



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



DL APW LVw
Tracts on I. The definition an
Stanford Law Library



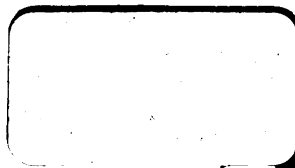
3 6105 044 266 265



*Stanford
Law Library*

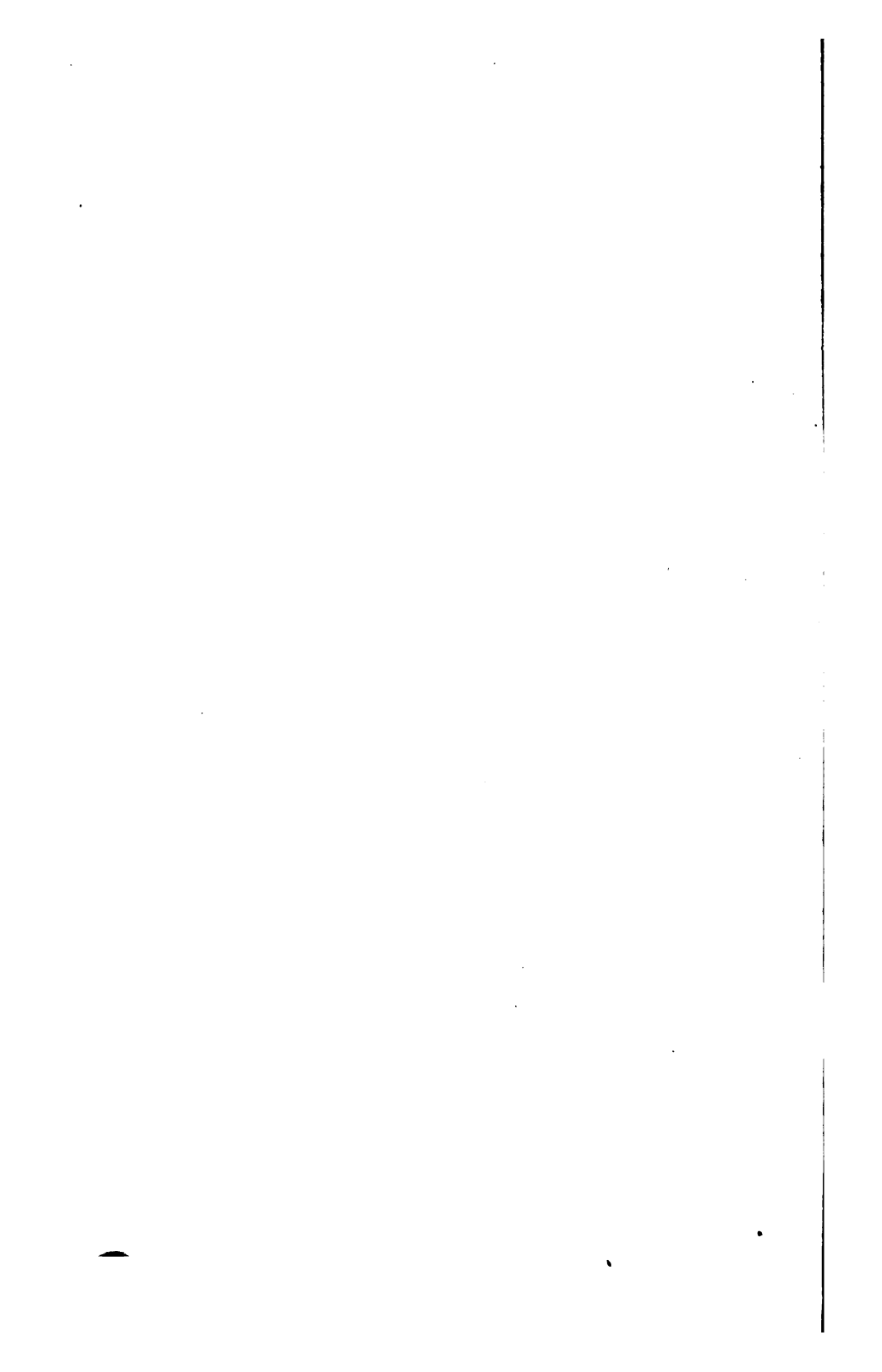


Given by
Title Insurance
and
Trust Company
Foundation



Copyright
1957

DL
APW
LV_w



MS - to
Edw - W. Scott
Feb 7 - 1815

Tractions

O N

- I. THE DEFINITION AND NATURE OF CROSS REMAINDERS.
- II. FINES AND RECOVERIES BY TENANT IN TAIL.
- III. DIFFERENCE BETWEEN MERGER, REMITTER AND EXTINGUISHMENT.
- IV. ESTATES EXECUTED, EXECUTORY, VESTED AND CONTINGENT.
- V. CONTINGENCIES WITH A DOUBLE ASPECT.
- VI. THE SUCCESSION BY A PARENT TO A CHILD.
- VII. THE LANGUAGE OF POWERS.

By RICHARD PRESTON, Esq.
OF THE INNER TEMPLE

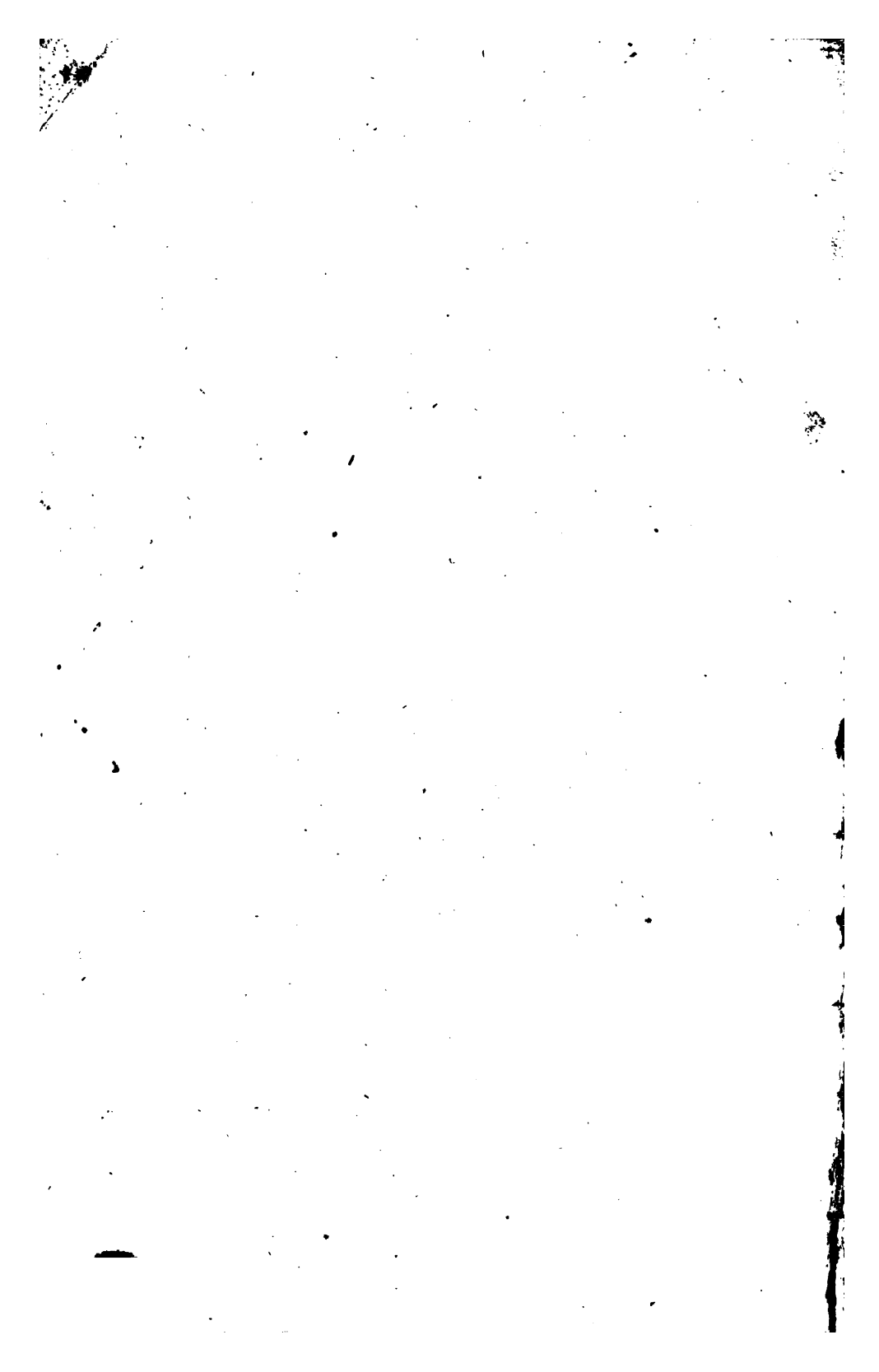
AUTHOR of the ELEMENTARY TREATISE ON ESTATES, and SUCCINCT
VIEW of the RULE IN SHELLEY'S CASE.

Hæc olim meminisse juvabit.

L O N D O N :

PRINTED FOR R. PHENEY, INNER TEMPLE LANE, FLEET STREET,

1797.



TO CHARLES BUTLER, Esq.

OF LINCOLN'S-INN.

AMONG those who are avowed admirers of your professional labors, few, if any, hold them in higher estimation, or are more sensible of their merit, than myself. At an early period, these labors formed the basis of my studies. From the valuable annotations of yourself and Mr. *Hargrave*, on the text of *Littleton*, and the Commentaries of Lord *Coke*, and particularly your practical observations introduced into these notes, I have derived more real assistance than from any other work. This consideration alone would have made me anxious to inscribe these observations to you, in token of my gratitude and esteem. But the obligations I owe you, in common with the Profession, are very inconsiderable indeed, when compared with those you have conferred on me individually.

DEDICATION.

With infinite pleasure I acknowledge that you have a claim to my warmest gratitude, and that there is no one to whose liberality, patronage, and friendship, I am equally indebted.

The best, and only return I can make for these marks of distinction, the return however most congenial to your feelings, will, I am persuaded, be continued exertions for the purpose of contributing, as far as it is in my power, to promote the extent of legal knowledge, and facilitate the means of acquiring it.

With this impression, and actuated by your example, in private life, and by your professional conduct, I entertain some hope that I shall never experience either a deprivation or diminution of your esteem.

And with the utmost regard and respect,

I am,

Dear Sir,

Your most obliged

and obedient Servant,

RICHARD PRESTON.

*Inner Temple,
March 4, 1797.*

TO THE READER.

THE following Tracts form part of a much larger collection. They were written by the Author, partly to impress the subjects on his mind, and partly to assist those whose studies have been confided to his care. From the experience of their utility, they are offered to the profession at large, with some confidence that they have sufficient novelty to be interesting.

Titles frequently depend on CROSS REMAINDERS, and the ownership arising from them. On their nature, very little is to be found in the best written treatises. They therefore appeared deserving of particular attention. To the definition and account of the nature of these Remainers,

TO THE READER.

MENT. In extending his researches into the doctrine of Merger, he found these terms frequently confounded. For this reason he judged it right to invite attention to the proper application of the several terms. At an early period, he hopes to present the reader with a detailed view of the learning on MERGER; a learning which, from its difficulty, and its importance in practice, is intitled to a much larger portion of attention than it has received. Its intimate connexion with the learning on tenures in general, renders it at the same time more useful and instructive than the Author had imagined when he entered on the subject.

The abstruse learning of VESTED, CONTINGENT, EXECUTED, and EXECUTORY ESTATES, is considered in the fourth Tract. Estates have generally been divided into estates vested and contingent. This division is sanctioned by the authority
of

TO THE READER.

of Mr. FEARNE. The object of this Tract is to promote an inquiry into the accuracy of the division. The Author contends that some limitations give estates neither vested or contingent, and of course that all estates are inaccurately classed under the description of vested and contingent.

An attempt is made to shew that estates require the further distribution into estates executed and executory. This inquiry however is instituted without the least disrespect to the name of Mr. FEARNE. No one holds it in higher estimation, and had he been living his conclusions would have been examined with equal freedom.

Similar observations were offered by the Author, in Mr. FEARNE's life-time, on his description of the several sorts of Contingent Remainders; and the Author has the satisfaction to see that in the 4th edition

of

7

TO THE READER.

of Mr. FEARNE'S valuable labors, such alterations have been made, as ascribe the determination of the case of *Arton* and *Hare*, to the true ground of the decision.

In this Tract the Author was, at one time, inclined to have introduced copious observations on the nature, definition, and several sorts of executory devises, and also on the general learning and particular cases relating to this abstruse subject, together with the history of perpetuities. To complete a treatise on this learning, there is still scope for considerable exertions. The subject is by no means exhausted.

CONTINGENCIES WITH A DOUBLE ASPECT are intimately connected with the learning on contingent estates. The nature of these contingencies is considered in the fifth Tract.

In the sixth Tract a passage in BLACKSTONE'S COMMENTARIES on the right of a parent to inherit to his child, is examined.

The

TO THE READER.

The observations on the language of powers, as noticed by Mr. BUTLER, are introduced in the seventh and last Tract.

This Tract was written by the Author for the use of students, that they might see the reason, and be convinced of the propriety of applying Mr. BUTLER's observations to practice.

No part of a work is more generally useful than a good index. It facilitates and also encourages research. It renders books particularly valuable to gentlemen in actual practice. Of all other indexes, those which express the proposition, and form a sort of analytical digest, seem intitled to preference. An index of that sort is added. In many instances it expresses the proposition more fully than the text, and, as far as it goes, forms the general out-line of the manner of entering notes under common-place titles.

The

TO THE READER.

The Author cannot say he is indifferent to the manner in which these Tracts shall be received by the Profession. He has too high a respect for their opinion to deem it of no value; and is too sensible of the gratification he has derived from their former approbation, to estimate it lightly. Their reception of this Number will determine him either to abandon, or pursue this mode of communication.

Of Cross Remainders.

CROSS REMAINDERS are the subject of this note. A Remainder is an estate limited to commence after the determination of a particular estate previously limited by the same deed or instrument out of the same subject of property.—Cross Remainders are of a complex nature.

Remainders of this sort have this denomination, when several parcels of land, or several parts of the same parcel of land, are conveyed to several persons, and these several persons, are by the form of the limitation, to have the parcel or part of each other, when their respective estates, in their respective parts, shall determine. These Remainders are common to, and may be raised effectually under, deeds at the common law, limitations of use, and limitations by devise. In deeds they cannot arise without express limitation, at least without words clearly expressing an intention to give Remainders of this sort. In wills they

B

Of Cross Remainders.

they frequently arise by implication, and in distinguishing the instances in which they may and may not arise, great skill and nicety are required. Our present purpose will be answered by defining these Remainders, and shewing their nature, their qualities and extent. It is not necessary that the parties should in the first instance take by way of Remainder. It frequently happens that they take under limitations which as to their original shares confer a right of immediate possession. The doctrine of Cross Remainders is always applied to estates which are to take place in the share or parcel of land of each person, on the determination of his estate in that share or parcel of land, and the denomination does not apply to the estates which the parties take in the original shares under the first limitation to them.

