trusts in the will have been thus rendered impossible, the court properly decreed that the property held by the trustees for the bankrupt should, subject to the Mathews encumbrance, be conveyed to the assignee in bankruptcy.

The decree of the court is affirmed.

Affirmed.

KREKEL, J., concurs.

CLAFLIN v. CLAFLIN.

(Supreme Judicial Court of Massachusetts, 1889. 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.)

Bill in equity, filed November 3, 1888, to terminate a trust for the benefit of the plaintiff under the will and codicil of his father, Wilbur F. Clafin, in the residue of his estate, against the trustees under the will and the plaintiff's mother and brother. The answer of the mother and brother admitted that the plaintiff had the entire beneficial interest in the principal and income of that portion of the trust fund held in trust for him, and made no claim to the same adverse to his right. Hearing before W. Allen, J., who ordered the bill to be dismissed; and the plaintiff appealed to the full court. The case, so far as material, is as follows:

Wilbur F. Clafin at his death left a widow and two sons, of whom the plaintiff was a minor. The will, which was dated July 27, 1885, and named William Clafin, James A. Woolson, and Horatio Newhall as executors and trustees, provided in the second clause that the sum of \$50,000 might remain in the hands of one of the executors for the period of five years, the income during that time to be equally divided between the wife and the two sons, the principal at the end of that period to fall into the residue of the estate; in the sixth clause, that a trust company should hold \$100,000 in trust to pay the net income of three several sums of \$30,000 to the wife and sons during their lives, and to pay over the principal of such sums at their death, as they should appoint by will; in the ninth clause, that the persons named as

executors and trustees in the will should hold \$60,000 to pay the net income of \$20,000 to his wife for five years, and if she should die before the end of that time, to pay over the principal as she should appoint by will, or if she should live to the end of that period, to pay it over to her, and further to pay to each son the net income of \$20,000 for ten years, and, if either of them should die before the end of that time, to pay over that amount as he should appoint by will, or, if either of them should live to the end of that period, to pay it over to him; and in the eleventh clause as follows:

“Eleventh. All the rest and residue of all my personal estate I give, bequeath, and devise to William Clafin, James A. Woolson, and Horatio Newhall, all aforesaid, and to the survivors of them, but in trust nevertheless for the purposes following, viz.: to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Clafin, Clarence A. Clafin, my son, and Adelbert E. Clafin, my son, or their heirs by representation.”

The codicil, which was dated August 6, 1885, provided that, “Whereas in item ‘eleventh’ in said will I directed the three trustees therein named, viz. William Clafin, James A. Woolson, and Horatio Newhall, ‘to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Clafin, Clarence A. Clafin, my son, and Adelbert E. Clafin, my son, or their heirs by representation,’ now then I revoke and annul the provision of said will as above set forth, and instead thereof I declare the trust in the words following, which words are to be taken as a part of said will instead of the words revoked and annulled, viz.: to sell and dispose of the same, and to pay to my wife, Mary A. Clafin, one third part of the proceeds thereof, and to pay to my son Clarence A. Clafin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Clafin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years.”

The will and codicil were duly admitted to probate, and the executors proceeded to settle the estate according to their terms; and when the plaintiff reached the age of twenty-one years the trustees paid over to him the sum of \$10,000.

The plaintiff contended that he had the entire beneficial interest both in the income of the third part of the rest and residue of the estate and in the property itself, and that no reasons existed why the same should be longer held by the trustees, as such further holding caused him unnecessary inconvenience and expense.

FIELD, J. By the eleventh article of his will as modified by a codicil, Wilbur F. Clafin gave all the residue of his personal estate to trustees, “to sell and dispose of the same, and to pay to my wife, Mary A. Clafin, one third part of the proceeds thereof, and to pay to my son

the remaining one third part thereof to my son Adelbert E. Clafin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Clafin was not quite twenty-one years old when his father died, but he some time ago reached that age and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls and by Vice-Chancellors. The cases are collected in Gray's Restraints on Alienation, §§ 106-112, and Appendix II. See *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115, and, on appeal, Cr. & Ph. 240; *Rocke v. Rocke*, 9 Beav. 66; *In re Young's Settlement*, 18 Beav. 199; *In re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, H. R. V. Johns. 265; *Turnage v. Greene*, 2 Jones Eq. (55 N. C.) 63, 62 Am. Dec. 208; *Battle v. Petway*, 5 Ired. (27 N. C.) 576, 44 Am. Dec. 59.

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were sui juris and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 339; *Russell v. Grinnell*, 105 Mass. 425; *Inches v. Hill*, 106 Mass. 575; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320. This is not

a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In *Sears v. Choate* it is said, "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches v. Hill*, *ubi supra*, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, a beneficiary who would have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trust in the will have been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. *Russell v. Grinnell*, 105 Mass. 425. See *Toner v. Collins*, 67 Iowa, 369, 25 N. W. 287, 56 Am. Rep. 346; *Rhoads v. Rhoads*, 43 Ill. 239; *Lent v. Howard*, 89 N. Y. 169; *Barkley v. Dosser*, 15 Lea (Tenn.) 529; *Carmichael v. Thompson*, 5 Cent. Rep. 500; *Lampert v. Haydel*, 20 Mo. App. 616.

Decree affirmed.²

² Accord: *Lunt v. Lunt*, 108 Ill. 307; *King v. Shelton*, 36 App. D. C. 1 (1910). See *Kales' Future Interests* (Illinois, 1905) §§ 289, 294.

In *Parker v. Cobe*, 208 Mass. 260, 94 N. E. 476, 33 L. R. A. (N. S.) 978, 21 Ann. Cas. 1100 (1911), it was held, following the rule of the English cases, that where a trustee was directed to lay out a given sum in the purchase of an annuity for A., A. could require the payment of that sum directly to him. The court, by Loring, J., said: "The case at bar is not a case where \$75,000 was left upon the trust that the income of it should be paid to Ruth H. Cobe during her life, but it is a case where the \$75,000 was to be laid out by trustees in the purchase of an annuity for Ruth H. Cobe during her life. For that reason it is not a case within the rule of *Clafin v. Clafin*, 149 Mass. 19 [20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393]. The \$75,000 was to be laid out in the purchase of an annuity in the case at bar by trustees and not by executors. In our opinion that makes no difference. Where the only duty to be performed by a trustee is to buy a particular piece of property for the cestui que trust which piece of property the cestui que trust can sell as soon as it is bought, the rule of a bequest for a particular object applies and the cestui que trust is entitled to the money. The purchase is as much a nugatory act in case of a trust as it is in case of a bequest, and the same rule governs both cases."

Suppose that the cestui que trust and the trustee agree that the trust shall be terminated before the time prescribed, can the trustee distribute without being guilty of a breach of trust? See *Welch v. Episcopal Theological School*, 189 Mass. 108, 75 N. E. 139.

CHAPTER VI

ILLEGAL AND IMPOSSIBLE CONDITIONS

CO. LIT. 206a: If a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall not be avoided. As if a man maketh a feoffment in fee upon condition, that the feoffor shall within one year go to the city of Paris about the affairs of the feoffee, and presently after the feoffer dieth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton, that it must not be to the damage of the feoffee; and so it is if the feoffor shall appear in such a court the next term, and before the day the feoffor dieth, the estate of the feoffee is absolute. But if a man be bound by recognizance or bond with condition that he shall appear the next term in such a court, and before the day the conusee or obligor dieth, the recognizance or obligation is saved; and the reason of the diversity is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c. is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no state or interest shall grow thereupon. And to illustrate these by examples you shall understand. If a man be bound in an obligation, &c. with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good.