Cross Remainders must be defined, *First*, As between two persons; and *Secondly*, As between three or more persons; for the definition of Cross Remainders, as between two persons, will not be sufficiently extensive to shew the nature of these Remainders as between three or more persons.

Cross

Cross Remainders between two persons are Remainders limited to each of two persons, in lands or the parts of lands, previously limited to each other of them.

Definition of Cross Remainders between two persons.

Cross Remainders as between three or more persons, are several Remainders limited to each of three or more persons, in lands or parts of lands, previously limited to each of them, and operating by way of successive accumulated Remainders, upon the several aliquot parts which each takes in the shares of the others of them, so that in the first place, or by way of immediate estate, each person is to have a parcel of land, or a part of a parcel of land, and the others as tenants in common, are to have an estate in remainder, in the lands or part of this person, and the persons taking each part under each successive limitation of Remainders, are to have Remainders in like manner in the part limited to each other, till every subdivided part is divisible between two persons only, and then each of these persons is to have a Remainder in the share of the other of them; so that ultimately, by small undivided parts, the en-

Between three or more persons.

Of Cross Remainders.

The nature of
these Re-
mainders.

tirety of the lands may centre in one person. These Remainders place the parties in the situation of coparceners, inheritable to each other, with this difference, as many parts as there are, according to the number of the persons taking under Cross Remainders, so many *successive* estates, either vested or contingent, there are in every part. The consequence is, that if *A.* and *B.* are tenants in common with Cross Remainders, each of them has an estate in the part of the other, so that in each part there are two estates; one limited to the person taking an original share, the other to the person taking by way of Remainder.

So if three persons are tenants in common with Cross Remainders, there will be three distinct and successive estates in different degrees in each part, and the second estate in each part, being the first remainder in the same, will as to that part confer a title on those two persons who take nothing in the original share of that part, and these two persons will take as tenants in common, and a Remainder be limited to each of them in the share of the other. When more than

Of Cross Remainders.

5

than three persons are tenants in common, with Cross Remainders, there will be an increased number of Remainders, adding one remote or successive Remainder in every part, in every degree, for each distinct person; and every remainder will exclude the person who takes under the limitation of any prior estate in that part; or in the original share of which the particular part is a subdivided portion.

The subdivision is originally by parts, so that each person taking under a Cross Remainder has an estate in each part, and the owner of every other part takes a Remainder in the share or respective shares of the other or others of them. The right of possession under Cross Remainders may be assimilated to the order of succession between coparceners: and as to the mode in which they become intitled to the possession, and the proportions in which they take, there is a very near and striking analogy. In point of estate and interest there is no resemblance whatever. Every person whose title is to commence by descent, has a mere expectancy depending on the

Of Cross Remainders.

death of his ancestor, and on the power of alienation by that ancestor. Under Cross Remainders each person takes an estate in his own right, so that he has at the same time an estate in every part of the land, by parts; in some parts he may have an estate in possession, in other parts one estate by way of immediate Remainder, and in other parts one estate or several estates by way of more remote Remainder, and ultimately, he may become intitled to the intirety in possession. But then his right is by different degrees of possession, and under different estates in every part. Generally speaking, the intirety is in the first place divided into equal shares, corresponding to the number of persons who are to take these shares, and on the determination of the estate of each person, the others are to take the part of that person between them as tenants in common, by way of Remainder; so that the lands, as between these Remainder men, are divided into one share less than the original shares of all the parties. On the determination of the estate of each Remainder-man, the part of that person is to be divided between the others by way of

of

Of Cross Remainders.

of Remainder, so that the shares in the part under this Remainder will be reduced in number, and so on progressively as to the part of each person under each successive Remainder, till the intirety of each original share shall be limited to one person, and consequently, by parts, the intirety of the whole shall centre in one individual.

For Cross Remainders as between four persons do, with a view to each part, become, in the first line of Remainders, as Cross Remainders between three persons, and in the next line, as Cross Remainders between two persons. When the Remainders are limited between more than four persons, then on each successive limitation of Remainders in each part, the Remainder in that part will experience a similar reduction; and on every more remote and successive line, the Remainders in each part must be considered as crossed between one person less than in the former line of Remainders in that part. The reason of this reduction is, each successive Remainder is introduced in the place of the estate of another person, and is a provision anticipating

Of Cross Remainders.

the determination of that estate, and making it necessary that the estate of that person shall be determined before the next Remainder limited in that part shall, as far as respects the Possession, come into its place.

To elucidate these observations, and apply them first to Cross Remainders between two persons.

On Cross Remainders between two persons, either separate parcels of land, or undivided parts of the same land, are limited to them with this provision, resulting as a consequence of law on the declared, or in wills, the presumable intention of the settlor, that each taker shall have the lands or part of the other of them, when the estate of that person shall determine. As each person has a Remainder in the lands, or part, of the other of them, these estates are called Cross Remainders.

It is difficult to represent the situation of those who have these Remainders, by lines or any symbolical figure. It is still more difficult

Of Cross Remainders.

difficult to define Remainders of this description. The definitions which are now given are as accurate as the author of this note could make them. He is sensible, however, that, of themselves, they will convey a very imperfect idea of the Remainders intended to be described.

The most satisfactory manner in which the estates, and the situation of the tenants of these Remainders can be exhibited, is by a short abstract, shewing the order in which the Remainders are placed.

Suppose *A.* and *B.* to be tenants in common, with Cross Remainders between them; in point of effect, the lands will stand limited in this manner :

As to one parcel, or one moiety, to *A.* for life or in tail.

Remainder to *B.* for life or in tail.

As to the other parcel, or moiety, to *B.* for life or in tail.

Remainder to *A.* for life or in tail.

When three (for instance *A.* *B.* and *C.*) are tenants in common, with Cross Remainders

Of Cross Remainders.

remainders between them, then the order of limitation will be in this form,

<p>As to one parcel or one third part to <i>A.</i> for life or in tail.</p>	<p>As to another parcel or third part to <i>B.</i> for life or in tail.</p>	<p>As to the other parcel or third part to <i>C.</i> for life or in tail.</p>
<p>Remainder to <i>B.</i> and <i>C.</i> as tenants in common, for life or in tail.</p>	<p>Remainder to <i>A.</i> and <i>C.</i> as tenants in common, for life or in tail.</p>	<p>Remainder to <i>A.</i> and <i>B.</i> as tenants in common, for life or in tail.</p>

Sometimes, indeed generally, Remainders are superadded upon the Remainder of each person, crossing the Remainders between several persons taking as tenants in common, so as to make the aliquot parts which they take under each limitation of Cross Remainders, the subject of another line of Remainders, and by this means extend the right of each tenant to the share of his companion in the tenancy; and the definition attempted to be given of Cross Remainders between three or more persons is intended to describe this accumulation of Remainders. When the Remainders are limited in this manner, then as to
the

the part taken under each successive Remainder, Remainders are superadded and limited cross-wise, to the different persons: thus, in the instance of Cross Remainders between three persons, the first Remainder divides the share of *A.* between *B.* and *C.* as tenants in common; the next remainder limits cross Remainders of these shares as between *B.* and *C.* The same distribution of shares takes place between *A.* and *C.* in the share of *B.* and between *A.* and *B.* in the share of *C.*

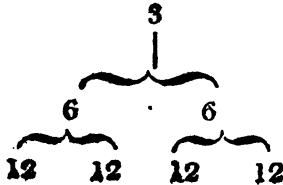
Thus as to the third part of *A.*, *A.* is tenant for life or in tail, *B.* and *C.* are Remainder-men as tenants in common for life or in tail, with Remainder as to the sixth part of *B.* to *C.* and with the like Remainder as to the sixth part of *C.* to *B.*

When these Remainders are crossed between more than three persons, with a view that the whole property shall finally devolve to one person, then the Remainders are multiplied, and one estate in every subdivided part, must be added for each distinct person,

Of Cross Remainders.

person, so that in point of number, the original shares will correspond with the number of persons taking these shares; and, upon the first limitation of Remainders, each share will be distributed into subdivided parts among the owners of the other shares; and upon each successive Remainder, the parts will be multiplied into aliquot parts by dividing each aliquot part among those who are to take the same as tenants in common. In these cases the limitations, or the law in its application of them, run successive changes of estates in Remainder in each part from one person to another, as long as there are two or more persons to divide the part between them; and by this means, the parts, and subdivision of parts, will be increased in a multiplied progression,

As between two, the parts are
 half - - - - - half
 and they will not experience any greater
 subdivision, As between three, the parts are

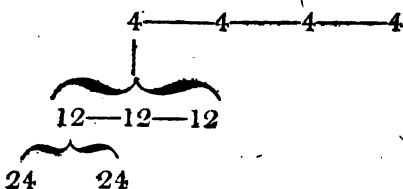


And

Of Cross Remainders.

And each 3d. part will undergo the same subdivision.

As between four, the parts are,



And each fourth part, and every 12th part, must be subdivided in like manner as the first 4th and 12th parts. So that when there are Cross Remainders between two persons, each may have the whole by moieties; one moiety by the original limitation, and the other moiety by the Remainder. And when there are three Cross Remainders, and these Remainders are continually crossed, then one may have the whole, and he will take the same by parts of different proportions. For instance, *A.* the owner of the first share will have one third part by original limitation; two sixth parts by the first Remainder, being one half of the share of the Remainder to *B.* and one half of the share of the Remainder to *C.*; and under the second Remainder, he will have two further

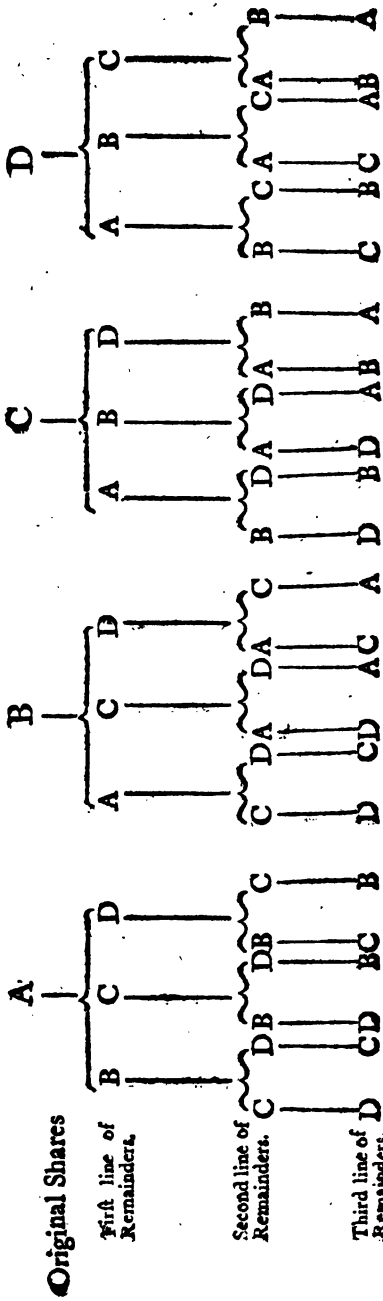
Of Cross Remainders.

ther sixth parts, making, by different parts, the intirety of the whole; these parts however, are taken with an ownership conferring a right of possession at different times, and each person takes an estate in each subdivided part, whatever the number of subdivisions may be. This is also the case as to each original taker, with a view to the several shares of all his companions in the tenancy.

To elucidate these observations, they shall be applied to Cross Remainders between four persons,

Thus; suppose four persons to take as tenants in common, with Cross Remainders between them, and *A.* to be one of the takers, he will be intitled to the several aliquot parts to which the letter *A* is prefixed in the accompanying table.

Original



Of Cross Remainders.

So that *A.* as tenant in common, does in the first degree take one fourth, or a quarter part. In the first line of Remainders by distinct parts, and for a distinct estate in each part, he takes three 12th parts, being another fourth part. In the second line of Remainders he takes six 24th parts, being another fourth part. And in the last line he takes six 24th parts, being the Remaining six 24th parts, so that his title to the intirety is by 16 different parts, and one estate in each of these parts. And the shares will be multiplied according to the number of persons between whom the Cross Remainders are first limited; increasing the shares in a certain ratio by the rules of compound multiplication, or rules bearing some analogy to that mode of computation.

The observation arising from this table of Cross Remainders, is, that in every line of Remainders, *A.* upon the successive Remainders, severally answering to each line, takes several parts equal in the whole to his original aliquot part. The same observation applies to *B.* *C.* and *D.* respectively.

Thus

Thus, under the first line of Remainders, operating on the original shares of *B. C.* and *D.*; *A.* has three 12ths or one fourth part; in the second line of Remainders he has six 24 parts, which are three 12th parts, or another 4th part; and under the 3d line of Remainders he has six other 24 parts, being the remaining 4th part. From these deductions it appears, that Cross Remainders are most accurately represented by lines or degrees of possession, and that the aliquot part of each person, in each line, are always equal, and no more than equal, to his original share. It is also observable that the number of aliquot parts in each line, will vary according to the number of persons who take shares in the entirety; and that in the last line of Remainders, and also in the last line except one, the parts will be the same in number; because, in the last line of Remainders, the limitation upon each part, is, in fact, a limitation of Cross Remainders as between two persons; and the last line only changes the parts between these two persons upon the determination of their respective estates.

Of Cross Remainders.

The utility of considering and defining Remainders of this sort may be easily proved.

Practical observations, and conclusions on Cross Remainders.

From the nature of Cross Remainders practical conclusions of very material consequence are to be drawn. The opinion to be formed on the power of alienation, and also on the operation of an assurance, will frequently depend on a perfect knowledge, and solution of the nature of these Remainders. Under Cross Remainders, each person has an estate extending, in different lines, and with different degrees of right to the possession, to every part of the lands which are the subject of these remainders; consequently he has a power of alienation over every part of the land according to the nature of his estate, and the extent and relative degrees of his ownership, in each particular part. In each part he has only one *estate*, and that estate is either in possession or remainder; and as to his estate in Remainder, he has a Remainder in a more immediate or more remote degree, according to the order and place in which that estate stands
in

in the table of Cross Remainders. He has not *two* estates in any *one* part of the land. It follows, that if he levies a fine or makes a conveyance of the entirety of the land, that fine or conveyance will extend to his estate in each particular part; and it also follows, that the estate of every tenant in possession, holding under a limitation with subsisting Cross Remainders, is succeeded by a Remainder or Remainders over, in favor of other persons. A consequence flowing from this deduction, is, that a tenant in tail, with Cross Remainders, cannot, of himself, without the concurrence of those in Remainder, make a good title to this particular part of which he has the freehold in possession, by any other means than suffering a common recovery. A fine, feoffment, or other like conveyance, of that particular part of the lands, would pass a fee, determinable on the failure of the issue, inheritable under the intail. It would not affect the estate of those in Remainder. To over-reach their estate in this part, and exclude their title, a common recovery is absolutely necessary. This is a point deserving attention in practice. To

Of Cross Remainders.

simplify the case as much as possible, and to shew the application of these observations, let it be supposed that *A.* and *B.* are tenants in tail, with Cross Remainders between them, and that one of these persons wishes to sell, or acquire the fee-simple of his moiety. To do this he must suffer a recovery. That assurance will bar the Remainder in his moiety; but a fine or conveyance, by feoffment, lease, release, &c. would merely pass the time of the estate, and degree of interest, of the tenant in tail, and after his death, and failure of issue, the person intitled to this moiety under the limitation of Cross Remainders, might by entry, unless the Remainder was discontinued, and if discontinued, then by action, recover the same. In this particular, the difference between Cross Remainders, and a limitation to two persons as tenants in tail, with Remainder or reversion to them in fee, is deserving of attention. In the former case, each person has *one* estate in different parts, and a power of alienation over each of these parts, according to the order, nature and situation of his estate in that part. In the other case, each has two estates in the *same* part,

part, and no estate whatever in the other part, and therefore no power of alienation over the same. A consequence however of his having several estates in the same part, is, that a fine levied of his moiety, if with proclamations, will complete the title to the fee simple of that moiety, because the fine will take from the estate tail the privilege of the issue under the statute *de donis*, and then the time of the estate tail in *this* moiety, will merge in the reversion or Remainder in *fee* of the *same* moiety.

2 Bro. Cha.
Cal. 180.

These observations may be illustrated, and their application rendered more obvious, by apposite examples. Assume then the facts, that *A. B.* and *C.* are tenants in tail, with Cross Remainders in tail between them, with reversion in fee to them; a fine by them jointly of all the land, would effectually extinguish their several estates tail, in possession, and Remainder, and pass the same and the reversion in fee, for as the fine of each person extends over all the land, it will bar his estate in every part. By this means, *cæteris paribus*, a good title would be made to the entirety of the lands in fee-

Of Cross Remainders.

simple. So if each of them distinctly levied a fine of the entirety of the land to the same person, that fine would complete the title; because each gives his estate tail in possession in a third part, and also his estates tail in the first and second line of Remainders of the other two third parts, and also his reversion in fee in his original third part. But admit that each tenant in tail levies a fine of the entirety to a *distinct* person, that fine would operate on the estate tail and Remainder of each person in his particular share, but it would not bar, exclude, or defeat the two lines of Remainders in that share, consequently, after failure of issue of any of these tenants in tail, the others, or their issue intitled under the Cross Remainders, might by their entry, if there was no discontinuance, and in case of a discontinuance, by their action, recover this share of the lands, and would become tenants in tail of the same share; and if each levies a fine, or suffers a recovery of the original and particular share of which he is tenant in tail in possession, he does not even exclude himself or his issue from the estates in the other parts which he has by way of *Remainder*. From the same principles, it follows, that

that if two of these three tenants in tail, suffer a common recovery of their two third parts, and the third levies a fine of his third part, the title is open to the objection that those who suffered the recovery still have a remainder in the share of the person who levied the fine; because that fine does not operate with effect to bar these Remainders; and it also follows, that the recoveries being a bar of all Remainders in the two third parts of which they are suffered, the third tenant in tail and his issue have no existing title to these two parts, though the fine levied by this tenant in tail is confined to his original third part. Suppose one of several tenants in tail, with Cross Remainders, to be desirous of selling his estate throughout the different parts of the lands, and let it be considered what is the proper mode of assurance for transferring these estates. Of that part of which he is tenant in tail in possession he may suffer a Common Recovery; and that recovery will be effectual to bar all the Remainders in the share of which he is seised in this manner. A good title therefore may be made to this part of the land. The remaining

Of Cross Remainders.

maining parts of the land are held for estates by way of remote Remainders. Of these parts, he alone cannot suffer a recovery, which will be good even against his own issue, much less against those in Remainder. As the freehold of these shares is not in them his recovery would be void for want of a tenancy of the freehold. By a fine he may dock his estate tail in the shares of his companions, and convey to a purchaser that degree of interest which he has in their shares. The ownership under that conveyance will be liable to be defeated by the alienation of the other tenants in tail, by their suffering a common recovery. These observations however will shew, that in a case, with these circumstances a purchaser cannot rely either upon a fine of the whole, or a common recovery of the whole. He ought to require a recovery of those parts, of which the tenant in tail is seised in possession, and a fine of those parts of which he is seised by way of Remainder, with a covenant to suffer a common recovery when the estate tail of these parts shall fall into possession. In these cases it is taken for granted, that the other tenants in tail do

do not concur in the alienation. When their concurrence is obtained, a common recovery duly suffered; or admitting them to have the immediate reversion or remainder expectant on their estates tail, a fine, with proclamations levied by all of them, will complete the title to the fee simple. On the modes of alienation by a tenant in tail, and on the effect of the assurances made by them, some practical observations will be offered in the next note.

On the Effect of Fines, Recoveries, and
other Assurances in Fee, by Tenant
in Tail.

BY the statute *de donis*, it is provided, that a Fine levied by tenant in tail shall, *ipso jure*, be of no effect. In the construction of the statute, it was held, that the fine was not actually void. It was only voidable; and even this restraint has now, under certain circumstances, been abrogated. Notwithstanding the statute, tenant in tail, continued owner with a power of alienation in fee, subject to be defeated by his issue, and those in remainder or reversion. The invention of Common Recoveries, and the statutes making fines with proclamations a bar to the issue, have put the issue completely in the power of their ancestor. And it is of particular importance (because the subject frequently occurs in practice) to mark with precision, the distinct estates which pass by the conveyance

ance

ance of tenant in tail, when it imports to be a disposition of the fee.

First, A common recovery by tenant in tail, (if duly suffered) has the effect to bar his estate tail, and all Remainders over, or reversion depending on that estate, and all conditions, and collateral limitations, annexed to the same. And no condition or limitation, either in a common law conveyance, or in a conveyance under the statute of uses, or in a declaration of uses or in a will, can take from tenant in tail the right of aliening, by a common recovery. Its operation in effect is to enlarge the estate tail into a fee-simple. But by suffering a common recovery, tenant in tail cannot derogate from his own acts, or discharge the fee acquired under the recovery, from the incumbrances which affected the estate-tail. In effect, the time of the estate-tail continues, and the operation of the recovery is to take from that estate the privileges and qualities annexed to the same, by the statute *de donis*, in favor of the issue, and the reversioner or remainder-man. It is a mode of assurance by which tenant in tail, may alien in fee-simple.

Secondly,

On the Effect of Fines, Recoveries, &c.

Secondly, a fine must be considered either as creating a *discontinuance*, or operating merely as a *conveyance*. In the first instance, it carves out a new title in fee-simple, without conveying the title under the old fee-simple. In the other instance, a fee, determinable on the failure of the issue, inheritable under the intail is conveyed. A feoffment has the like operation, with the like distinction between its effect as a *conveyance*, and as creating a *discontinuance*.

Thirdly, assurances by *lease and release*, confirmation in enlargement of an estate, grant, bargain and sale, covenant to stand seised, are all mere modes of *conveyance*; and all these assurances have their effect by passing a fee determinable on the death of the tenant in tail, and the failure of those issue who are inheritable to his estate.

On a conveyance by fine, it must also be observed, that if the fine is levied with proclamations, pursuant to the statutes of 4 *Hen.* 7. and 32 *Hen.* 8. the right of the
issue

issue under the intail, will be wholly defeated; but when the issue are not barred, (and they are not barred, unless there is a common recovery or, fine with proclamations, or, in some special cases, a warranty,) they, on the decease of the tenant in tail, by whom the alienation is made, may, by their entry, when there is no discontinuance, and by their action, when there is a discontinuance, defeat the estates of the person claiming under the alienation of the tenant in tail.

Machell and
Clarke, s. L.A.
Raym. 773.

This observation equally applies to all the other modes of conveyance already enumerated, and which operate by way or in the nature of a grant. On the extent of the estates which actually pass by these modes of assurance, there are several distinctions.

First, the recovery of tenant in tail, also his fine, or his feoffment, when it creates a discontinuance, passes an estate in fee-simple; and his feoffment or fine not operating by way of discontinuance, and all the other modes of assurance of the
third

On the Effect of Fines, Recoveries, &c.

third class, pass determinable fees. For in point of *limitation* of time, the estates taken under a common recovery, or a discontinuance by fine or feoffment, will not determine till the title is impeached, consequently the estate is *absolute*, though it may be *defeasible*; for a distinction deserving of notice must be made between estates which are *determinable*, and estates which are *defeasible*. On the other hand a conveyance by fine, or feoffment, or by lease and release, &c. passes a fee of the same extent only in point of time, as the estate of the tenant in tail, by whom the conveyance is made; and therefore this estate will determine when there is a failure of the issue inheritable under the intail.

The determination of an estate depends on its limitation; in other words on the time for which it is to continue; and, of necessity, the estate must determine when it has filled the measure of its duration. That an estate is defeasible, must arise from some quality annexed to it, as from the circumstance of its being attended with a condition, or from the nature

ture

ture of the title, as being open to claims of persons who may impeach it. But a fee-simple, though defeasible, has not any fixed boundary for its determination. It will continue for ever, unless the claims of those who have a better title are enforced.

These considerations lead to some observations on the instances in which preference is to be given to a fine or common recovery as a proper assurance by a tenant in tail, who is merely tenant in tail; and also by a tenant in tail who is also the owner of the immediate reversion or remainder in fee.

As often as any estate is interposed between the estate tail and the reversion or remainder in fee; and also as often as the reversion or remainder in fee is subject to any charge or incumbrance which does not affect the estate tail; so often a common recovery is absolutely necessary to free the title from objections. A fine would be an improper assurance. In the first case it would not extend to bar the intermediate estates; and in the second case

On the Effect of Fines, Recoveries, &c.

case its effect would be to merge the estate tail in the reversion or remainder in fee; to accelerate that estate, and consequently to accelerate the right of those in whose favor charges or incumbrances have been created upon the reversion or remainder in fee. Some advantages are certainly to be derived from a fine which are not common to a recovery. The convenience of levying a fine in vacation, and with that expedition with which it may be passed through its different stages, renders it frequently the most eligible assurance. Its operation to bar strangers by non-claim, also gives it a claim to preference over a common recovery, as often as the same effect can be obtained from a fine as from a recovery, considered merely as a form of conveyance by tenant in tail. To draw the line, in which, with a view to all cases, it is most prudent for a tenant in tail to convey by fine in preference to a common recovery, is attended with some difficulty. Every case must depend materially on its own circumstances. These distinctions however may be taken.

A com-

A common recovery is the proper assurance by tenant in tail,

1st. When he is merely tenant in tail.

2dly, When he has the remainder or reversion in fee, by *descent*.

3dly, When he has the remainder or reversion in fee, either by purchase or descent, and that estate is affected by some charge or incumbrance which does not affect the estate tail.

4thly, When there is an intervening estate between his estate tail, and his remainder or reversion in fee.

And a fine is the proper assurance by tenant in tail, when he himself has created the intail, and has also the remainder or reversion in fee immediately expectant on the estate tail, and there are no charges or incumbrances imposed on the remainder or reversion in fee, which do not equally affect the estate tail.

These points involve learning of a very curious nature. They are also the subject

D

of

On the Effect of Fines, Recoveries, &c.

of every days practice. An elucidation of the observations already made, may on this account be useful to those students, to whom, from their inexperience, the reason of the distinctions may not be immediately obvious.

First, A common recovery is the only mode of assurance, by which a tenant in tail can *enlarge his estate tail* into a fee-simple. This will appear from the observations already made. A fine levied by a person merely tenant in tail, will not, in point of *conveyance*, enlarge his estate tail into a fee-simple. It will confer a title to a determinable fee; in other words to an estate to continue as long as there shall be issue inheritable under the intail: consequently under these circumstances, preference is to be given to a common recovery. In short, a fine if intended to convey the fee-simple merely under the ownership of an estate tail, would be an improper and ineffectual mode of assurance. There are cases in which a tenant in tail is incapable of suffering a common recovery, for want of the concurrence of the persons

On the Effect of Fines, Recoveries, &c.

35

persons in whom the estate of immediate freehold is vested. In these cases of necessity there is no option between a fine and a recovery; and for this reason the tenant in tail, or those who are content to purchase from him, must for the present be satisfied with the limited effect of a fine; since it is an effectual, and at the same time the only, mode of assurance, by which the tenant in tail can bind his own issue. After the determination of the previous estate of freehold, the title may be completed by a recovery, suffered by the tenant in tail, or if dead, then as it is now generally understood, by a recovery suffered by his issue.

Secondly, When tenant in tail has the Remainder or reversion in fee by *descent*, a recovery is certainly the more eligible mode of assurance, although there are no intervening estates between the fee and the estate tail; and although it is well ascertained, that the Remainder or Reversion in fee is not incumbered. Under these circumstances the efficacy of a fine to give a

On the Effect of Fines, Recoveries, &c.

good title in fee-simple, would depend on the facts,

First, That the remainder or reversion in fee, expectant on the estate tail, is actually vested in the tenant in tail, and not in any person claiming under a conveyance or devise by his ancestor.

Secondly, That the ancestor hath not given any bonds judgments &c. which are a lien on the remainder or reversion in fee, or will give a remedy against the heir in respect of the estate descended.

Thirdly, That there are no intervening estates capable of taking effect.

All these points, except the existence of bond debts, which are binding on the heir personally, without affecting the assignee, are material to a purchaser; and he will expect to be satisfied on these heads. At a distant period it may be difficult to give satisfactory information on these points in answer to the enquiries of a cautious purchaser. To supersede the necessity of these enquiries, it is always advisable, and all things considered

sidered, less expensive, that a recovery should be suffered as a certain and effectual means of completing the title. It shortens the deduction of the title, by barring the remainder or reversion in fee, and putting the same altogether out of the question, and making the right of the tenant in tail, the only criterion of the validity of the title; while, if the title depends on a fine, instead of a common recovery, it is equally necessary to deduce the title from the tenant in tail, and also from the successive owners of the reversion, or remainder in fee. There is an ownership arising from two distinct estates and the title is constituted of the united ownership under these estates. It is therefore necessary that the title to the reversion, as well as to the estate tail, should be traced to its source, through every channel in which the reversion has passed.

Thirdly, When the tenant in tail has the remainder or reversion in fee, either by purchase or descent, and the reversion or remainder is affected by some charge or incumbrance which does not affect the estate tail, a recovery is the only safe and effectual

On the Effect of Fines, Recoveries, &c.

tual mode of assurance. It over-reaches and bars the reversion or remainder in fee, and all charges and incumbrances depending on that estate. The effect of a fine would be to take from the estate tail, the privileges annexed to it in favor of the issue, by the statute *de donis*; and the time of the estate tail would merge in the time of the reversion or remainder in fee, and the charges and incumbrances affecting the reversion or remainder would become a charge on those to whom that estate, thus accelerated, gives a right of possession.