And so it is if a feoffment be made upon condition that the feoffee shall go as is aforesaid, the state of the feoffee is absolute, and the condition impossible and void.

If a man make a lease for life upon condition that if the lessee go to Rome, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

If a man make a feoffment in fee upon condition that the feoffee shall re-eneff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for "the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof." And so it is if A. be bound to B. that I. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.¹

But it is commonly holden that if the condition of a bond, &c. be against law, that the bond itself is void.

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not anything that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxim or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguisheth. As if a man be bound upon condition that he shall kill I. S. the bond is void.

But if a man make a feoffment upon condition that the feoffee shall kill I. S. the estate is absolute, and the condition void.²

THOMAS v. HOWELL.

(Court of King's Bench, 1693. 1 Salk. 170.)

One devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of twenty-one. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the

¹ Accord: *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616.

² Accord: *Conrad v. Long*, 33 Mich. 78 (condition subsequent by way of forfeiture if the devisee should live with her husband); *O'Brien v. Barkley*, 78 Hun. 609, 28 N. Y. Supp. 1049 (condition subsequent of forfeiture if the first taker live with her husband); *Cruget v. Phelps*, 21 Misc. Rep. 252, 47 N. Y. Supp. 61 (condition of forfeiture if the legatee traveled or resided outside the continent of Europe during her husband's life and until she shall be divorced from him).

daughter, being about seventeen, married J. S. And it was adjudged in C. B. that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.³

PRIESTLEY v. HOLGATE.

(Court of Chancery, 1857. 3 Kay & J. 286.)

Joseph Priestley, by his will, dated in 1850, gave and bequeathed to James Priestley the sum of £19 19s.; and also a further legacy of £2000.

The testator made a codicil, dated in 1852, as follows: "Whereas, since the making of my will, James Priestley, to whom I had bequeathed £2000, has emigrated to Australia, I therefore hereby revoke that legacy, and in lieu thereof I give and bequeath to him the said James Priestley, in case he remains in Australia or out of this kingdom, £600, to be paid to him twelve months after the decease of my wife; but if he return to England before her decease, I give and bequeath to him the further sum of £400 (making £1000). This last £400 not to be paid till twelve months after the decease of my wife."

In November, 1852, the testator died. Sarah Priestley, his widow, died in January, 1856.

At the time of the decease of the testator, James Priestley was at Melbourne, in Australia, whither he had gone in the year 1852.

On the 9th day of August, 1853, he sailed in a British ship named the Madagascar from Melbourne on the homeward voyage to England, and upon the voyage the Madagascar was totally lost, and all her crew and passengers perished at sea.

The plaintiff was his administratrix, and filed the bill in this suit to recover the said legacies of £19 19s. and £600 and £400.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD. I delayed giving my judgment in this case, in the hope of finding something to enable me to decide in favor of the plaintiff's claim to the additional legacy of £400. [His Honor stated the effect of the will and codicil and continued:] At the time of making this codicil, James Priestley was in Australia. It is proved that he embarked to return to England, but the ship in which he sailed foundered at sea, and all on board perished. The condition on which the legacy was given is personal to the legatee, and the legacy cannot take effect unless that inchoate return fulfils the terms of the condition. I was desirous to adopt that construction, if

³ Accord: *Union Pac. Ry. Co. v. Cook*, 98 Fed. 281, 39 C. C. A. 86 (where the grantee could no longer perform the condition because the land was washed away); *Cincinnati v. Babb*, 4 Ohio S. & C. P. Dec. 464 (where the grantee could no longer use the premises for a church because it was taken by condemnation).

possible; but I do not think that the words of the condition, which are very precise, "if he return to England before her decease," can be satisfied by his embarking on a voyage to this country, in which he perished at sea.

If the codicil had contained a recital, that, owing to the testator's displeasure with James Priestley on account of his departure to Australia, he attached this condition to the legacy as a penalty, possibly the inchoate return might have satisfied the condition; but it may be, that the reason for the condition was, that the testator thought, that, while away from England, James Priestley did not require so large a provision as he would if residing in this country. I must, therefore, decide against the plaintiff's claim as to the £400.⁴

In re MOORE.

(Chancery Division and Court of Appeal, 1887, 1888. 39 Ch. Div. 116.)

John Moore, who died on the 17th of April, 1885, by his will dated the 2d of April, 1885, after appointing one Trafford his trustee, and appointing a guardian of his infant son, John William Moore, proceeded as follows: "I give and bequeath to my trustee all property of which I am possessed or entitled to, or over which I have any disposing power, upon trust (after payment thereof of my debts, funeral and testamentary expenses) to pay to my sister Mary Maconochie during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband: and upon trust as to one moiety of my said trust estate to pay the same to my said son on his attaining the age of twenty-one years; and as to the other moiety thereof upon trust to pay the same to my said son on his attaining the age of twenty-five years," with a gift over on the death of his said son under the age of twenty-five years.

Mary Maconochie and her husband were married in 1866, and they had never lived apart until the latter part of 1886, more than a year after the death of the testator, when they ceased to live together. The testator was well aware, at the date of his will, that they were living together, but he had quarrelled with the husband and had not been for several years on speaking terms with him.

⁴ Accord: *Stockton v. Weber*, 98 Cal. 433, 33 Pac. 332 (where the condition precedent required the securing of legislation); *Brennan v. Brennan*, 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363 (where the condition precedent was that the devisee support the testator during her life, but the devisee had no knowledge of the condition); *Boyce v. Boyce* (1849) 16 Sim. 476 (where trustees were directed to convey such one of the testator's houses to M. as she should designate, and all the other of them to C., and where M. died in the lifetime of the testator, and so made no selection). See 1 Roper on Legacies (4th Ed.) 754-757.

The testator's son survived him and was still an infant.

This was an originating summons taken out by the trustee of the will against Mrs. Maconochie for the decision of the question whether she was entitled to payment of the legacy of £2 10s. per week, discharged from the restriction imposed by the testator.

Upon the summons coming on in chambers, his Lordship directed it to be adjourned into court for argument; that a guardian ad litem should be appointed to the testator's infant son, and that the infant should be separately represented.

The summons was heard before Mr. Justice Kay on the 7th of December, 1887.

1887, Dec. 14. KAY, J. (after reading the bequest and stating the facts, continued):

Before applying rules of law to a provision of this kind it is proper to determine, independently of any such rule, what is the construction of this bequest.

Independently of any rule of law or decided case, the construction of the words which I have read is indisputable. It is a gift of a fixed sum every week during a certain period. To that period there are two limits: it is not to extend in any case beyond the joint lives of the husband and wife and the time when the testator's son attains twenty-one; but the payments are only to be made during such part of that period as Mary Maconochie may be living apart from her husband, and for her maintenance while so living apart. As matter of construction it is impossible to hold that any of these payments are given to her while living with her husband. The living apart from her husband is of the essence of the gift in this sense—that it is the measure of the duration of these payments.

It has been argued that it must be treated as a legacy given upon a condition precedent, which, being against the policy of the law, must be rejected, leaving the legacy free from condition. If it be treated as a gift of an indefinite number of weekly payments of £2 10s., there being a condition attached to each that in the week for which it is payable the legatee should be living apart from her husband, if the condition be rejected, it must fail because the number of payments is undefined.