Fourthly, When there is an intervening estate between the estate of tenant in tail and his reversion or remainder in fee, a common recovery is the only means, by which the intervening estate can be defeated. A fine would operate on the estate tail, and turn that estate into a base or determinable fee. In all these cases therefore a common recovery is certainly intitled to preference over a fine. In many cases indeed, as has been already observed, a fine would be ineffectual for the purpose
of

of giving a good title in fee-simple; but when the tenant in tail himself has created the intail, and has also the remainder or reversion in fee immediately expectant on that estate, and there are no charges or incumbrances imposed on the remainder or reversion in fee which do not equally affect the estate tail; then, and then only, preference may safely be given to a fine. No end is to be attained by means of a common recovery which, under these circumstances, will not be equally attained by means of a fine. Since the estate tail is chargeable with the incumbrances affecting the reversion or remainder in fee, the time of the estate tail, when enlarged into a fee-simple, by the peculiar and extensive operation of a common recovery, would, to the extent of the whole fee-simple, continue chargeable with these incumbrances since the estate tail was subject to them. Under a fine, and the merger of the estate tail, the incumbrances would affect the old fee-simple, precisely in the same manner, and to the same extent, as they would affect the fee-simple derived out of an estate tail. The only difference is that in one case,

On the Effect of Fines, Recoveries, &c.

the continuing estate is the old fee-simple, in the other case it is, in point of legal ownership, a new fee-simple depending on the title to the estate tail; although, with a view to its descendible qualities, the estate arising from the uses declared of the recovery, will be considered as part of the old dominion. But as the title to the estate tail, and to the fee-simple out of which that estate was created, are the same in all material circumstances; and the existing incumbrances extend to both estates, the change of the estate tail into a fee-simple; or the merger of the estate tail in the old fee-simple, makes no alteration in the rights of the parties or of any other persons. Though in some cases with a view to the devolution in a course of descent, it is material to distinguish between the old fee-simple, and the new fee-simple, yet, on an accurate investigation of the subject, it will be found that a fee-simple derived from an enlargement of an estate tail is in fact and in title, the *fee-simple* out of which the estate tail was created. The right of excluding the interests of the persons who have the reversion or remainder after

On the Effect of Fines, Recoveries, &c.

41

after an estate tail, is merely a privilege and quality annexed to the estate tail,

In all the cases of a fine which have been noticed, the observations must be understood of a fine with proclamations. And in all the cases of a recovery it must be understood that the estate tail was created by a person who was the owner of the fee-simple.

On the Difference between Merger,
Extinguishment, and Remitter.

MERGER is the annihilation of *one estate* in another.

Extinguishment is the annihilation of a *collateral thing* in the thing itself out of which it is derived. A rent, a common, or a feignory may be extinguished. That the estate in the rent, common, or feignory ceases, is the consequence of the extinguishment of the thing itself; for when the thing ceases, the estate therein must also cease. Under the doctrine of merger, the thing or subject may continue, after the annihilation of one estate in another; for, notwithstanding the annihilation of the estate, the thing continues, and the effect of the merger is only to involve the time of one estate in the time of another estate; or at the utmost to accelerate the right of possession under the more remote estate.

Perhaps

Perhaps the doctrine of *remitter* may appear to have some connection with the learning on merger. An attentive examination of the two subjects will shew that there is a wide difference in the mode in which merger and remitter severally operate. Remitter is the same in effect as to *rights* and *titles*, which merger is of *estates*, and extinguishment is of *things*.

The doctrine of remitter proceeds upon the ground, that the possession is cast on an innocent person, who has an existing title to the possession, or, in the pithy language of the law, an entry congeable; or that the freehold is cast on a person who has a right remediable, and who has done no act by which he has estopped himself to insist on his ancient title; and then as often as the possession when the entry is congeable; or the immediate freehold when the right is remediable, devolves to that person by act of law, or is vested in him by the act of the parties without his concurrence or voluntary consent; or at a time when that person, as in the case of an infant, &c. is under an incapacity of giving assent to any act which would be to his prejudice; the
law

On the Difference between *Reverter*, &c.

law of itself restores the party to the estate, to which he had a subsisting right of possession, at the time when he entered; or a subsisting right of action at the time when the freehold devolved to him. By this means the law denies that the estate under which, in the one case he entered into possession, and in the other case became seized of the freehold, has any existence. Remitter universally supplies the place of an entry, when an entry is lawful and is made; and of an action, when an action might be maintained; and it places the rightful owner in the situation of the person against whom the action ought to be brought; and it redresses an injury done to the person in whom the right resides and who is thus put into possession, or obtains a seisin of the freehold in the same manner and to the same extent in which he could restore himself to his estate by means of an entry or an action. The restitution of right, by mere operation of law, is given in lieu of an entry, when an entry is lawful and might be made; and of an action when an action might be maintained; and it supplies its place and has all its effects; and it is given upon the principles

principles of justice, that the right of entry being in the person in actual possession, or the right of action being in the person who has seisin of the freehold, there is no one, in one case, upon whom the rightful owner can enter, or in the other case, against whom he can bring an action, and therefore the law ought to place the party precisely in that situation, to which his entry or action upon the ground of his former title, would restore him: to the intent, that if any person will controvert the title in an action, the *mere right*, as it subsists between the parties, may be discussed and decided.

From the writings of *Littleton* and his learned commentator, it will appear that the object of the law of remitter is to restore the party to his ancient title. Thus remitter puts an end to a defeasible estate. It seats the person in whom the right resides in his former ownership, and gives him the tenancy upon the footing of his antient right. It revives the seisin under that title in favor of the person in whom the possession or the freehold becomes vested
under

On the Difference between Merger, &c.

under a defeasible estate. Merger on the contrary puts an end to a subsisting estate, held by good title, and accelerates the right of possession under a more remote estate residing in the same person.

**Observations on Estates considered as
Executed and Executory, Vested and
Contingent.**

ESTATES have generally been divided
into

Vested Estates.

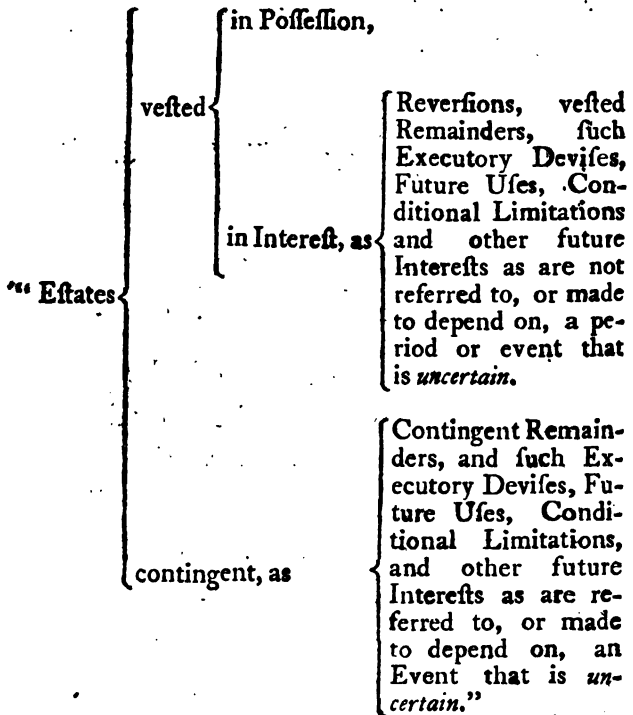
Contingent Estates,

and, from the writings of the most
esteemed authors, it may be collected to
have been their opinion, that the terms
vested and contingent, applied to all the
variety of estates, so that every estate must
be either vested or contingent.

Thus

Observations on Estates, &c.

Thus according to Mr. *Fearne*.—
 “ When we consider estates with regard to
 “ the certainty and time of the enjoyment
 “ of them, we may distinguish them into



The terms vested and contingent, cer-
 tainly apply to the circumstances under
 which estates are, on the one hand, to con-
 fer a right of present or future enjoyment,
 and,

and, on the other hand, a future right of future enjoyment. But it is submitted that these terms, in their appropriate sense, are not sufficiently extensive to distinguish all the classes of estates. On a minute examination of the subject, it will be found that estates necessarily require a further division into estates

1st. Executed,

2d. Executory.

The difference between estates executed and executory, and vested and contingent, as between themselves, will be examined in this note.

An estate *executed* is when there is a *present* and *immediate* right of *present* or future enjoyment. The term, in this sense, applies to *vested* estates, as distinguished from estates in *contingency*. In another sense it applies to the time of enjoyment; and, in this application, an estate is said to be *executed*, when it confers a *present* right of *present* enjoyment. Every estate which is executed, necessarily gives a vested interest.

* E

terest.

Observations on Estates, &c

terest. That the estate is executed in possession, or merely in interest, and not in possession, will depend on the circumstance that it does or does not confer a right of present or future enjoyment. When the right of enjoyment in possession is to arise at a future period, the estate is executed only; that is merely vested, in point of interest: and when the right of immediate enjoyment is annexed to the estate, then, and then only, is the estate executed in possession.

An *executory* estate, according to the legal application of the term, may be neither vested or contingent, but of a peculiar nature; as an executory estate by devise, or by springing use, to commence at a time, or upon an event, which *certainly* will happen; or as a term for years which in point of interest is to commence from a future, but certain, period, and, on that account is generally called an *interesse termini*; because it does not give a present term, but only an interest in a term.

All contingent estates are executory. A vested estate may be executory

as far as relates to the possession, at the same time that it is clearly vested in point of interest. Again, an estate by executory devise, springing use, &c. while it continues executory, and does not depend for effect on a contingent event, is neither vested nor contingent. The interest which it passes is not *present*, so that it may be granted, and therefore the estate is not *vested*. It does not give a right to arise upon a contingency, and for that reason it is not contingent. That an executory devise may give a contingent interest, it must be referred to a contingent event, before it can take effect as a vested interest, or must be limited to an uncertain person; and even, under these circumstances, it retains the name of an executory devise.

Also an *interesse termini* not depending on a contingency, may be of the same particular description so as not to be vested or contingent. But as these estates arise rather by contract for the possession, as distinguished from the regular and orderly limitations of estates of freehold, and as the reason for which interests of a freehold qua-

Observations on Estates, &c.

lity were regulated by the feudal law of the country, does not apply to terms of years which are interests of a chattel quality, these future executory interests for years are assignable.

An estate which is executory may give either a *fixed* or *contingent* interest. With reference to the possession, an estate of this sort does, from its peculiar nature, confer a right of future enjoyment. The difference to bring it to a point, is, *all executory estates are not contingent*; and *all contingent estates are executory*. For this reason it is necessary to distinguish between those estates which are executory and not contingent; and those estates which are contingent and necessarily executory.

An estate is contingent only, when it is made to depend for effect, on an event which may not happen, or may not happen before the determination of the estates of freehold, with which it is connected as a remainder, and by which it is consequently preceded and supported; or when it is limited to a person not in being, or not precisely ascertained.

The

The executory estates which have been mentioned are of neither description ; and therefore, notwithstanding they are executory, they are not contingent. All must acknowledge that an estate, executory in point of interest, gives no immediate right, so that the owner may be said to have seisin of that estate ; yet it does not always necessarily depend on an uncertain event, whether an estate which is executory shall ever confer a fixed right of enjoyment. A devise of an estate of freehold, to commence at a future day, as the 4th day of next *May* ; or upon an event which certainly will happen, as the death of *B* ; gives an executory interest ; in other words an interest which is not executed immediately so as to be vested. It follows, that there clearly is a distinction between estates which makes it necessary to consider them as vested or contingent, executed or executory ; for an estate which is executory, may be neither vested or contingent, and yet give a certain and fixed right of future enjoyment. Mr. *Fearne*, indeed, in the passage quoted from his valuable treatise (and the weight impressed by the authority

Observations on Estates, &c.

of his Name is very sensibly felt) ranks future uses, and all such conditional limitations, and other future interests, as are not referred to, or made to depend on, a period or event that is uncertain, among estates vested in interest; and, if he is right in this position, the terms vested and contingent, embrace every description of estates. Having submitted these observations to the reader, he must judge for himself. To assist him, an outline will be given of the nature and different qualities of estates which are vested, and estates which are contingent. Some observations will also be introduced concerning estates executed and executory, in the sense in which these terms have been applied.

But, in the first place, it will be proper to remark that estates vested in interest are also said to be executed; and estates which are contingent are said to be executory. These terms are used with reference to the certainty of the right of enjoyment. In this sense an estate which is vested is executed as to that right; while an estate which is contingent is only executory,

And

And it must be remembered, that all estates which are executed, admit of transfer by alienation; some absolutely, others *sub modo*. Estates which are contingent, or executory, are not the subject of alienation by any other means than by devise. An estate which is executory or contingent, confers a power of testamentary disposition, At law it cannot be transferred by deed. Interests of this sort may be released or extinguished; or bound by estoppel; and a disposition to a purchaser for a valuable consideration, will most probably be sustained in equity.

A vested estate gives a certain, fixed, and immediate right of present or future enjoyment; that is an interest clothed with a *present* and existing right of alienation. For by a vested estate is to be understood an interest clothed with a legal or equitable seisin, which enables the person to whom the interest is limited, to exercise the right of present or future enjoyment *immediately* in point of estate. The interest, whether the same is to intitle the owner to the possession, now, or at a future period, is fixed and

present, so that the right of ownership over the land, or other subject of property to the extent of the estate limited therein, may be aliened. An estate which is vested is directly the contrary of one which is contingent, and the terms vested and contingent, used in reference to the certainty that estates intitle the owner to the enjoyment of a present interest, are opposed to each other in contradistinction. No vested estate can be deemed contingent; and no contingent estate can be deemed vested. Again, every estate which is executed, necessarily passes a vested interest. On the other hand, no interest can be allowed to be vested while it gives an estate, which, in point of interest, is executory. The notion of an executory estate, is irreconcilable with the idea of a vested interest. At the same time, many interests which are executory are not contingent. It follows that the terms executed and executory, contrasted to each other, have one sense at least *peculiar* to themselves, and *not common* to the contrasted terms vested and contingent. An executory devise, or springing use, to give an estate at a future period,

riod, or upon an event which certainly will happen, *does not*, it is submitted, pass a *present*, though it gives a *fixed, right* of enjoyment. Notwithstanding the right of enjoyment is fixed, and does not depend on an event, the interest which is limited will not be clothed with a legal *seisin* 'till the stated period shall arrive, or the proposed event shall take place. 'Till the arrival of that time, or the rise of that event, the person to whom the limitation is made, has no legal title; he has not a vested interest, because he has no *seisin*, or in other words, such present right as will enable him to exercise an immediate act of ownership, by a disposition, by a common law conveyance.

A contingent estate gives a right of enjoyment to arise upon an event, expressed, or implied by law, and it is not certain that the event will take place. The circumstance that the remainder is to take place upon the event which is to determine the preceding estate, or independent of the determination of that estate, is totally immaterial, as long as an event, which
will

will not certainly happen, is to arise before the estate to commence upon that event, is to take effect and vest in interest. If C. at is *Rome*, it is not certain that he will return, and for this reason the estate limited to commence upon that event, is contingent: And when C. has an estate determinable on his return from *Rome*, and a Remainder is *limited to commence upon that event*, the Remainder is contingent. But it is not contingent merely because it is to commence upon the determination of that estate, but because the determination of the preceding estate, is to be occasioned by an event, and the Remainder is to commence on that event.

Remainders to take effect eventually; estates to arise, either by springing or shifting use; or executory devise, upon an event which will not certainly happen; are all contingent estates, till the event upon which they are to give a certain fixed right of present or future enjoyment shall arise.