In other words, if it be a gift of so many sums of £2 10s. as there should be weeks in which the legatee was living apart from her husband, then, if you strike out the words "living apart, &c.," there are no means of computing how many such payments should be made.

The duration of these payments is a limitation, not a condition; and to give them any longer or other duration than that prescribed by the will cannot be done by treating them like a legacy of a sum of money given subject to a condition which may be discharged. To treat this gift in that manner would be making an entirely new and essentially different bequest.

It may be said, "You do, in effect, make a different bequest when you reject a precedent condition and establish the legacy discharged from it." That is so. It is doing great violence to the will. In cases of real estate the common law of England will not permit such a construction: and this rule, adopted from the civil law, ought not to be extended. By rejecting a precedent condition upon which a simple legacy of a sum of money is bequeathed, the amount of the legacy is not altered. But in this case the argument requires that an annuity given during one period should be altered into an annuity for another and wholly different period.

This is, for the present purpose, the essential difference between a condition and a limitation.

If the gift were during the joint lives of the husband and wife until the son attained twenty-one, with a condition defeating it if the husband and wife lived together, it might be necessary to reject the condition and maintain the gift; but I think it impossible to construe the will in that way.

Suppose it were a legacy of a sum computed by the number of illegal acts committed by the legatee, at £2 10s. for each—obviously such a legacy must fail if you reject the mode of computing it.

Then, suppose it to be £2 10s. for every week in which the legatee should commit an illegal act—if the limitation be rejected the computation would be equally impossible; and I am not aware of any rule of construction or rule of law which would justify the court in treating such a gift as a life annuity.

The argument in its most plausible form is that from the nature of the gift there are two limits contemplated, and if you take one away the other only is left, and therefore, in this case, the gift should be read as though it were of £2 10s. a week during the joint lives of the husband and wife, until the son attains twenty-one.

But what authority is there for thus removing an essential limit? There is none, unless it can come under the law as to conditions, or, what is in some cases equivalent, conditional limitations defeating an interest previously given. But before this law can be applied it must be determined, as matter of construction, whether the gift is of that nature.

In my opinion, the true construction of this bequest is that it is a limitation of weekly payments during a specified time, and that it is not a legacy subject to a condition either precedent or subsequent. The object of the limitation being obviously to induce the person in whose favor it is made to live apart from her husband, the whole limitation may possibly be void; but if the event has not happened, the trust has not arisen at all.

For this construction it seems to me that there is clear and distinct authority.

In *Webb v. Grace*, 2 Ph. 701, a covenant to pay to a single woman during her life, subject to the proviso after contained, an annuity of

£40, provided that if she married, the annuity should be reduced to £20, was held to be valid because it was in effect an agreement to pay £40 a year to her during so much of her life as she should remain unmarried, and £20 a year afterwards, and that this was a limitation, not a condition.

In *Heath v. Lewis*, 3 D. M. & G. 954, a gift by will to a woman who had never been married, if she should be unmarried at the death of M., of £2 10s. a month during her life if she should so long remain unmarried, was read "as a limitation as distinguished from a condition," and therefore the payments ceased on her marriage. This gift might have been construed to be a defeasible life annuity more easily than the provision in the will now before me, and of course the defeasance would have been void.

In *Evans v. Rosser*, 2 H. & M. 190, the testator gave real and personal estate to his son-in-law during the term of his life or marriage again, and after his death or marriage, over; and it was held that this was a limitation till marriage, and not a gift of a life estate defeasible on marriage.

The same construction was applied in the well-known case of *Rochford v. Hackman*, 9 Hare, 475, where a limitation in form determining a life estate upon alienation, was held to amount to a limitation until alienation and then over—a construction which has been followed in a multitude of cases since that decision.

But it is said that the court is bound by authority to hold that the legatee in this case is entitled to £2 10s. a week, whether she lives apart from her husband or not. The authorities cited demand a careful consideration. Undoubtedly our law, in dealing with bequests of personal property, has adopted some doctrines of the civil law which seem to me much less satisfactory than the rules of the common law which we apply in the case of devises of real estate. Swinburne (*On Wills*, part 4, s. 6, ed. 1611, p. 138; ed. 1590, p. 122) states four sorts of impossible conditions, of which the second are "those which be contrary to law or good manners," instancing a gift of £100 to A. B. if he murder such a man or deflower such a woman. Then he says (part 4, s. 6, ed. 1611, p. 140; ed. 1590, p. 124) that where a condition is impossible "such condition hindereth not the * * * legatary, but that he may * * * recover the legacy, as if such had not been at all expressed." And he further says (part 4, s. 6, ed. 1611, p. 142; ed. 1590, p. 127), "When the condition is both impossible and dishonest * * * the disposition is thereby void: and that in disfavor of the testator, who added such a condition, whereas if the condition had been only impossible or unlawful, the disposition had been good, and that in favor of the testament."

Jarman on *Wills* (4th ed. vol. ii, p. 12) states the law, adopted from the civil law, to be that where a condition precedent is originally impossible or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as

if the condition had been subsequent: but that, where it is illegal as involving *malum in se*, the civil agrees with the common law in holding both gift and condition void.

This law is recognized in *Williams on Executors* (6th ed., p. 1174; 8th ed., pp. 1269, 1270).

In *Tothill's Reports* (ed. 1671, p. 141; ed. 1820, p. 78) is the following short note of a case—*Tennant v. Braie* (Nov. 8, 6 Jac.): “A devise made to the daughter to pay her a sum of money if she will be divorced from her husband, the gift made good, though the condition void.”

The doctrine that conditions precedent as well as conditions subsequent which are against the policy of the law are treated as void in cases of legacies of personal estate, and that the legacy “stands pure and simple,” is distinctly recognized by Lord Hardwicke in *Reynish v. Martin*, 3 Atk. 330, 332; and the rules borrowed from the civil law were held by the late Master of the Rolls to apply to a mixed fund of the proceeds of real and personal estate: *Bellairs v. Bellairs*, Law Rep. 18 Eq. 510.

I assume, therefore, that if this is to be treated as a legacy given upon a precedent condition or defeasible by a subsequent condition which is bad as involving that which is *malum prohibitum*, the legacy must take effect, discharged of the condition.

In *Brown v. Peck*, 1 Eden, 140, the testator, noticing in his will that his niece Rebecca had married without the consent of her mother, directed that if she lived with her husband his executor should pay her £2 a month and no more; but if she lived from him and with her mother, then they should allow her £5 a month. Lord Keeper Henley held that she was entitled to the monthly payment of £5, “and that the condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure.” I have referred to the registrar’s book, and it seems clear that the condition was only impossible in the sense that everything which is prohibited by law is so in the contemplation of law. The husband, wife and mother seem to have been all three living. It is evident that the will was read as a gift of £5 a month to Rebecca for life upon condition that she did not live with her husband, or £5 a month for life cut down to £2 if she should live with him. Such a condition was against the policy of the law, and was therefore treated as a nullity. It appears from the Registrar’s Book that the point was not argued, the other parties desiring that the legatee should have the £5 a month.

In *Wren v. Bradley*, 2 De G. & Sm. 49, one bequest was to pay to the testator’s daughter, in case she should be living apart from her husband A., and should continue so to do during the lifetime of the testator’s wife, an annuity of £30; but, if she should cohabit with him, it should cease during such cohabitation. The husband and wife were living apart at the date of the will, but were living together at the death of the testator, and the Vice-Chancellor, evidently with consider-

able hesitation, held that she was entitled to the gift discharged from the condition. He came to the same conclusion with respect to a direction to pay the interest of one-third of the residue to his said daughter "during such time as she shall continue to live apart from her said husband," but if she cohabited with him the income was to be paid to other persons, and after her death the capital was given over. This latter gift is in the form of a limitation rather than a condition.