All estates which depend for effect on the doctrine of executory devises or of shifting

Shifting or springing uses, are not *contingent*. Necessarily they are executory and not vested, and they will be contingent or not according to the distinctions which have been taken; namely, the circumstance that they give an estate upon an event which certainly will or will not happen.

The estate passing by a limitation which does not give a fixed right of present or future enjoyment, is therefore contingent, because it is uncertain, and depends on an event which will not certainly happen, whether the limitation, even in the order and at the time, when it is to take place, will ever confer such right of enjoyment. As soon as the event arises which the limitation describes, and on which the estate is to vest in interest, the estate becomes vested; for it no longer remains uncertain whether the estate will give the right of enjoyment in possession, when the possession shall be vacant,

This is equally true in regard to limitations by way of remainder, and limitations to take effect under the learning of executory

tory devises, and springing and shifting uses.

It is not the uncertainty of enjoyment in future, but the certainty of the right to that enjoyment, which makes the difference between an estate vested in interest, and one which is contingent. It is the certainty and fixed right of having the enjoyment at the time when the possession shall fall in the one case; and in the other case the uncertainty of having this right at that time; which are universally the characteristics and distinguishing features of a *vested* estate, and an estate in *contingency*; but still it follows from the nature of executory devises, and springing uses, that when they do not operate immediately on the freehold, they are not vested, though they may not be contingent. In these cases the fee descends to the heir at law, till the will, or remains in the owner till the declaration of uses can draw the same from him, either entirely or by portions.

The tenant of a vested estate has a present and *certain* interest. This interest
though

though it may not yield him any immediate profit, because it does not intitle him to the possession at this instant, gives him the ownership of the land for the time comprised in his estate; and that ownership may be exercised by an immediate disposition of the land to be enjoyed in future, at the time when he is to be entitled to the possession, in right of his estate, according to the limitation under which he claims, and the relative situation of his estate in reference to the interest of other persons.

A contingent estate gives no *certain* nor *immediate* right to the land. An interest *executory* in point of estate, may give a certain right of enjoyment, but that interest cannot, in point of estate, and right of alienation, otherwise than by *will* (and in this particular *executory* estates and estates in contingency, are upon the same footing) be immediate. Till the event marked by the limitation of a contingent estate, takes place, it is dubious and uncertain whether the limitation will at any time confer the right of enjoyment; because it is not certain that the event upon which the estate

Observations on Estates, &c.

is to commence, will ever arise. This is equally true in application to estates to take effect on a contingency, either by executory devise, or springing use.

Estates which are contingent, by reason that the limitation describes an event which will not certainly arise, alone fall within the literal terms of the description already given of interests of this denomination. An estate may also be contingent,

First, Because it is limited to a person not in *esse*, as a child before it is born; and in this case the estate cannot vest till the person to whom it is limited is born.

Secondly, Because the person, though born, is *not ascertained*; as the survivor of several persons; or the heirs of a person who is living.

Thirdly, Because the estate is limited by way of remainder, and to commence on an event, or at a time, which, though it will certainly happen, may not happen during the continuance of the preceding estates of freehold; as an estate to *A.* for his life, and after the deaths of *A.* and *B.* or of the death of *B.* alone, then to *C.*

All these estates are, constructively, to commence on an event; for unless the child is born; the person ascertained; or the time or event upon which the remainder is to commence,

commence, happens before the determination of the preceding particular estate, the estate limited upon either of these contingencies, will not commence in interest. Therefore the definition first given of a contingent estate, taken generally, and applied to the circumstances under which remainders, are to take effect in interest, extends to every possible description of estates of that quality. In determining whether a remainder is contingent, upon the ground that the preceding estates may determine before the remainder can take effect in possession or in interest, according to the terms in which it is limited, the opinion must be formed on the consideration that the preceding estate can or cannot determine before the remainder may take effect in possession. When it is certain that the remainder will take effect in possession, upon the determination of the preceding estates of freehold, at whatever time and however early these estates may determine, the remainder is vested; and it is contingent, when this certainty is absent. But as often as the words of limitation do not, in point of fact, or in consideration of law, express

express any contingency, or any contingency beyond an event which, in the sense affixed to these words, will certainly happen before the remainder can commence in possession, the remainder will be vested. That a remainder may be contingent, from words of *contingency*, these words must refer to some event, which will not certainly happen, or which is unconnected with the estates already limited. As often as words sounding conditionally, really describe nothing more than events, which, in the course of things, must happen before the remainder can commence in interest, agreeable to the terms in which the particular estates are limited, no contingency will be created. The remainder may be vested, notwithstanding these words of contingency.

Another reason for which an estate must be contingent, is from its relative situation to another estate, because it depends on the circumstance, as a contingency, that the estate previously limited shall not vest in interest. This is the case of one estate in fee to be substituted
in

in the place of another, in case that other shall not vest in interest. Thus if a grant, or limitation, or devise, is made to *A.* for his life, and after his decease, in case he shall have a *son*, to such son in fee; or to a person in esse in fee, upon a contingency. And in case *A.* shall not have a son, or such contingency shall not happen, then to *B.* in fee; the estate of *B.* will be contingent, simply because his estate is to take place only in case another estate in *fee* shall not vest in interest; and this contingency is implied by law precisely to the same extent as if it was *expressed*. That it is merely on this account that the limitation to *B.* gives a contingent interest, is evident from the consideration, that *B.* is a person in esse capable of taking, and that his estate, independant of its relation with the estate in fee, previously limited, is to take place on the decease of another person. To give rise to this construction, the estate in the room of which the subsequent or alternate fee is to be substituted, must be a fee limited in contingency, so that the contingency implied by law may be referred to the sub-

F

sequent

sequent limitation. When the first fee is vested, then the alternate fee must take effect if at all, under the learning of executory devises or shifting uses, and upon an express contingency.

On Contingencies with a double Aspect.

OF estates limited on a contingency, it is generally true that they cannot vest, unless the contingency arises. With a view to the greater number of instances, the contingency must arise agreeable to the words in which it is expressed, and the sense which the parties have annexed to these words. Sometimes however contingencies are said to have a *double aspect*.

A contingency with a double aspect, is when *one event only* is expressed by the party; and two events are in his contemplation. This construction is made in favor of the intention, that the same may not be frustrated. It is to a few cases only that this favor is extended. The construction on these contingencies seems to have been borrowed from the manner of limiting *vested* remainders, and from the exposition they received; which enables every estate to take place in possession,

On Contingencies with a double Aspect.

after the determination of the preceding estate, without any regard to the particular time at which, by the words of the remainder, the estate is to vest in possession, and also, notwithstanding an interposed estate, is void in its limitation. In these cases, the court proceeds upon the intention that the determination, or failure, of every prior, or intermediate estate, shall accelerate the commencement of the more remote one. It is upon similar grounds of intention, that the contingency with a double aspect is allowed; for it proceeds upon an implied intention of the testator that the estate, limited upon a contingency, referable to one estate, shall also take place in case the contingency upon which that estate is to vest in interest, shall not arise. In point of law, the contingency has a double aspect, providing, by expression, for a contingency annexed to the estate previously limited, and also, by construction of law, for the event that the contingency upon which the prior estate is to commence in interest, shall never arise. This then is the nature and import of a contingency with a double aspect, and
hence

hence the observation of Lord Mansfield in the case of *Foncreau v. Foncreau*, that the testator meant to give *successive estates*. Hence also the observation of Lord Hardwicke; “ The cases put of a remainder on a particular estate, are admitted. But it is said they differ from a conditional limitation to introduce an executory, or springing, devise, after a fee,” and he added “ I do not find any authority to warrant that distinction; for *Jones v. Westcomb* is a strong authority, that the construction ought to be the same, whether it is on a remainder so limited on an estate which never takes effect, or whether it is a contingent limitation after a fee.”

Doug. Rep. 509.

1 Ves. 411.

1 Eq. Abr. 245.

1 Will. 184.

The case of *Gulliver v. Wickett*, will illustrate these observations. In that case the testator devised to his wife for her life, and after her death, to such child as she was then enient with, and to the heirs of such child for ever, provided that if such child as should happen to be born should die before the age of twenty one years, leaving no issue of its body, then the testator gave

On Contingencies with a Double Aspect.

the property to another person. The wife neither had a child, *nor* was enfiend with one; and it was held that the devise over was good: and in delivering the opinion of the court, Chief Justice *Lee* said, “ We “ are of opinion that whether the limitation “ to the child never took effect, or whe- “ ther it did, and was determined, was the “ same thing; and as the remainder to “ the child never could take place, the “ next devise over must take effect.” At one time, it was understood that this doctrine was confined to limitations of chattel-real, and personal property. The determination of the case of *Fonereau* and *Fonereau*, and *Baldwin* and *Karver*, cited in a note to that case, has clearly extended the construction to devises of real estate. The case of *Gulliver v. Wickett*, also arose on real property; though neither the court or the counsel called it to their recollection for this purpose, when the case of *Fonereau* and *Fonereau*, was under consideration.

See Dougl. 503.

The cases evidently turn upon the ground of intention, inferred from the collective interpretation of the will; and the

the courts imply those words of contingency, which would have declared the intention, which they infer from the terms in which the testator has expressed his will. These contingencies with double aspect, are very accurately described by Lord *Mansfield* in the case of *Jones and Morgan*. And in *Avelyn v. Ward*, Lord *Hardwicke* said, he knew of no case of a remainder or conditional limitation over of a real estate, whether the first limitation were by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place. The opinion of Lord Chief Justice *Lee*, delivered on the case of *Gulliver v. Wickett*, was to the same effect. The conclusion from the authorities is, that as often as the case calls for this construction, the limitation over will give an estate to commence in possession, as soon as the estate previously limited shall be removed, either by failing of effect, or by taking effect, and afterwards determining, notwithstanding the contingency which is

F 4

expressed,

MS. Cases.

1 Vol. 428

On Contingencies with a Double Aspect.

expressed, merely provides for the determination of the former estate, or the determination of that estate by a particular event.

These contingencies frequently occur in dispositions of terms for years. Thus if a devise or settlement of leasehold estates is made in trust for *A.* for life, remainder to his first and other sons, and the heirs of their bodies successively, according to the priority of their births; and in case they shall die without issue, then in trust for other persons, the trust for these persons is limited to take effect upon two contingencies. *First*, on the failure of issue of the sons: and *Secondly*, in case there shall be no son capable of taking under the limitation in favor of the sons. The first event is expressed. The second is implied by law. In the event which is expressed, the trust declared in favor of the persons who are to take after the determination of the interests intended for the sons, have a tendency to a perpetuity. The enjoyment under them, and, from the nature of the property, and the modifications of which it admits, the right to a vested estate, are to be deferred, until a general

neral and indefinite failure of the issue of the sons, and, on this account, they are too remote, and therefore void. Under the contingency implied by law, these trusts are to give a vested interest, in case there shall be no son capable of taking under the prior limitations. The subsequent trusts, are, in this alternative, to give a vested interest on the death of *A*. In this point of view, these trusts are not the object of the rule against perpetuities, and they may be supported and take effect. These observations are consistent with the opinion expressed by Lord *Mansfield* in the case of *Jones and Morgan*. He said “upon *Stanley and Leigh, Sabberton and Sabberton*, they take this distinction. There is a double contingency, and it is a double contingency by *implication*; that is to the first son, and if he dies without issue male, then over. Why there is the double contingency if he has a son, and that son dies without issue, it is given over; but there is another contingency, if he never has a son, that is good; but in the event of his having a son, the moment that son is born, he takes the whole, so that is a double

On Contingencies with a double Aspect.

“ double contingency, that is, as if the
 “ testator has said and to him for life, and
 “ in case he has a son, I give it to that son,
 “ and if he never have a son I give it over; or
 “ if having a son, that son dies without
 “ issue male, then I give it over; in the
 “ one case it is good, in the other it is bad:
 “ and upon this distinction these cases have
 “ been held to be good, because there hap-
 “ pened to be no son.”

These cases lead to a remark on a point of practice of considerable importance. In marriage settlements and in wills it very frequently happens, that the limitations of a long term, or of the trusts of a term of this sort, and of personal chattels, are made in the exact words of limitations which would be proper for a strict intail under which, in application to real property, the several sons would be intitled to several estates tail, to take place successively, according to their seniority. This is a practice pregnant with mischief. It is to be reprobated in the highest degree. It is replete with error, and leads to the most dangerous consequences. All
 the

the limitations to the *several* sons, except the first, are void ; since the limitations to the second, and other younger sons, are to take effect on a general and indefinite failure of issue of the body of their brother ; and unless there is an elder son there cannot be a younger one, and if there is any son, the whole interest of the term, or the property of the chattel, must vest in him ; and vesting in him, it will go to his representative, even in the event that he dies immediately after his birth. In no event ; is there any possibility of title in the other sons. Subsequent limitations to the daughters, are not the subject of these remarks. The limitations to them come under a different consideration. They have a double aspect, and may take effect, in case there shall be no son : but the birth of a son will exclude even their title. All these observations proceed upon the supposition, that by the several limitations, the parties affect to give several and distinct estates, to take place, each after the other, by way of remainder, without any qualification to determine the estate of the first and other sons, in any other event, than their

Foley v. Bur-
nel, 1 Bro. C.C.
274.

On Contingencies with a double Aspect.

their deaths generally and indefinitely, without issue, or without issue of some particular description or by some particular person. For if there is any qualification to abridge the estate of each successive son, unless he shall live to attain the age of twenty-one; or if no estate can vest in him unless he shall attain that age, then the limitations to the second and other sons, may be good. The ingenuity of skilful conveyancers has provided a form for qualifying these limitations, so as to accommodate the order of succession to leasehold estates to the effect of limitations of real estates, and prevent the absolute property from vesting in any child unless he shall attain the age of twenty-one years. Some declare the trusts in favor of such son as shall first attain twenty-one, and direct that in the mean time, the elder son for the time being shall be entitled to the rents and profits. Others declare the trusts in favor of the sons generally, so that they may have a capacity of taking as soon as they are born; and provide that their estates shall remain, according to the in-
tail,

On Contingencies with a double Aspect.

77

tail, unless they shall attain the age of twenty-one years. Either of these forms provides against the error which has been noticed. Of the two, the latter form seems more eligible.

On the Succession by a Parent to a Child.