I must follow these decisions in any case governed by them: but the construction of one set of words is not binding when you are construing a different provision. Because the court in those cases held the words were conditional it does not follow that other words are to be so construed. The decisions are only binding when the bequest is ascertained to be conditional by independent construction. They do not lay down any rule what bequests are to be so considered; no canon of construction is established by either of the cases for this purpose.

I confess that I find it difficult to understand these two decisions. As to *Brown v. Peck*, 1 Eden, 140, the legatee must have been entitled to the gift of £2 a month. That was not affected by any illegality. If the reason given in the short report be good, she was entitled to the £5 a month as well as the £2. The only mode of arriving at the decision was by treating it as an annuity of £5 a month during the joint lives of the husband and wife, cut down to £2 a month if they lived together. I should have had great difficulty in so construing it. But such a bequest is altogether different from a gift of a weekly payment during a period only defined by the legatee living apart from her husband. In that respect the wording of the bequest in this case differs materially from that in *Brown v. Peck*.

Here the payments are to be made "during such time as she may live apart from her husband," and there is no alternative life annuity or gift for any longer period. In *Brown v. Peck* it was, if she lived with her husband £2 a month, but if she lived from him £5 a month, one or other of those payments being intended to last during the joint lives.

In *Wren v. Bradley*, 2 De G. & Sm. 49, however, the gifts more nearly resembled the bequest in the present case, especially the gift of interest of one-third of the residue, which was to be paid "during such time as she should continue to live apart." The gift of residue was obviously construed as a life-estate, with a conditional limitation divesting it, which could be rejected. With all respect, I think this construction doubtful. But, again, the words differ from those in the present case. It was more possible to construe the gift as a defeasible life interest than it would be to put that construction upon the words I have to consider.

In one sense the rule rejecting certain conditions, which is borrowed from the civil law, is a rule of construction. That is, when you find a legacy coupled with an invalid condition, the will is to be construed as if the condition was not there. But, obviously, it must first be de-

terminated whether there is a conditional legacy; and the construction for the purpose is independent of and must precede the application of the rule.

I hold that the legatee in this case is not entitled to any payment of £2 10s., because these payments are not legacies given upon a condition, but are to be made only within certain limits which the court has no power to alter.

Mrs. Maconochie appealed and the appeal was argued on the 7th and 8th of June, 1888.

June 9th. COTTON, L. J. The question we have to decide is whether the trustee of the will of Mr. John Moore ought to pay the sum of £2 10s. per week to Mrs. Maconochie, a sister of the testator. The testator by his will gave all his property to a trustee "upon trust (after payment thereof of my debts, funeral and testamentary expenses) to pay to my sister Mary Maconochie during such time as she may live apart from her husband before my son attains the age of twenty-one years the sum of £2 10s. per week for her maintenance while so living apart from her husband." When the will was made, Mrs. Maconochie was living with her husband, and continued to do so until after the testator's death. The testator did not like the husband, and his apparent object was to induce the wife to live separate from him. If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife. The appellant contends that the gift is to operate as a direction that £2 10s. per week shall be paid to her from the death of the testator, though she is living with her husband, thus entirely altering the amount of the gift made to her by the testator. She contends that the gift is a gift of personalty subject to an illegal condition precedent, and that according to the doctrine of the civil law, which has been adopted by our law as to personal legacies, the illegal condition may be rejected, leaving the gift absolute. The rule is thus stated by Mr. Jarman (*On Wills*, 4th ed. vol. ii. p. 12): "But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil law agrees with the common law in holding both gift and condition void."

According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute,

but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is *malum in se* and what is only *malum prohibitum*, but in the view I take of this case we need not consider within which of these two classes the restriction in the present case falls. Are the words relating to living separate a condition? In my opinion they are not a condition, but a part of the limitation, and although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them. Here if you give effect to the appellant's contention, you give her what the testator never intended to give her, an annuity during the whole of her life if the son is so long under age. It is wrong to give to an expression a forced construction in order to prevent a particular result that follows from the natural construction. The construction does not depend on the civil law, and the civil law is binding only so far as it has been adopted by our courts. I therefore do not enter into the question whether the civil law regards this as a condition or a limitation, for, if it regards it as a limitation and yet applies the same rules to it as to a condition, no authority has been cited to show that the civil law has to that extent been followed in England. Many authorities have been cited, but it has not been laid down in any of them that a gift in this form is to be treated as a gift upon condition. In *Tennant v. Braie* (Toth., ed. 1671, p. 141; ed. 1820, p. 78), upon the fair construction of the words, the gift was a gift upon condition, not a limited gift. A sum was to be paid once for all if a woman was divorced. There was nothing imposing a limit on the duration of the gift. In *Brown v. Peck*, 1 Eden, 140, the report is not clear either as regards the facts or the principle laid down. The testator, after noticing that his niece had married without the consent of her mother, directed that if she lived with her husband his executors should pay her £2 per month and no more, but if she lived from him and with her mother, then they should allow her £5 per month. Lord Henley treated this as a condition, for he says "the condition annexed being both impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure." What was meant by "impossible" it is hard to say, but that is not material. All that is of importance is that it was treated as a condition, and the words could reasonably be so construed. *Wren v. Bradley*, 2 De G. & Sm. 49, occasions more difficulty. There was first a gift of an annuity to the testator's daughter subject to conditions which were *contra bonos mores*. Then there was a gift of the income of one-third of an accumulated fund to the same daughter, "during such time as she shall continue to live apart from her said husband Abraham Wren," and then came a condition in the form of a subsequent condition, that if she should at any time cohabit with her husband, then during such time as she should cohabit with him the income should be paid to other persons. It was proved that at the date of the will she was living apart from her husband. The Vice-Chancellor appears to have been impressed

by that, and to have looked at the gift of the income as an immediate gift of it to the wife, subject to a proviso that if she returned to cohabitation the trust for payment to her should cease. I think this was the real ground of his decision, though he does not clearly state his reasons. I think his view must have been that, she being at the time separated from her husband, the gift was a simple gift to her with a subsequent condition defeating it if she returned to cohabitation. If that construction of the will be adopted as correct there is no difficulty about the decision, for as to the annuity the rule of the civil law clearly applied. None of the cases in my judgment warrant our applying it here, and in my opinion Mr. Justice Kay came to a correct conclusion. The gift here is not a gift of an annuity subject to a condition, but a limited gift, the commencement and duration of which are fixed in a way which the law does not allow.

BOWEN, L. J. I am of the same opinion. At the date of the will the testator's sister was living with her husband. The testator directs his trustees to pay to her during such time as she may live apart from her husband, before the testator's son attains twenty-one, £2 10s. per week for her maintenance whilst so living apart from her husband. There can be no question that the object of this gift was to promote separation, an object which is against the policy of the law, and Mr. Justice Kay has decided that the gift is bad.

The argument for the appellant was twofold. First, she contended that the condition was subsequent and might be rejected, leaving the gift absolute; secondly, that if it was a condition precedent, this being a gift out of pure personalty, the doctrine of the civil law applied and the gift was absolute, for which *Harvey v. Aston*, 1 Atk. 361, and *Reynish v. Martin*, 3 Atk. 330, were referred to, where Lord Hardwicke states the rule of the civil law and the extent to which our courts have adopted it. There is a great distinction in our law between conditions precedent and subsequent. Lord Hardwicke, in *Reynish v. Martin*, says (3 Atk. 332): "The civil law considering the condition, whether precedent or subsequent, as unlawful, and absolutely void, the legacy stands pure and simple. But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded Mary of her right to this legacy in the ecclesiastical court, no more would it have done so here: and to this purpose several cases were cited, which are taken notice of in the case of *Harvey v. Aston*, and which I shall not repeat, but refer to that case for them." Accepting that as law with respect to legacies of personal estate on a condition, the question remains whether this is a legacy

on a condition. If not, then, unless it can be shown that the rule of the civil law extends to limitations as well as to conditions, and that our law has adopted it to that extent, the rule cannot apply. Is there here a condition? In one sense the gift does contain a condition, but it contains something more than either a condition precedent or a condition subsequent, and must be held to create a limitation. If the subject of gift here had been real estate, this would have been a limitation, not a mere condition, just as a gift to a woman *dum sola vixerit* is a conditional limitation, not a mere condition. But why should that be held to be a mere condition in the case of personalty which is not so in the case of realty? Here the sister's living apart from her husband is the measure of the gift to her, and if that be taken away, the quantum of the gift is altered. This was the ground taken by Mr. Justice Kay. No authority has been cited to show that limitations are treated by the civil law in the same way as conditions, but if they were it would not follow that they should be so treated in our courts. This is a gift which begins when the sister begins to live apart from her husband, continues while she lives apart from him, and comes to an end when she ceases to live apart from him.

As regards the cases cited, *Tennant v. Braie, Toth.*, ed. 1820, p. 78, is a case of a gift upon condition, though it is so meagrely reported that I should hesitate before acting upon it. *Brown v. Peck*, 1 Eden, 140, appears to have been compromised after an expression of opinion by the court. *Wren v. Bradley*, 2 De G. & Sm. 49, is a peculiar case. There were two gifts, the first of which was clearly a gift on condition; the second gift is more difficult. I think that the Vice-Chancellor considered the context of the will to throw light on the second gift, and to lead to the conclusion that it was a gift to a woman who was at the time living separate from her husband, with a condition defeating it if she returned to cohabitation. The cases therefore do not support the view that the doctrine of the civil law is to be extended to limitations, and in my opinion the judge below came to a right conclusion. One regrets taking away a dead man's bounty from the object of it under the very circumstances in which he intended her to have it, but we must not depart from the law.

FRY, L. J. I am of the same opinion.

CARTER'S HEIRS v. CARTER'S ADM'RS.

(Supreme Court of Alabama, 1865. 39 Ala. 579.)⁵

Appeal from the Probate Court of Clarke.

On the 30th July, 1863, a petition was filed in said court by Benjamin W. Carter, on behalf of himself and several other persons, as heirs at law and next of kin of Claiborne Carter, deceased, alleging that certain provisions of the latter's will were void, and praying that on the final settlement, all the property of the estate might be divided among them.

The provisions of the will of Claiborne Carter which were alleged to contain the invalid gift were as follows :

"After paying all my debts and funeral expenses, I give, bequeath, and devise, unto Francis B. James, Maria C. James, and Robert D. James, Jr., children of Robert D. James, all my estate, real and personal ; to have and to hold the same, after my death, forever ; on this condition nevertheless, that the said Robert D. James do, immediately after my death, manumit and set free seven certain negro children owned by him, and now in his possession in Clarke county, to-wit : John, Wesley, and Albert, yellow boys, and also Milly, Mary, and Alabama (all brothers and sisters, and children of Ellen, now dead,) and Ellen, a child of said Milly, and also all the children that any of the said negroes may hereafter have. And if said Robert D. James shall fail to give the said negroes their freedom, as far as the laws of the State will permit, or so that they may enjoy their liberty, and the profits and results of their own work and labor ; or should said slaves be kept at work, against their own will, after my death ; or should they ever be sold, carried away, or in any way disposed of, either by said James, his children, heirs, creditors, or any one claiming under or through him, so that they are deprived of liberty of working for themselves, and of disposing as they please of their own time, under the laws of the State ; or should they hereafter ever be taken for the debts of any of the children of said James, or their heirs, and put into a state of slavery, —then this devise and bequest to be, and in that event is hereby declared to be, utterly void, and all my estate is to revert to my next of kin and legal heirs. The true intent of this will is, to give all my property for the liberty and freedom of the said negroes, so that they may enjoy the same as far as the law of the land will allow, and good conscience, honesty and right will protect. And I do make and constitute the said donees, Frank, Maria, and Robert, agents and guardians of said negroes, to see to and protect them in their liberty and rights ; and if either the said Frank, Maria, or Robert die, this power is to go to the survivor thereof. If either of the donees, Frank, Robert or Maria,

⁵ Statement of the case is abridged. Only so much of the opinion is given as relates to the validity of the will.

die before me, then the survivors thereof who may be living at my death shall take under this will."

The administrators filed an answer to the petition, denying among other things the invalidity of the provisions of the will, and setting up the division and distribution of the property under the order of the Probate Court. The court dismissed the petition of the distributees and heirs at law; to which they reserved a bill of exceptions, and which they now assign as error.

STONE, J. The rule in regard to void conditions is too well settled to require elaboration. If the void condition be precedent, it defeats the whole instrument or conveyance. If it be subsequent, the conveyance stands, and the condition alone is defeated. See 2 Story's Equity, § 1306; *Weathersby v. Weathersby*, 13 Smedes & M. (Miss.) 685; 1 Jarman on Wills, 806 et seq.

The clause of Claiborne Carter's will, which raises the issue in this cause, presents the case of a conditional testamentary disposition. Some of the conditions we regard as precedent, and some as subsequent; that is, the will requires certain things to be done before its dispositions take effect, and provides that certain other things, done or suffered after the will by its terms takes effect, shall divest the title out of the beneficiaries therein named. To prove the correctness of this view, let us suppose, that after Claiborne Carter made his will, no responsive or corresponding provision had been made by Robert D. James, or those claiming under him; that he and they had remained entirely silent as to any and all disposition of the seven negro children, John, Wesley, &c. All will admit that, in such case, the children of Robert D. James never would have taken under the will of Claiborne Carter. The primary condition was to precede the vesting of the devise and bequest; and it was to take effect immediately after the death of Claiborne Carter. The language of the will is: "I give, bequeath, and devise, unto Francis B. James," &c., "all my estate, real and personal; to have and to hold the same, after my death, forever; on this condition nevertheless, that the said Robert D. James do, immediately after my death, manumit and set free seven certain negro children," &c. These words have all the properties of a condition precedent.

There is some obscurity in the language of Claiborne Carter's will, caused by the words, "as far as the laws of the State will permit," and "as far as the laws of the land will allow." We have carefully considered the clause under discussion, and come to the conclusion, that these words were inserted to meet the obstacles which the law interposed to the absolute emancipation of the seven negro children. There are other conditions, which we think these words do not qualify or limit. Of this class we consider the following: "So that they" [the negroes] "may enjoy their liberty, and the profits and results of their own work and labor." We think the testator clearly intended that the privilege

here provided for—namely, that of enjoying their own liberty, and the profits of their labor—was to be the least condition on which the children of Robert D. James were to take under his (Carter's) will.