IN the second volume of his commentaries, (page 13) the learned *Blackstone* has a passage in these words. "In personal estates the father may succeed to his children; in landed property he can never be their heir, *by any the remotest possibility.*" By this passage, it must be understood that the *father* cannot succeed to his *son* merely in *the character and relation of father*. In any other sense, it is by no means accurate to say the father cannot, "by any the remotest possibility," succeed to the son as his *immediate heir*. The intention of *Blackstone* evidently was to admit, that which certainly is true, that the father though he cannot be heir to the son, merely as his father, yet, eventually, may become *heir* to the *estate*, and, after a descent to any *collateral kinsman*, may succeed as the heir to that person. It also seems

seems to have been his intention to have denied that there was any possible means by which the father could succeed as *immediate heir* to his son, by any the remotest possibility. A contrary doctrine however is clearly established. It has been held that *the father may be immediate heir* not only to the *estate of his son, but to his son, as his second cousin*. In this character, the father, when he is the person in the line of devolution, who would be intitled to be heir, as *cousin* to the son, if he did not sustain the relation of father, is not excluded from intitling himself to the *estate* of his son. In searching for the heir of the son, the father, considered merely as the father, must be passed over as not inheritable; on the other hand he is to be allowed the right of a cousin and collateral kinsman, when he can claim in that right. Thus he is to be considered in a double point of view, first, as a father secondly, as a cousin. Suppose then two cousins to intermarry, and that there is issue of that marriage, a son, who purchases lands and dies. In enquiring for the heir to the son, it is a decisive objection against a claim of the father, that he is the father;

On the Succession by a Parent, &c.

as often as the question is, whether he shall be preferred to the uncle or great uncle of the son, on the part of his father. But let the paternal line fail, and then recourse must be had to the maternal line. In that line the father may succeed as a *cousin* to his son, thus,

A. a bastard has two sons, *B.* and *C.*; *B.* has a son *D.*, *C.* has a daughter *E.*, these two children intermarry and have issue *F.* who purchases lands, and dies without issue. In this case *D.* the father, *B.* the grandfather, and *A.* the great grandfather as the paternal ancestors of *F.* in the direct descending line, are to be excluded from the succession. *C.* therefore, if living, as the paternal great uncle, or *E.* his daughter, as the paternal cousin in right of her representation of *C.* and notwithstanding she is the mother of *F.* may succeed to his estate. But supposing *C.* and *E.* to be dead without issue, then *B.* as the brother of *C.* and, if *B.* is dead, then *D.* his son may succeed; the former as brother, the latter as nephew to *C.*; in other words, as the *cousin and maternal heir of F. the son.* In this case, *F.* is supposed to have been the

the purchaser, and the observations shew that both his father and mother, as his cousins, are in the line of succession to him, and capable of being his heirs in the collateral line of their relationship. From the circumstance that the son is the purchaser, arises the conclusion that the mother stands preferable in the line of succession to the father. The same would be the case if the lands had been purchased by *D.* the father, *B.* the grandfather, or *A.* the great grandfather of *F.* in the paternal line. On the other hand, suppose *E.* the mother, or *C.* her father as the maternal grandfather of *F.* to have been the purchaser, then *B.* the paternal grandfather, and in right of him, *D.* the father of *F.* would be preferred to *C.* and *E.*

The situation of these persons may be represented by a circle, in this form,

G

Paternal

Paternal Line:

A

Maternal Line:

Son of A, also the father of D,
and the grandfather, and also the
paternal great uncle of F.

B

Common Ancestor

The office of A.

Son of A, also the father of E,
and the grandfather, and also the
paternal great uncle of F.

C

The father, and also second cousin
of F, being the fifth cousin of E, the
brother of B.

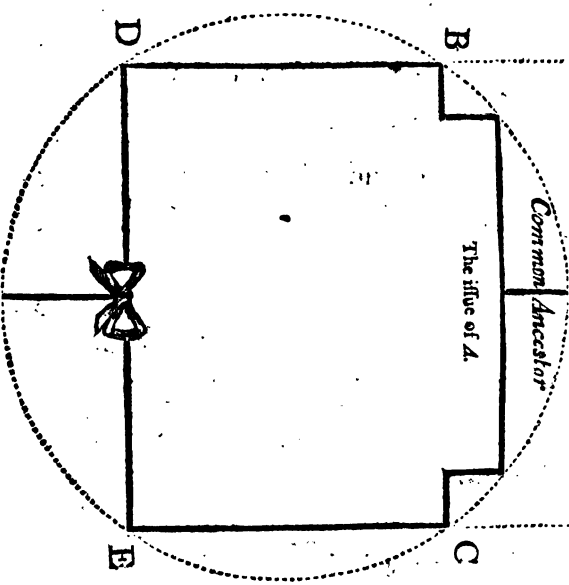
D

The mother, and also the second
cousin of F, being the fifth cousin of
D, the father of B.

E

The purchaser.

F



To find the paternal heir of *F.* the purchaser, the circle must be searched from the left to the right, beginning with *D.* the father, and ending with *E.* the mother, as cousin to her son. By supposing *C.* and *E.* to be dead without issue, there will be a failure of the heirs of *F.* on the part of his father, though his father, or his paternal grandfather is living. Recourse must therefore be had to the *maternal* line. To find the heir in this line, the reverse of the circle must be taken, and then *B.* if living, is the first inheritable person as the brother of *C.* and if *B.* is dead, then *D.* the father of *F.* as his second cousin, will in right of his representation of *B.* be the immediate heir of *F.*

The difficulty, if any, in understanding these positions, will be removed by considering that the father will succeed to the son as his heir in the maternal line. The like observation applies to the mother when she is *inheritable*, for she takes as heir in the *paternal* line.

On the Language of Powers.

IN his valuable and excellent annotations on *Littleton* and on *Lord Coke's Commentary*, Mr. *Butler*, with the accuracy and judgment which so eminently characterise his labours, has made the following observation on the language of powers.

“ As the estates created by powers, and
 “ estates created by conveyances, are, after
 “ their creation, the same, the terms ex-
 “ pressing the operation of appointments
 “ and conveyances, are very often, both
 “ in the deeds creating the powers, and the
 “ deeds by which they are exercised, con-
 “ founded. Something of this may be
 “ observed in the best drawn marriage set-
 “ tlements. Thus, in the power of leasing,
 “ the party is authorised to grant, lease, or
 “ demise, when in fact he can neither grant
 “ lease, nor demise for a longer term than
 “ his own life; the power therefore does
 “ not

“ not authorize him to grant, &c. the land,
“ but to appoint the use of the land, for the
“ number of years or lives in question.
“ The expression therefore should be, *to*
“ *limit or appoint by way* of lease or de-
“ *mise*. So in the power of selling and
“ exchanging, it is often said, that it shall
“ be lawful for the trustees to grant, bar-
“ gain, sell, release, and confirm the lands;
“ but, in the strict sense of those words, it
“ is impossible for the trustees to grant,
“ bargain, sell, release, or confirm; for the
“ trustees have no actual estate, except
“ their estate for preserving contingent re-
“ mainders, and therefore cannot convey
“ the lands for a larger term. The power
“ therefore, operating as an appointment
“ of the whole fee, the expression here,
“ as in the former case, should be *limit and*
“ *appoint*.

Than these observations nothing can be more correct, and it is almost impossible to express the points, either with more perspicuity, or in language more clearly marking the distinction to be established and elucidated. The extensive knowledge,

On the Language of Powers.

and the early and continued pursuits of Mr. *Butler* in the conveyancing line, afforded him the best information on the subject, and the most solid ground for his remarks, and if a different opinion had not been expressed, it would have appeared to me impossible, that a doubt could be entertained on the subject.

An appointment, as applicable to real estate, is a mode of assurance which owes its effect to the doctrine of uses. It is used for the purpose of limiting uses under a power to be exercised through the medium of a feisin, or legal estate in some other person. These powers are generally given by a conveyance taking effect by the rules of the common law; but the deed exercising the power, is not a common law conveyance. The person who exercises the power, does not *grant* or *release* the land. He merely directs the uses to arise under a grant or release. The land is not *conveyed* by him. It passes from the former owner, through the medium of the feisin of the persons who are the feoffees, grantees, or releasees to uses; and therefore
 this

this exercise of the power is a *direction* of the use, and properly called an *appointment*; a term so appropriated to the mode in which the instrument operates, and to the description of the act by which the power is exercised, that it uniformly receives that appellation by all persons, who speak with accuracy, and a full knowledge of its effect; and the manner in which that effect is obtained. It is true, the power may be exercised by any form of words, declaratory of an intention, that the power shall be exercised. It is equally true that powers are frequently penned in terms which seem to authorize the owners of the power to *lease, to release, to grant, or to convey*, and no one ever denied that the law did not accept the intention and give it effect: However these words do not, nor are they intended to operate by way of lease, grant, release, or conveyance. The parties use these words with an intention, that the power shall confer the right of making an appointment, corresponding in effect with a lease, a grant, a release, or other proper conveyance: and this intention is supported by the construction which the law affixes

to the words. But does the instrument by which the power is exercised, operate as a lease, a feoffment, a grant or a release; or does it operate as an appointment of an use in the nature of a lease, a feoffment, a grant, or release? This is the mode of putting the question, and bringing the point fairly to issue; for if it is admitted, as certainly it must be by all who attentively consider the subject, that, properly speaking, the instrument operates as a limitation or appointment of the use, and not as a lease, a feoffment, a grant, or release; and that when the words of the power authorize a lease, a grant, &c. the law denies their operation in that particular mode, and declares that the instrument, exercising the power is not a lease, a grant, &c. but is an appointment by way of lease, of grant, &c. it follows, that a power prescribing the identical mode of operation, which, alone, is consonant with the conclusion of law, is the proper and accurate form. And to point to the distinction on the mode in which the power takes effect, and by which the instrument exercising the same,

same,

same, operates on the legal ownership, is to render an essential service to those who are desirous of forming clear and distinct notions, on the subjects in which they are engaged, and with which it is both their duty and their interest to be acquainted.

That an instrument by which a power is exercised is properly called an appointment, is clear, from the denomination given to the same in all precedents. Every book of forms in conveyancing, of any authority among the profession, classes these instruments under the denomination of *appointments*; and every gentleman of practical knowledge describes these instruments by that appellation, as the only term, by which the mode of their operation and their effect, is to be distinguished. This alone would abundantly prove that these instruments are properly called appointments; that they are denominated from their operation; and that they have this denomination because they do not operate as a lease, a grant, &c. and it also gives some weight in the same scale, that, by skilful conveyancers, the words limit and appoint,

point, or one of them, are always used for the purpose of exercising these powers, notwithstanding the language of the instrument authorises the owner of the power to lease, grant, release, &c. Their practice evinces their opinion, that the words limit and appoint express more accurately than the language of the deed, the mode in which the power is to be exercised, and the means by which it is to be rendered available, operative, and effectual. But the distinct nature of appointments by way or in the nature of a lease, a grant, &c. is best proved by a recurrence to the legal effect of those instruments, and the form in which they are to be placed on a record stating their operation. Upon the maxim of law, that every deed must be pleaded according to its legal effect, it is impossible to say, that an instrument exercising a power, can, strictly speaking, and independent of its connexion with the power, be pleaded as a lease, a grant, a feoffment, or a release. A plea to the effect of the deed, or instrument, so pleaded, would be an answer to the allegation. The instrument, exercising the power of appointment,

ment, ought to be pleaded in a more special manner. The person relying on that instrument could not safely go to issue upon the fact, that the person exercising the power, leased or granted the lands, or made a feoffment to him of the same; nor could he go to issue upon the fact that this instrument was the lease, the release, the grant, or feoffment of the person from whose estate or seisin, or under whose conveyance, the use arose. He ought to set forth the legal conveyance, and the uses, and then plead the appointment; and that by virtue of the appointment, and of the statute made for transferring uses into possession, &c. he became seised or possessed. It will be obvious that, though a power is given to grant, to lease, &c. yet the exercise of the power is an appointment; a limitation of a use; and not a lease, a grant, or conveyance of the land. This distinction was taken in *Mo.* 611. It may be collected from other cases, and has never been over-ruled or questioned. Can it then be seriously contended that powers contained in conveyances to uses, ought not to authorise the persons who have an interest or
ownership

On the Language of Powers.

ownership under these powers, to limit and appoint, instead of giving them power to lease, grant, release, &c.? Can any doubt be entertained that a power to limit and appoint, is equally as effectual as a power to lease, to grant, or release, and less informal? If equally effectual and less informal, is it right to continue the error even of expression; an error which necessarily leads to a confusion of ideas, and will perplex at least, if not mislead, the student. The adage of *Nomina sibi perdas, certe distinctio rerum perditur*, is applicable to this purpose.

AN
INDEX
BY WAY OF
ANALYTICAL DIGEST.

Abejance.

THE fee when in abeyance under the limitations
of a will, descends to the heir till it can vest in
the devisee. - - Page 60

And, when in abeyance, under a declaration of uses
it results to the owner, till it can vest in the
cestui quo use. - - - *ibid.*

Absolute.

An estate by discontinuance is absolute in extent,
though defeasible in title. - - - 30

Abstract.

Form of cross remainders, between 2 - 9
between 3 - 10
between 4 - 15

Acceleration.

I N D E X.

Acceleration.

There is an acceleration of estates and of charges
by merger. - - Page 32. 42. 46.

Action.

The discontinuance of tenant in tail cannot be de-
feated by the issue in tail without action. 29
Remitter supplies its place. - - 44

Alienation.

The right of an heir to take by descent, is always
subject to the alienation of his ancestor. 6
Of the power and means of alienation by tenant in
tail under cross remainders. - - 18. 20
Practical observations on this subject. *ibid.*
Of the power of alienation over contingent and exe-
cutory estates. - - 55
Effect of alienation by tenant in tail, by

Fine,
Fine with proclamations,
Recovery,
Feoffment,
Release,
Grant,
Bargain and Sale,
Confirmation,
Warranty.

} 26 and Seq. Pag.

All vested estates admit of alienation. 55. 61.
Executory and contingent estates are not transferrable
at law by deed. - - 55

Ancestor.

On the succession by parents to children. 78
The

I N D E X.

- The paternal ancestors succeed to their children as
maternal heirs, and the maternal ancestors as
paternal heirs. - - - Page 79. 83.
- The ancestor may defeat the descent to his heir by
alienation. - - - 6

Appointment.

- On the language of powers. - - - 84
- Appointments owe their effect to the doctrine of uses.
86
- The deed exercising the power is not a common law
conveyance. - - - 86
- The exercise of a power, by whatsoever words the
power is given is, in effect, an appointment. 89
- It may be exercised by any form of words. 88
- Mr. *Butler's* observations on the language of powers
stated; his reasoning adopted and enforced. 84

Aspect.

- The nature of contingencies with a double aspect,
explained and elucidated. - 76

Assignae.

- The assignee of an heir is not bound by bond debts
of the ancestor. - - - 36

Assignment.

- Executory estates are assignable in equity. 55
- An *interesse termini* is assignable.

Bargain and Sale.

- A bargain and sale when made by tenant in tail,
passes a determinable fee. - - - 28
- It does not bar the issue. - - - 29

Bastard.

I N D E X.

Bastard.

On the succession by the children and grand-children
of a bastard, when the two grand-children being
the son and daughter of two sons of the bastard,
marry and have issue. - Page 80

Bond Debts.

Bond debts are no specific lien on a purchaser. 36
A tenant in tail may become chargeable with the
bond debts of his ancestor, by suffering his estate
tail to merge in the reversion or remainder de-
scending to him from his ancestor who was the
obligor. - - - 38
To prevent his liability he should suffer a recovery.

ibid

Butler Charles, Esq.

His observations on the language of powers quoted,
and his reasoning enforced and applied to prac-
tice. - - - 84

Certainty.

Of the certainty by which estates are distinguished
into

Vested,	}	59
Contingent,		60
Executed,		61
Executory,		

Charges.

Charges on a remainder, reversion, &c. are barred
by the recovery of tenant in tail, if duly suf-
fered. - - - 38
They

I N D E X.