The argument, then, leads to this: The devise and bequest were to take effect only on the alternate conditions precedent—namely, that the seven negro children were to be emancipated; or, failing in that, they were to enjoy their liberty and the profits of their labor. Each of these conditions is violative of the positive law of the land. At the time this will took effect by the death of the testator, both the constitution and statute of the State inhibited the emancipation of slaves. See Acts 1859-60, p. 28; Constitution of Alabama, art. 6, title Slavery, § 1. And our statute and the policy of the law also forbade that slaves should enjoy their liberty and the profits of their labor. It is the policy of our law that slaves shall remain under the direction and control of their owner, and not go at large. They cannot enjoy their liberty and the profits of their labor, without violating section 1005 of the Code, except in the mode for which that section provides; and there is no pretense that the clause of this will contemplates the license which that section tolerates.

It results from what we have said, that the dispositions of Claiborne Carter's will, in favor of the children of Robert D. James, are inoperative, because they depend on a condition precedent which is illegal and void.

Having construed Claiborne Carter's will, we feel bound to declare, that the probate court rightly dismissed the petition in this case. The property had been divided under the will, on the basis that its dispositions are valid. The property, under that division, has passed into other hands, and is beyond the reach or control of the administrators, and of any process the probate court can issue. The administrators, being the actors, and parties to the division, cannot re-possess themselves of the property. *Pistole v. Street*, 5 Port. 64; *Wier v. Davis*, 4 Ala. 442; *Dearman v. Dearman*, 4 Ala. 521; *Fambro v. Gantt*, 12 Ala. 298; *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382; 1 *Story's Equity*, §§ 90-92. The remedy of the heirs-at-law and next of kin of Claiborne Carter is in chancery. *Hunley v. Hunley*, 15 Ala. 91.

The decree of the probate court is affirmed.⁶

⁶ See, also, *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526 (1898)—real estate involved.

In re HAIGHT.

(Supreme Court of New York, Appellate Division, Second Department, 1900.
51 App. Div. 310, 64 N. Y. Supp. 1029.)

Appeal by Benjamin Haight, a legatee under the last will and testament of Augustus Holly Haight, deceased, from an order of the Surrogate's Court of the county of Orange, entered in said Surrogate's Court on the 23d day of January, 1899, denying his motion to amend a decree of said Surrogate's Court, entered in said court on the 10th day of November, 1880, and to require Edward Haight, as trustee, etc., of Augustus Holly Haight, deceased, to pay over to him all the income of the residuary estate held in trust for said Benjamin Haight, and also from a decree bearing date the 26th day of June, 1899, and entered in said Surrogate's Court, overruling his objections to the intermediate accounting of Edward Haight, as trustee, and settling the accounts of said trustee.

HIRSCHBERG, J. Augustus Holly Haight died on the 10th day of April, 1879, leaving a will and codicil which were admitted to probate in Orange county on the eighth day of May following. He named Louis Haight, Edward Haight and James G. Roe executors and trustees, and letters testamentary were duly issued to them. They thereafter filed an account in the Surrogate's Court, and a decree was rendered on such accounting on the 10th day of November, 1880. Louis Haight died in 1894 and James G. Roe in 1896, and Edward Haight has since acted as sole trustee. He has presented an intermediate account of his proceedings, and the same has been settled by the surrogate of Orange county in a decree dated January 23, 1899. The testator left no widow and but one child, Benjamin Haight, and these appeals are taken by Benjamin from the last decree, and from an order denying his motion to amend and modify the first decree in so far as it limited his right to the income of the estate to the sum of \$2,000 per annum, and to require the payment to him of all of said income.

Among other bequests the testator gives to his executors the sum of \$8,000 in trust for his sister, Sarah J. Smith, during life, and the sum of \$8,000 in trust for Maria Crassous during life, the principal in each instance to revert to the residue of the estate on the death of the beneficiary. The will contains this provision for the testator's son: "All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my executors, hereinafter named, in trust however, and to and for the following uses and purposes, namely: to invest the same and to keep the same invested, and to pay the income therefrom to my son, Benjamin Haight, for and during the term of his natural life; but it is my will that so long as the present wife of my said son shall be living and he shall be law-

fully bound to her as a husband, the income to be paid to my said son shall not exceed the sum of two thousand dollars in any one year; and that in case of the death of said wife, or in case of his ceasing to be bound to her as a lawful husband, then the whole of said income is to be paid over to my said son during his natural life."

No disposition is made by the will of the annual income which shall be in excess of \$2,000 during the life of Benjamin Haight's wife and the continuance of their marriage relations; but on the death of the son leaving a child or children surviving, the executors are directed to apply the income to the maintenance, support and education of such child or children during minority, and to pay over the principal equally to each child on the attainment of its majority; and should the son die without leaving a child surviving and attaining the age of twenty-one years, then the estate is to be paid in equal shares to the children of the testator's brother and sister.

Benjamin Haight married on the 21st day of August, 1877, and the will was made two days afterward. At the time of the first settlement and for several years afterward the income of the residue did not amount to \$2,000 a year; but during a few years past it has been slightly in excess of that sum, and the excess is expected to increase in consequence of the termination of the trusts for the benefit of the testator's sister and of Maria Crassous. The former died July 2, 1891, and the latter January 16, 1899, having each received the income of the respective trusts in full, without any deduction for commissions. By the decree of November 10, 1880, the executors and trustees were directed to pay the income arising from the residue of the estate, less commissions, to Benjamin Haight to the amount of \$2,000 per year, in the words of the decree "as long as the present wife of the said Benjamin Haight shall live, or as long as the said Benjamin Haight shall be lawfully bound to her as a husband; and in case of the death of the said wife, or in case said Benjamin Haight shall cease to be bound to her as a husband, then said executors are hereby ordered and directed to pay over to said Benjamin Haight the whole of the interest and income arising from said rest and residue for and during the term of his natural life." Benjamin Haight was a party to the proceedings on the first accounting, was then of full age, and no appeal was ever taken from the decree.

The appellant insists that the provision of his father's will which makes his enjoyment of the whole of the income dependent on the termination of his marriage relations is void as in contravention of good morals and public policy, and that he may now raise the question notwithstanding the decree of November 10, 1880. I have concluded that he is correct on both points.⁷

⁷ The part of the opinion which deals with the second point is omitted.