- They are accelerated by the merger of the time of
an estate tail in the reversion. Page 38
Bond debts, are no lien against a purchaser. 36

Collateral Limitations.

- When collateral limitations are annexed to the estate
of tenant in tail, they may be barred by his recovery. 27
The alienation of tenant in tail by a recovery cannot
be restrained by a collateral limitation. *ib.*

Collateral Things.

- Collateral things may be extinguished. 42

Common Recoveries.

- Tenant in tail, with cross remainders, should suffer a
recovery of the share of which he is tenant in
tail in possession. 23
A recovery by tenant in tail, bars all reversions and
remainders depending on his estate, and all
charges to arise on the determination thereof. 27
It also bars all conditions and collateral limitations
annexed to the same estate. *ib.*
Common recoveries enlarge estates tail into fee-
simple. *ib.*
In their operation they are more extensive than a
fine. 31. 34
Instances in which a recovery is absolutely necessary
to complete the title. 31
Instances in which a recovery is entitled to prefer-
ence, though a fine would answer the purpose.
31. 33. 35
Common recoveries do not enable tenants in tail,
to derogate from their own acts. 27

I N D E X.

They take away the privilege of the statute <i>de donis</i> in favor of the issue, remainder-men, and reversioner. - - -	Page 27. 41
They are a mode of assurance by which tenant in tail may alien in fee simple. - - -	27
They are the only assurance by which tenant in tail can acquire a fee-simple, merely under the ownership of his estate tail. - - -	34
When suffered by the issue after the death of the ancestor, though barred by his fine, the remainder, reversion, &c. will be barred. - - -	32

Common.

The right of common may be extinguished. - - -	42
--	----

Common, Tenants in.

Under a tenancy in common in tail, with reversion in fee, each person, without some particular reason will have the estate tail and the reversion in the same share. - - -	20
--	----

Conditions.

Conditions when annexed to the estate of tenant in tail, may be barred by his recovery. - - -	27
The alienation of tenant in tail by a recovery cannot be restrained by a condition. - - -	<i>ib.</i>

Confirmation.

A confirmation when made by tenant in tail passes a determinable fee. - - -	28
It does not bar the issue. - - -	29

Contingent Estates.

Defined. - - -	57
The	The

I N D E X.

The nature of these estates.	Page 61
The circumstances on account of which estates are contingent, are,	
1. Uncertainty of event.	52. 57. 62
2. Non-existence of person.	52. 62
3. Uncertainty of person.	<i>ib.</i>
4. The possibility that the particular estate may determine before the remainder can vest.	<i>ib.</i>
5. The possibility that a fee previously limited may vest.	64
Executory estates, as executory devises, future and springing uses are contingent, when they are to arise on an event which will not certainly happen.	58
Nature of the event which makes an estate contingent.	59. 63
It must refer to the vesting of the estate and not the certainty of having the possession.	59
When the estate vests it ceases to be contingent.	<i>ib.</i>
Distinction between,	
Contingent estates,	}
Vested estates,	
Executory estates,	
Contingent estates give interests, which are;	49
Descendible;	}
Devisable,	
Assignable in Equity,	
May be bound by estoppel,	
Be released.	
Interests under contingent estates are not transferable at law.	54. 55
	54

I N D E X.

Contingencies with a double Aspect.

Nature of these contingencies.	Page 67
The reason of their denomination.	68
Examples of estates with these contingencies.	69
The practice of limiting terms for years, and personal property, in words proper for the strict settlement of real property without any, qualification is objectionable.	74

Conveyance.

Difference between an assurance by tenant in tail operating by conveyance and by discontinuance of his estate.	28
A lease, release, &c. by tenant in tail are mere modes of conveyance.	<i>ib.</i>

Coparceners.

The right to the possession under cross remainders compared to the order of succession among coparceners.	5
---	---

Covenant.

A covenant to stand seised, by tenant in tail passes a determinable fee.	28
It does not bar the issue.	29

Cross Remainders.

Of remainders which receive this denomination. 1. 2
They may be raised,

1. By deeds at the common law. 1
2. Limitations of an use. *ib.*
3. Limitations by will. *ib.*

In deeds, cross remainders cannot arise without express limitation. *ib.*
In

I N D E X.

In wills, cross remainders may arise by implication.

Page 2

It is not necessary that the first estate of the parties should be a remainder. - *ib.*

Definition of cross remainders as between two persons. - - 3

Between three or more persons. - *ib.*

Resemblance of cross remainders to, and their difference from, the estate of coparceners. - 4

Under cross remainders between two persons, each person has an estate in the part of the other, and there are two estates in each part. *ib.*

Nature of cross remainders between three persons. *ib.*

The estate taken by each person, under the first cross remainder will be subdivided in the next line of remainders, between the other parties. *ib.*

Observations on cross remainders between more than three persons. - - 5

Every remainder in each share, excludes the person who has an estate in that share under any former limitation of the same share. - *ib.*

Of the subdivision of shares under cross remainders. *ib.*

The right of possession under cross remainders is analogous to the order of succession by coparceners to each other. - - *ib.*

Difference between the two rights. - *ib.*

A title to commence by descent is a mere expectancy. - - *ib.*

Under cross remainders, each person has an estate, in every part of the land. - 6

The right to the whole is by different degrees of possession, and a different estate in each part. *ib.*

Cross limitations of remainders operate by distributing

I N D E X.

ting the shares among the takers, and dividing the share among the others. -	Page 6
Under each remainder in each part, there is a reduction of the shares in that part. -	7
Cross remainders as between four persons, do as to each part, become in the first line of remainders, as remainders between three persons, and so on.	<i>ib.</i>
A similar reduction takes place, when more than five persons take cross remainders. -	<i>ib.</i>
Reason of the reduction of shares. -	<i>ib.</i>
An abstract representing the situation of two tenants with cross remainders between them. -	9
Between three persons simply in the first degree. <i>ib.</i>	<i>ib.</i>
Observations on cross remainders superadded on each share. -	10
Effect of these additional remainders. -	11
The number of original shares correspond with the number of persons who take originally. -	12
There is a distribution of the other shares, and a subdivision of them, and the aliquot parts are multiplied. -	<i>ib.</i>
The intirety may become the property of one person under these remainders, and he will take the intirety by different aliquot parts. -	13
Observations on the tables of cross remainders between two, three, and four persons. -	<i>ib.</i>
Each person has an estate in every part of the land and takes the whole by different proportions and for different estates, -	16
Cross remainders are most accurately described by lines, or degrees of possession. -	17
The aliquot parts of each person, in each line are equal to his original share -	<i>ib.</i>
The	The

I N D E X

- The aliquot parts in each line, vary according to the number of persons who take shares in the intirety. - - - Page 17
- In the last line of cros remainders, the limitation, as to each part, is as a limitation between two persons. - - - *ib.*
- The last line only changes the parts between these two persons. - - - *ib.*
- Under cros remainders each person has an estate with different degrees of right to the possession, throughout every part of the lands. - - 18
- In each part he has an estate, either in possession or remainder. - - - *ib.*
- Each remainder will be more immediate or more remote according to the line in which the estate stands. - - - *ib.*
- No person has two estates in any one part of the land. - - - 19
- The fine or conveyance of one person of the intirety, will extend to his estate in each part. *ib.*
- Tenant in tail with cros remainders cannot, without a recovery, make a good title to the estate of which he is seised in possession. - - *ib.*
- A fine, feoffment, or conveyance by tenant in tail with cros remainders will pass a determinable fee. - - - *ib.*
- To exclude the cros remainder, tenant in tail in possession must suffer a recovery. - - *ib.*
- Tenants in tail under cros remainders have several estates in different parts. - - - 20
- Tenants in tail with the reversion in fee, have two estates in the same part. - - - *ib.*
- A fine by all of several persons tenants in tail with

I N D E X.

cross remainders, will pass all the cross remainders.	Page 21
The fine of all of several tenants, in tail with cross remainders, provided they have the reversion in fee without any intervening estate, will complete the title.	<i>ib.</i>
A fine by each of several tenants in tail, with cross remainders, and the immediate reversion in fee will if levied to the same person, complete the title.	22
Otherwise, if each person levies a fine to a distinct person.	<i>ib.</i>
If each of several tenants in tail with cross remainders levies a fine, or suffers a recovery of the share in which he has an estate tail in possession, he does not exclude himself, or his issue, from the other shares.	<i>ib.</i>
A recovery by two or three tenants in tail with cross remainders, and a fine by the other, leaves the title incomplete as to the share of the person who levies the fine.	23
If one of several tenants in tail, with cross remainders, means to convey all his estate in the lands, he should levy a fine of all the parts, and suffer a recovery of the share of which he is tenant in tail in possession.	23
The ownership under his fine, may be defeated by the recovery of the other tenant in tail.	24

Defeasible.

Difference between a defeasible fee, and a determinable fee.	30
Nature of a defeasible estate.	30, 31
	A fee

I N D E X.

A fee may be simple and absolute in its extent though defeasible in title. - - Page	30
Remitter puts an end to a defeasible estate.	45

Definitions.

Of cross remainders generally. -	1
Of cross remainders between, 2 persons.	2
3 persons.	3
4 persons.	6
Of Contingent estates.	
Vested estates.	}
Estates executed.	
Estates executory.	
	47

Determinable.

A grant, release, &c. by a tenant in tail, or a feoff- ment, or fine not creating a discontinuance, passes a determinable fee. - -	29
The determination of an estate depends on the time of its continuance. -	30
The defeasibility of an estate depends on the title, or some collateral quality, of the estate.	<i>ib.</i>

Descent.

As far as relates to the possession, and the propor- tions, there is an analogy between the title un- der cross remainders, and the right of succession among coparceners. - -	5
Difference between them. - -	<i>ib.</i>
A right to be heir on the death of an ancestor, is a mere expectancy. - -	<i>ib.</i>
<i>Black stone's</i> observations denying the right of suc- cession	tion

I N D E X.

sion by a father to his child, considered and examined. - - -	Page 78
A parent though he cannot succeed as parent, may succeed as cousin to his child. - - -	79
Paternal ancestors, taking by descent from their child, succeed as maternal heirs, and <i>vice versa</i> as to the maternal ancestors. - - -	80. 83
A table shewing the mode and order of succession by the ancestor to a child. - - -	82
An explanation of the table. - - -	83
Interests under contingent and executory fees are descendible. - - -	
The fee when in expectancy under the limitations of a will, descends to the heir till it can vest in the devisees. - - -	60
And when in expectancy under a declaration of uses it reverts to the former owner, till it can vest in the <i>cestui que use</i> . - - -	60
When tenant in tail has the reversion in fee by descent he should always suffer a common recovery. - - -	33

Devise and Deviseable.

Contingent and executory estates of inheritance are deviseable. - - -	61
All estates which are descendible are deviseable. <i>ib.</i>	
Executory devises may give an estate neither vested or contingent. - - -	50
Executory devises whether contingent or not, retain the name of executory devises. - - -	51

Discontinuance.

On the discontinuance of an estate tail, a tortious fee, depending on a new title, is acquired. - - -	28
A fine	

I N D E X.

A fine or feoffment, creating a discontinuance, passes a fee-simple, absolute in extent, defeasible in title. - - -	Page 28
A grant, release, &c. do not, of themselves, create a discontinuance. - - -	<i>ib.</i>
An estate discontinued cannot be restored without action or remitter. - - -	22

Entry.

To determine the estate of those who take a fee by the grant, &c. of tenant in tail, the entry of the issue is sufficient. - - -	29
It is not sufficient, but there must be an action, when there is a discontinuance. - - -	39
When an entry is lawful, remitter to a title of entry supplies its place. - - -	43, 44

Equity.

Equity will support a contract respecting an estate in contingency and estates executory. - - -	55
---	----

Estates.

Of estates under cross remainders between	
2 persons. - - -	3
3 persons. - - -	<i>ib.</i>
4 persons. - - -	7
Of estates tail and the operation of fines, feoffments &c. by tenants in tail. - - -	26
Extent of the estates which pass by these different modes of conveyance. - - -	<i>ib.</i>
Of contingent estates,	
Vested estates,	
Executed estates,	
Executory estates, }	47
Of estates depending on a contingency with a double aspect. - - -	76
	Of

INDEX.

Of the discontinuance of estates.	-	Page 28
Effect of merger on estates.	- - -	42

Estoppel.

Executory and contingent estates may be bound by estoppel.	- - - -	55
--	---------	----

Executed.

All vested estates, and those only, are executed.	-	49
And all executed estates are vested.	-	56
All executed estates confer a power of alienation.	-	51
Vested estates may be executory as to the possession.	-	51

Executory.

Executory estates are not vested in interest.	50.	56
They are not necessarily contingent.	50. 52.	58
They may give a fixed interest.	-	52, 53
Distinguished from vested estates.	-	52. 56
And when not contingent, from contingent estates and examples.	- - -	53. 56
Executory estates, not being contingent, are classed by Mr. <i>Fearne</i> among vested estates.	-	47
Reasons for entertaining a different opinion.	-	52
All contingent estates are executory.	-	50
Executory estates are not alienable at common law.	-	55

are descendible,		55
devifable,	}	
assignable in equity,		55
may be released,		
bound by estoppel,		

May give a certain fixed, though not a present right of enjoyment.	-	53
	-	A vested

I N D E X.

A vested estate may be executory as to the possession.	Page 50
That an executory devise may be contingent, the limitation of the estate must be referred to a contingent event.	51
Or be limited to an uncertain person.	<i>ibid.</i>
An executory estate necessarily confers a right of future enjoyment.	52

Expectancy.

The right to be heir on the death of an ancestor is a mere expectancy.	5
On the expectancy of cross remainders on each other.	4
The fee when in expectancy under the limitations in a will descends to the heir, and when in expectancy under a limitation of uses, reverts to the owner till it can vest.	60

Extinguishment.

It applies to collateral things.	42
That the estate is gone is the consequence of the extinguishment of the thing.	<i>ibid.</i>
Extinguishment contrasted with merger and remitter.	<i>ibid.</i>

Fearne, Charles Esq.

His division of estates into vested and contingent, as embracing all the variety of estates, stated and observed on.	47
Reasons for classing estates into executed and executory, as well as vested and contingent.	49

The

I N D E X.

Fees.

- The estates taken under the discontinuance of tenant in tail, are fee-simple defeasible. Page 30
- The estates taken under the conveyance of tenant in tail by grant, &c. are determinable fees. 29
- Of the assurances to be adopted under different circumstances to turn the estate tail into a fee-simple. 31 and Seq. Pa.

Fee-simple.

- The consequence of merger of the time of an estate tail in the fee-simple, is to accelerate the reversion and the charges upon the same. 40
- A fee-simple acquired by the recovery of a tenant in tail will be descendible from the donee of the estate tail as the purchasing ancestor. - *ibid.*
- That the recovery may pass a fee-simple, the donor of the estate tail must have had a fee-simple. 41
- The fee-simple acquired by the common recovery of tenant in tail, is, in fact and in title, the fee-simple of the donor of the estate tail. - 40
- The more remote of two alternate fees, will, without special words to vest the same, be a contingent fee. 64
- An estate may be a fee-simple, though defeasible in title. - - - 30

Feoffment.

- The feoffment of a tenant in tail when it creates a discontinuance gives a defeasible title to the fee-simple. - - - 28
- When it conveys the time of the estate tail, it passes a determinable fee. - - - *ibid.*

Fine.

I N D E X.

Fine.

Tenant in tail with cross remainders, should suffer a recovery of the lands of which he is tenant in tail in possession, and levy a fine of the residue.

Page 23

A fine to bar the issue in tail must be with proclamations. - - - - - 29. 48

A fine will not bar the estate of those in remainder or reversion except by nonclaim. 32. 34

The fine of tenant in tail, when it operates as a conveyance, passes a determinable fee. 30. 34

When it operates as a discontinuance it passes a fee-simple. - - - - - 30

Convenience of levying a fine in vacation, and with expedition, and its operation to bar titles by nonclaim, are advantages peculiar to this mode of assurance. - - - - - 32

Instances in which a fine with proclamations, is the proper assurance by tenant in tail. 32, 33. 39

A fine will not bar any estate interposed between the tail and the reversion or remainder of the same person. - - - - - 31. 38

Circumstances under which a recovery is entitled to preference, though a fine would on the apparent state of the title be equally effectual. 33. 38

Freehold.

That the recovery of tenant in tail in remainder may be a bar, he must have the concurrence of the tenant of the freehold. - - - - - 24. 34

Future Uses.

Future uses necessarily give executory estates. 54
Are

I N D E X.

Are descensible, devisable, assignable in equity, may be released, may be bound by estoppel.	}	Page 53
--	---	---------

Grant.

The grant of tenant in tail passes a determinable fee,
 avoidable by the issue. - - - 28

Heirs.

Cross remainders compared to the succession by co-
 parceners among themselves. - 4
 Difference between them. - - - 5
 The right to succeed as heir on the death of an an-
 cestor is a mere expectancy. - *ibid.*
 A limitation to the heirs as purchasers in the life-
 time of their ancestor, passes a contingent estate. 61
 Maxim, nemo est hæres viventis.

Infant.

An infant can do no act to prejudice himself so as to
 prevent a remitter. - - - 43

Intail.

Of the different effects of a fine, recovery, &c. by a
 tenant in tail. - - - 26

Interesse termini.

An interesse termini gives an executory estate. 50
 This interest is assignable at law. -
 These interests are not necessarily contingent. 51
 They arise by contract for the possession. *ibid.*
 They are of a chattel quality. - - - 52

Intermediate.

I N D E X.

Intermediate.

- An estate between an estate tail and a reversion or remainder in the same person are not barred by his fine. - - - Page 31
- To exclude an estate interposed between an estate tail, and a remainder or reversion in fee in the same person, a common recovery is necessary. 31, 32, 33. 38

Issue.

- Fines with proclamations and the learning on common recoveries have put the issue in tail in the power of their ancestor. - - - 26. 35
- The issue in tail are not barred, unless there is either
1. A fine with proclamations. 29
 2. A common recovery. - - - *ib.*
 3. A warranty, and then in some special cases only. - - - *ib.*
- The issue in tail, not being barred, may defeat the alienation of their ancestor. - - - *ib.*
1. When there is no discontinuance by entry. *ib.*
 2. When there is a discontinuance by action. *ib.*
- A common Recovery by the issue suffered after the death of the ancestor, will bar the remainders and reversion expectant on the estate tail, though the issue were barred by a fine levied by their ancestor. - - - 35

Judgment.

- That a judgment by the ancestor may not bind tenant in tail in respect of a fee descended to him he should suffer a recovery. - - - 36
- I By

I N D E X.

By the merger of the time of an estate tail in the reversion or remainder in fee, all judgments of the reversioner or remainder-men become actual incumbrances on the owner of the estate tail.

Page 36. 38

Leafe.

The instrument exercising a power to lease, is an appointment by way of lease. - 84

The power should authorize the party to limit or appoint by way of demise or lease, &c. *ib.*

Leafe and Release.

A lease and release by tenant in tail, merely convey the time of his estate tail. - - 28

Leafehold Estates.

It is an error in practice to settle them in words proper for a strict settlement of real estates, without any qualification. - - 74

Lien.

A bond charges the heir only, and does not affect a purchaser from the heir (*a*). - 36

To avoid the personal lien of a bond, and the real lien of a judgment, tenant in tail who has the fee by descent chargeable with bond debts and judgments, should suffer a recovery. *ib.*

Judgments are a lien on a purchaser. *ib.*

Limitations.

Of limitations of cross remainders,

(*a*) In a late case the Court of Chancery granted an injunction to restrain a purchaser from paying his purchase money to the *heir*; upon a suggestion that there was little, if any other, fund for payment of debts. *Green v. Loues*, 3 Bro. Ch. Caf. 207.

As

I N D E X.

As between two persons.	Page 3
three persons.	- 4
four persons.	- 7
more than four persons.	<i>ib.</i>
Of terms and personal property in the words proper for making a strict settlement of real property.	74
<i>Merger.</i>	
Its effect.	42
Contrasted with remitter.	42
—— ——— extinguishment.	<i>ib.</i>
An estate tail, discharged of the privileges of the sta- tute <i>de donis</i> , may merge in the reversion or re- mainder in fee.	21. 32. 38
Caution against levying a fine of lands held in tail, when the reversion is incumbered, and by levy- ing the fine, the time of the estate tail will merge.	20, 21. 32. 38, 39
Merger puts an end to a subsisting estate.	46
Notwithstanding the merger of an estate, the thing continues.	42

Maxim.

Nemo est hæres viventis.	
Every deed must be pleaded according to its effect.	90

Nonclaim.

The effect of a fine to create a bar by nonclaim, is, <i>cæteris paribus</i> , a reason for giving it a prefer- ence.	32
The fine of a tenant in tail cannot operate as a bar, to the remainder-men or reversioner except by nonclaim.	33. 38
I 2	To

I N D E X.

To bar the issue in tail or to operate by nonclaim,
the fine must be with proclamations. *Page* 29. 41

Parent.

A parent may be heir to his child as his cousin. 78.

Personal Property.

Limitations of personal property, &c. in the language
of strict settlements of real estate, without any qua-
lification to carry over the property to the second
or other son unless the eldest, &c. attains twenty-
one, are improper. - - - 74

Pleadings.

Every deed must be pleaded according to its legal
effect. - - - 90

An instrument in the form of a lease, &c. and which
is to operate under a power, is, in effect, an ap-
pointment by way of lease, &c. and must be
pleaded accordingly. - - - *ib.*

Powers.

Although powers in a conveyance to uses authorize
the party to lease, &c. the instrument exercising
the power is, in effect, an appointment by way
of lease, &c. - - - 84

The words of the power should authorize the party
to limit or appoint by way of lease, &c. *ib.*

The owner of the power has no estate. 85

Practice.

Practical observations on alienations by tenant in tail
with cross remainders. - - - 18

By tenant in tail in general. - - - 26

On

I N D E X.

On limitations of terms and personal property in the language of strict settlements of real estate. *Page* 74

Proclamations.

A fine to bar the issue in tail must be with proclamations. - - - 29. 41

And unless a fine is proclaimed, it will not operate as a bar by nonclaim. - - - 32

Purchaser.

A bond debt is no lien against a purchaser. 36

His enquiries into the title under tenant in tail, are in some cases shortened by suffering a common recovery. - - - 37

When tenant in tail with reversion in fee by descent, levies a fine, the title to the reversion as well as the estate tail, must be deduced and considered. *ib.*

Judgments are liens on the estate, and will affect the purchaser. - - - 36

Release.

A release by tenant in tail, in enlargement of an estate, passes a determinable fee. - - - 28

Contingent and executory estates may be released. 55

Rent.

A rent may be extinguished. - - - 42

Remainders.

Contingent, See Contingent Estates.

Cross, See Cross Remainders.

A remainder defined. - - - 1

I N D E X.

To bar remainders expectant on an estate tail, or to bar an estate between his own estate tail and his reversion, tenant in tail must suffer a common recovery. - - Page 33· 38

Remitter.

The effect of a remitter is to put the title on the *mere* right. - - - 45
 It concerns the title only. - - - 43
 Contrasted with merger. - - - *ib.*
 ----- extinguishment. - - - *ib.*
 It supplies the place of a lawful entry, when an entry is lawful. - - - 44
 It supplies the place of an action when the right is remediable. - - - *ib.*
 It is a restitution of the *estate* to the *right*. 44, 45
 It puts an end to a defeasible estate. - 45

Resulting Uses.

The fee when limited in contingency will result to the former owner till it can vest. - 60

Reversion.

When tenant in tail has the reversion by descent, he always ought to suffer a recovery. 33· 35
 Also when the reversion in fee is subject to incumbrances, not affecting the estate tail, tenant in tail should suffer a common recovery. 33· 35· 37

Right.

A right remediable may be turned into estate by remitter. - - - 43
 The effect of remitter, is to place the title on the footing of *the mere right*. - - - 45
Seignory.

I N D E X.

Seignory.

A feignory may be extinguished. - Page 42

Seisin.

Discontinuance puts an end to the seisin under the estate tail. - - - 28

The seisin under the old title, after the same has been discontinued, or divested, is revived by remitter. - - - 45

Under executory and contingent estates, there is no seisin. - - - 53- 57

Of vested estates there is always a seisin. 55

Settlement.

To settle long terms and personal property, by words proper for the strict settlement of real estates, without any qualification to prevent the property from vesting absolutely in any tenant in tail, unless, or until he attains 21 years, &c. is improper. - - - 74

Springing, Shifting and Future Uses.

Springing, shifting and future uses necessarily give executory estates. - - - 56

These estates are descendible,
 devisable,
 assignable in equity,
 may be released,
 may be bound by estoppel. } 55

Succession.

The right to succeed as heir, on the death of an ancestor is a mere expectancy. - - - 5

There

I N D E X.

There is some resemblance between the right of possession under cross remainders and the order of succession by coparceners to each other. *Page* 5
 A parent may inherit to a child, as his cousin. 78

Survivor.

An estate limited to the survivor of several persons will be contingent from the uncertainty of the person in whom the description will be fulfilled. 62

Table.

Of cross remainders between	
2 persons,	9
3 persons,	10
4 persons,	15
————— with successive limitations of cross remainders.	<i>ib.</i>
Of the succession by a parent to a child.	78

Tail.

Nature of the estate of tenant in tail with cross remainders.	19
Practical observations concerning fines and recoveries by him.	<i>ib.</i>
The effect of	
1. Recovery.	27
2. Fine.	28
1. Creating a discontinuance,	28, 29
2. Operating as a conveyance,	28
3. With proclamations,	<i>ib.</i>
4. Without proclamations,	29
3. Feoffment,	28
1. Creating discontinuance,	28, 29
2. Operating as a conveyance,	28
4. Bargain	

I N D E X.

4. Bargain and sale, -	Page 28
5. Covenant to stand seized, -	<i>ib.</i>
6. Grant, - -	<i>ib.</i>
7. Lease and Release, -	<i>ib.</i>
8. Confirmation. -	<i>ib.</i>
The consequence of the merger of the time of an estate tail in the reversion or remainder is to accelerate the incumbrances on the reversion or remainder.	
	38
Caution against permitting it. -	
	<i>ib.</i>
Tenant in tail cannot derogate from his own acts by suffering a common recovery. -	
	27
By suffering a recovery, tenant in tail may bar all	
Remainders, -	}
Reversions, -	
Conditions, -	
Collateral charges, -	
annexed to, or depending on his estate.	
	<i>ib.</i>
A recovery is the only means by which tenant in tail can acquire the fee simple, under the ownership of his estate tail. - -	
	34. 38
The power of tenant in tail to alien by recovery cannot be restrained. -	
	27
Tenant in tail may bar his issue by fine with proclamations, or by suffering a common recovery, and in some cases by warranty. -	
	29
Advantages, in particular instances, of levying a fine.	
	31
----- of suffering a	
common recovery. - -	<i>ib.</i>
The recovery of tenant in tail will not give a fee-simple, unless the fee simple was in the donor of the estate tail. - - -	
	41
Tenant of an estate tail by <i>purchase</i> will on suffering a com-	

I N D E X.

a common recovery to his own use, have a fee descendible to his heirs generally, and he will be the purchasing ancestor. - Page 40

Tenant of an estate tail by *descent*, will, on suffering a common recovery to his own use, take an estate in fee descendible to his heirs on the part of the ancestor who was the donee of the estate tail, and that donee will be considered as the purchasing ancestor. - - *ib.*

Terms.

Observations on the practice of limiting terms, &c. in words proper for the strict settlement of real property. - - - 74

Things.

The thing itself is the subject of the doctrine of extinguishment, - - - 43

Title.

An estate acquired by discontinuance gives a new title. - - - 28

Reverter restores the party to his rightful estate and antient title. - - - 44

The nature of the title gives a quality to the estate. 30

Uncertainty.

The uncertainty of a person, as not in being, or not ascertained, is one of the reasons for which a remainder may be contingent. - 62

Limitations, first, to the heirs of a person who is living as purchasers, secondly, to the survivor of several persons, are of this description. *ib.*

The

I N D E X.

- The uncertainty whether an event will happen upon which an estate is to arise, is another reason for which a remainder may be contingent. *Page 57*
- The uncertainty whether the time when, or the event upon which the remainder is to vest, will happen during the continuance of the particular estate, is another reason for which a remainder may be contingent. - - - 62
- The uncertainty whether a fee previously limited will ever vest, is another reason for which an estate may be contingent. - - - 64

Uses.

- Cross remainders may be introduced by limitations of use. - - - 1
- The use of the fee when limited in contingency, will result to the owner till it can vest. 60
- Springing, future and shifting uses give executory estates. - - - 48
- Observations on Mr. *Fearne's* arrangement of future uses when not depending on a contingent event, among vested estates. - - - *ib.*
- Contingent, future and executory uses give interests which are
- | | | |
|---------------------------|---|----|
| descendible, | } | 55 |
| devifable, | | |
| assignable in equity, | | |
| may be released, | | |
| may be bound by estoppel. | | |

Vacation.

- The convenience of levying a fine in vacation, gives it, *cæteris paribus*, a claim to preference. 32
- Vested*

I N D E X.

Vested Estates.

Definition of vested estates.	Page 55
Nature of the same.	49. 55
Vested estates always confer a power of alienation.	55
Distinguished from executory estates, } contingent estates. }	56
May be executory as to the possession.	54
Estates not vested cannot be granted.	51

Warranty.

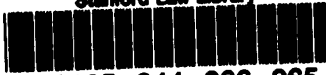
May under particular circumstances be a bar to the issue in tail.	29
---	----

Wills.

Cross remainders may be limited by will.	1
In wills, cross remainders may arise by implication.	2
The fee, when it is limited in contingency by will, &c. will descend to the heir, till it can vest in the devisee.	69
Executory and contingent estates may be disposed of by will.	55
It is wrong to limit personal and chattel real estates in words proper for a strict intail of real estate without any qualification.	74

7
5
4
3
2
1
0
1
2
3
4
5
6
7

DL APW LVw
Tracts on I. The definition an
Stanford Law Library



3 6105 044 266 265