As to the first point, the condition must be held void if its manifest object was to induce Benjamin Haight to take such steps as might be necessary in order that he should cease to be lawfully bound to his wife as a husband; in other words, to obtain, or provoke and so occasion, a legal divorce or separation, either in this State or in some other jurisdiction. If any other and innocent construction can be placed upon the condition, it is of course to be adopted. But the will was made directly after the marriage of testator's son, and the condition must be regarded as made in hostility to that union, and in the hope of destroying it in so far as that object could be accomplished by offering money by way of a premium or reward. It is true that the condition is not in so many words that the son shall procure or suffer a divorce in order to entitle him to the entire income, but the precise effect of such an express condition is produced by a provision which gives him the entire income when such a divorce is procured or suffered. If the former offends public morals and contravenes public policy, it is difficult to see why the latter does not also. "It is a general principle, well settled," said Mr. Justice Ingraham in *Wright v. Mayer* (47 App. Div. 604, 606, 62 N. Y. Supp. 610), "that conditions annexed to a gift, the tendency of which is to induce the husband and wife to live separate, or to be divorced, are, upon grounds of public policy and public morals, void." In *Wilkinson v. Wilkinson* (L. R. [12 Eq.] 604) the testatrix gave the residue of her property to her niece, with a direction that all interest should pass under the will as upon the death of the niece, should she not cease to reside in Skipton within eighteen months of testatrix's death. The husband of the niece resided at Skipton, and the court considered the provision to be a manifest attempt to induce the legatee to leave her husband, the vice-chancellor saying (p. 608): "The condition is a vicious one, and that being so, I have no difficulty in declaring that it is void." In *Brown v. Peck* (1 Eden Ch. 140) the testator provided that if his niece lived with her husband she should receive two pounds per month from the estate, but if she lived from him and with her mother the executors should allow her five pounds per month. The legacy at five pounds per month was held to be good, divested of the condition, the latter being void as *contra bonos mores*. In *Tenant v. Braie* (Toth. 76) the same disposition was made of a bequest to a daughter, conditioned "if she will be divorced from her husband." In *Conrad v. Long* (33 Mich. 78) a condition annexed to a devise was held void which was to take effect when the devisee "should conclude not to live with her present husband." In *Whiton v. Harmon* (54 Hun, 552, 8 N. Y. Supp. 119) a like provision was held to be void, the devise being to a son "for and during the term of his natural life, or while he shall live separately from his present wife." (See, also, *Potter v. McAlpine*, 3 Dem. Sur. 108, cited in *Whiton v. Harmon*, *supra*, 555.) In *O'Brien v. Barkley* (78 Hun, 609; s. c.,

fully reported in 28 N. Y. Supp. 1049) the authorities on the subject are collated in a very elaborate and able opinion by Mr. Justice Kellogg. In that case a trust created for testator's daughter for life "provided, however, and on the express condition that she do not, at any time after my decease, associate, cohabit or live" with her husband, was declared to be wholly void, as having no other object than to effectuate testator's design to separate the husband and wife, and the daughter, therefore, took the life estate discharged of the void condition.

In the light of these decisions and the many cases of similar import cited in the opinions, and in view of the mischief apprehended, I can but conclude that there is no difference in spirit and principle between a gift made expressly dependent upon the procurement of a divorce, and one which is made payable only in the event of a divorce. The one invites the divorce directly and in terms, while the other incites it by the offer of a premium. The end desired by the donor is the same, viz., to induce the separation or divorce, and the means employed must be regarded as objectionable whatever form or language may be employed, so long as it is apparent that the sole object of the donor is to encourage that result, and the means employed are calculated to promote it.

I have found no cases to the contrary of the principle stated, but in *Born v. Horstmann* (80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577) and in *Thayer v. Spear* (58 Vt. 327, 2 Atl. 161) provisions similar to the one under consideration were held valid, where made for the benefit of a wife to meet the deprivation of support incident to widowhood or to the legal termination of her marital relations. In each case increased financial provision was made by will for a daughter in the event of her becoming a widow or otherwise becoming lawfully separated from her husband. The courts found the intention to be in each case only to provide for the daughter in case she were deprived of her husband's support and made dependent upon her own resources, whether by his death or as the result of a lawful divorce or separation. The manifest object of the provision was not to induce or invite a divorce or separation, but to provide for the widow or the divorced wife, as the case might be, in the event of the happening of either calamity. In the California case the court said (p. 459): "Not only may there be a good and sufficient reason * * * for providing that the legatee shall not have the bulk of the property until she is deprived of the support of a husband, but there may be the best of reasons for placing the same in such condition that she cannot be improperly induced by a worthless or profligate husband to squander it, while she continues to be his wife, and, it may be, under his influence and control. We think such a condition in a will is not only valid, but that, under certain circumstances, it may be just and commendable." In the Vermont case the court said (p. 329): "The first object is to ascertain, if possible, what the intention of the

testatrix was; and we find no difficulty in reaching the conclusion that it was to have her estate disposed of just as it has been by the Probate Court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income, only, was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate." Neither the reasoning nor the legal attitude of the parties concerned toward each other renders these cases controlling or influential in this instance. The increased provision is made in the case at bar to take effect at a time when the pecuniary obligations of the beneficiary are lessened, and the duty of support which the husband owes the wife has no reciprocal existence. The cases cited are analogous to *Cooper v. Remsen* (3 Johns. Ch. 382), where a legacy was upheld which was designed to provide for the testator's daughter during the continuance of a separation from her husband actually existing at the time of the execution of the will.

If the condition is void, it follows that Benjamin Haight is entitled to the entire income. This is so whether the condition be regarded as precedent or subsequent. The whole estate appears to be invested in personal securities. A subsequent void condition could not, of course, destroy an estate already vested. Assuming, however, that the condition is precedent in its character, and would, therefore, work a forfeiture of the gift in excess of \$2,000 annually, at the common law, yet in equity and under the civil law, though the condition is void the gift is good. "With respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible * * * or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent." (2 Jarm. Wills [6th Am. Ed.] 15. See, also, 2 Williams, Exrs. [7th Am. Ed.] 1264.) "When, however, the illegality of the condition does not concern any thing *malum in se*, but is merely against a rule or the policy of law, the condition only is void, and the bequest single and good." (1 Roper, Leg. 757.)⁸

⁸ See also *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391 (1890)—real estate involved.

With regard to conditions in restraint of marriage, and conditions not to dispute a will, see elaborate notes in 6 Gray's Cases on Property (1st Ed.) pp. 23-25; *Id.* (2d Ed.) pp. 31-33.

INDEX

[THE FIGURES REFER TO PAGES]

- ACCELERATION, 298.
- ACCUMULATIONS,
 - Rule against perpetuities applied to, 596.
- CHARITIES,
 - Rule against perpetuities applied to, 578.
- CHATELS, REAL,
 - Future interests in, 145.
- CLASSES,
 - Determination of, 257.
 - Validity of limitations to, 96.
- CONDITIONAL ESTATES,
 - Application of rule against perpetuities to, 475.
 - Forfeiture of estate of inheritance on failure to alienate, 607.
 - Forfeiture of estate of inheritance on alienation, 597.
 - Illegal and impossible conditions, 703.
 - Illegal conditions, 497.
 - Mode of perfecting a forfeiture of, 10.
 - Relief against forfeiture of,
 - By license, 12.
 - By waiver, 15.
 - In equity, 24.
 - Validity and construction, 1.
 - Who may take advantage of the breach of condition, 5.
- CONDITIONAL LIMITATIONS, 37.
- CONDITIONS,
 - Continuing breach, 23.
 - Implied in case of leaseholds that tenant shall not repudiate tenancy, 2.
 - Implied in law, 2.
 - Limitation upon suit for breach of, 24.
 - Precedent to the taking effect of executory devises and bequests, 279.
 - Relief in equity for breach of, 24.
 - Tending to produce separation of husband and wife, 706.
- CONSTRUCTION,
 - Acceleration, 298.
 - Divesting contingencies and conditions precedent to the taking effect of executory devises and bequests, 279.
 - Effect of failure of preceding interests for remoteness, 297.
 - Gifts implied in default of appointment, 344.
 - Implication of cross-limitations, 256.
 - Limitations to classes, 257.
 - Meaning of "heirs" in a limitation to testator's "heirs" or the "heirs" of a living person, 190.
 - Principles of, 184.
 - Remainders whether vested or contingent, 66.
 - "Survivor" construed "other," 197.
 - Vesting of legacies, 204.

[The figures refer to pages]

- CONSTRUCTION—Continued,
 What words exercise a power, 379.
 Words of limitation distinguished from words of condition, 10.
- CONTINGENT REMAINDERS,
 Alienability of, 81.
 By execution sale, 88.
 Application of rule against perpetuities to, 485.
 Distinction between, and vested, 66.
 Conveyance of, set aside in equity, 88.
 Descent of, 82.
 Destructibility of, 41.
 Extinguishment of, by release, 87.
 Forfeiture on alienation of, 606.
 Partition of, 95.
 Validity of, 41.
- CROSS-LIMITATIONS,
 Implication of, 256.
- DESCENT,
 Of contingent remainders, 86.
- DESTRUCTIBILITY, RULE OF,
 Applied to contingent remainders, see Contingent Remainders.
 Whether applicable to interests after a freehold which may take effect as
 a remainder or as a shifting future interest, 55, 536.
- DEVICE,
 Of right of entry for condition broken, 10.
- EQUITY,
 Relief against forfeiture, 24.
 Setting aside conveyance of future interest in, 88.
- ESCHEAT, 26.
- ESTATES,
 On condition, see Conditional Estates.
 Of inheritance,
 Forfeiture on alienation of, 597.
 Forfeiture on failure to alienate, 607.
 Indestructible trusts of, 695.
 Restraints on alienation of, 648.
 Spendthrift trusts of, 657.
 Fee simple,
 Power to dispose of by life tenant, 401.
 Fee tail,
 Interests subject to, and the rule against perpetuities, 562.
 For life,
 Forfeiture on alienation of, 636.
 Power of life tenant to dispose of fee, 401.
 Restraint on alienation of, 662.
 For years,
 Forfeiture on alienation of, 636.
 Future interests in, 145.
 Implied condition that tenant will not repudiate tenancy, 2.
 Restraint on alienation of, 662.
- EXECUTION SALE,
 Inalienability of contingent remainder by, 88.
- EXECUTORY DEVISE, 38, 58, 97, 107, 145.
 Construction of divesting contingencies and conditions precedent to the
 taking effect of, 279.
 Effect on, of failure of preceding interest, 292.

[The figures refer to pages]

- EXECUTORY DEVISE**—Continued,
 Effect of failure of, on preceding interest, 279.
 Extinguishment of, by release, 87.
 Gift over on intestacy and failure to alienate, 607.
- EXECUTORY INTERESTS**, 30.
 Not vested or contingent, but certain to take effect, 204.
- FEE SIMPLE**, see Estates.
- FORFEITURE**,
 Mode of perfecting, where estate conditional, 10.
 Of estates of inheritance on failure to alienate, 607.
 Of estates of inheritance on alienation, 597.
 On alienation of estates for life or years, 636.
 Relief from, by license, waiver, and in equity, 12, 24.
- FREEHOLD INTERESTS SUBJECT TO A TERM**,
 Distinction between and reversions and remainders, 104.
 Validity of, 103.
- FUTURE INTERESTS**, see Table of Contents.
 Conveyance of, when set aside in equity, 88.
 Extinguishment of, by release, 87.
- GIFTS OVER**,
 Upon the death of a previous taker, 235.
 On failure of issue, 245.
 On intestacy or failure to alienate, 607.
- HEIRS**,
 Meaning of, in limitation to testator's "heirs" or "heirs" of a living person, 190.
- ILLEGAL CONDITIONS AND RESTRAINTS**,
 Forfeiture of estates of inheritance,
 On alienation, 597.
 On failure to alienate, 607.
 Forfeiture on alienation of estates for life or for years, 636.
 Illegal and impossible conditions, 703.
 Indestructible trusts of absolute and indefeasible equitable interests, 695.
 Rule making void, distinguished from rule against perpetuities, 497.
 Restraint on alienation of estates of inheritance, 648.
 Restraint on alienation of estates for life and years, 662.
- IMPLICATIONS**,
 Gifts by, 256, 344.
- ISSUE**,
 Gift on failure of, 245.
- LAPSE**,
 Of powers, 356.
- LEGACIES**,
 Vesting of, 204.
- LIFE ESTATE**, see Estates.
- LIMITATIONS TO CLASSES**,
 Determination of the class, 257.
 Rule against perpetuities applied to, 519.
 Validity of, 96.
- MARRIED WOMEN**,
 Clauses against anticipation and the rule against perpetuities, 497.
 Restraints on alienation of separate estate of, 650.
 Spendthrift trusts for, 690.

[The figures refer to pages]

- MODIFYING CLAUSES,**
Effect of, in applying the rule against perpetuities, 557.
- PARTITION,**
Of contingent remainders, 95.
- PERSONAL PROPERTY,**
Future interests in, 145.
- POSSIBILITIES OF REVERTER, 26.**
- POSSIBILITY ON A POSSIBILITY, RULE AGAINST, 456.**
- POWERS,**
Appointed property as assets, 357.
Appointments in fraud of power, 315.
Contracts to appoint, 315.
Defective execution of, 365.
Gift in default of appointment, 344.
Illusory appointments, 332.
In trust, 344.
In life tenants to dispose of the fee, 401.
Lapse of, 356.
Nonexclusive, 332.
Operation, classification, release and discharge of, 301.
Operation of, 357.
Rule against perpetuities applied to, 563.
Survival of, 333.
What words exercise, 379.
- RELEASE,**
Extinguishment of future interests in, 87.
Of powers, 301.
- REMAINDERS, see Freehold Interests Subject to a Term.**
Conveyance of, set aside in equity, 88.
Contingent, see Contingent Remainders.
Extinguishment of, by release, 87.
Forfeiture on alienation of, 606.
Implication of cross, 256.
Miscellaneous legal consequences which depend upon the character of the remainder, 95.
Vested, definition of, 32.
- RESTRAINTS ON ALIENATION, see Illegal Conditions and Restraints.**
Rule making void, distinguished from rule against perpetuities, 497.
- REVERSIONS, 30.**
Conveyance of, set aside in equity, 88.
- REVERTER,**
Possibilities of, 26.
- RIGHTS OF ENTRY FOR CONDITION BROKEN, see Conditional Estates.**
How far assignable, 7.
How far devisable, 10.
- RULE AGAINST PERPETUITIES. 95.**
Accumulations, 596.
Applied to interests after estates tail, 562.
Charities, 578.
Corollaries to, 408.
Distinguished from rule which makes void, restraints on alienation and provisions requiring a trusteeship (otherwise valid) to be effective at too remote a time, 497.
Independent gifts, 533.
Interests subject to the rule, 461.

[The figures refer to pages]

RULE AGAINST PERPETUITIES—Continued,

- Limitations to classes, 519.
- Modifying clauses, 557.
- Powers, 563.
- Separable limitations, 533.

SHELLEY'S CASE,

- Rule in, 110.

SHIFTING FUTURE INTERESTS, 32.

- Gift over on intestacy and failure to alienate, 607.

SPECIFIC PERFORMANCE IN EQUITY,

- Right to, how far subject to rule against perpetuities, 461, 490.

SPENDTHRIFT TRUSTS,

- Of estates for life, 678.
- Of estates of inheritance, 657.

SPRINGING FUTURE INTERESTS, 32.

“SURVIVOR” CONSTRUED “OTHER,” 197.

TRUSTS,

- Indestructible,
 - Of absolute and indefeasible equitable interests, 695.
 - Rule making void, distinguished from rule against perpetuities, 497.
- Spendthrift, 657, 678.

VESTING, see Legacies; Remainders.

WILD'S CASE, RULE IN, 96.

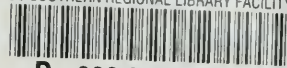
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