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IS A GRANT A CONTRACT.

A Review of Fletcher vs. Peck, 6 Cranch, 87.

On January 7, 1795, an Act of the Georgia Legislature became a law by the approval of its governor, which directed a sale of virtually all the land then embraced within the limits of the state, lying between the present western boundary of the state and the river Misissippi. The purchasers were four companies. The area of the land sold exceeded 35,000,000 acres. The price paid was $500,000 in specie or approved currency.[1] The governor's deed in pursuance of the act, was dated January 13, 1795.

A portion of this land was conveyed by the purchasers, August 22, 1795, to James Greenleaf, who, on September 23, 1795, conveyed a part to Prince, who conveyed to Phelps February 27, 1796, who conveyed to John Peck December 8, 1800. Peck on May 14, 1803, conveyed to Robert Fletcher.

Peck's deed to Fletcher contained several covenants, viz: That Georgia at the time of its conveyance, was "seised in fee" of the soil, subject to the extin-

[1]Says Albert J Beveridge, Vol III, Life of Marshall, p. 551, "The greatest real estate deal in history was thus consummated."

guishment of the title of Indians who occupied a portion of the land; that the legislature had good right to make the sale; that the governor who executed the deed, had lawful authority to make it; that all the title of Georgia had been conveyed to John Peck, Fletcher's grantor; and that the title had been in no way constitutionally or legally impaired by virtue of any act of the legislature of Georgia passed subsequently to the conveyance of January 13, 1795.

On February 13, 1796, the legislature of Georgia repealed the act which had authorized the sale, declaring it a "usurped act" and to be "null and void;" and asserting that the land which the conveyance of January 13, 1795, purported to convey, was "the sole property of the state subject only to the right of the United States (with the occupying Indian tribes) to enable the state to purchase, under its pre-emption right, the Indian title to the same." The reason for this attempt to annul the grant was, as Senator Beveridge puts it,[2] that "It came out that every member of the legislature who had voted for the measure, except one, had shares of stock in the purchasing companies."

The action Fletcher vs. Peck was brought upon the above covenants. It was brought, not in a court of the State of Georgia, but in the Circuit Court of the United States for the District of Massachusetts. Whether the conveyance from Peck to Fletcher was a bona fide conveyance, or only a fictitious one, agreed on for the purpose of obtaining the judgment of the Federal courts, is not wholly clear. Beveridge describes it as a "friendly" suit. Referring to the alleged sale by Peck to Fletcher, he says: "On May 14, 1803, he had sold or pretended to sell, to one Robert Fletcher, of Amherst, New Hampshire, 15,000 acres of his holdings

[2]Life of Marshall, Vol III p. 561.

for the sum of $3,000." In an opinion concurring with the result announced by the court, Johnson, J., confessed that he had been "very unwilling to proceed to the decision of the cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties." He justified his entertainment of the case by his "confidence" in the respectable gentlemen who have been engaged for the parties; which had induced him to "abandon my (his) scruples on the belief that they would never consent to impose a mere feigned case upon the court."[4]

The first question raised by the covenants is, Was Georgia seised in fee of the land in 1795? The plaintiff alleged that not Georgia but the United States, had the fee. On this issue a special verdict of the jury was taken; finding a grant of Charles II to the Earl of Clarendon and others, and other facts, from which apparently, the court, not the jury, finds that Georgia was seised. One of these facts is a proclamation in 1763, by George III, the king of Great Britain, in which he declared that all the land between the Alatamaha and St. Mary's should be annexed to Georgia, but reserving under the dominion of the Crown for the use of the Indians all the lands on the western waters, and forbidding a settlement on them, or a purchase of them, from the Indians. The lands conveyed to the plaintiff lie on these "western waters."

Marshall, C. J., thinks this reservation a temporary arrangement, suspending for a time the settlement of the country, but it "is not conceived to amount to an alteration of the boundaries of the colony." He thinks that the commissions given by the king to the

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[3]Life of Marshall, Vol. III, p. 584.

[4]6 Cranch p. 147.

governor of Georgia "entirely remove the doubt," if the terms of the proclamation led to any. The land in question is, the court thinks, "within the state of Georgia."

Nor do the majority of the court think that the nature of the Indian title is "absolutely repugnant to seisin in fee on the part of the state:" The covenant that the state was seised in fee in 1795 was, therefore, not broken. Speaking for the minority, Johnson, J., argues that Georgia never had more than a "pre-emptive right" to purchase the land, which was not a fee simple, but simply a power to purchase a fee, when the Indians should be pleased to sell. If ever more than a "possibility," it was reduced to that state, when Georgia ceded to the United States, by the ratification of the constitution, both the power of pre-emption and of conquest. By such ratification, it retained "only a resulting right, dependent on a purchase or conquest to be made by the United States."

But the constitution says nothing of this kind. It excepts from the representative population of a state, Indians not taxed and two-fifths of the slaves. Among the powers of Congress is that to "regulate commerce with foreign nations, and among the several states and with the Indian tribes." From these clauses, the justice seems to derive a power in the United States to purchase or conquer the land of the Indians within a state.

Georgia having the fee the next question is, did it have the power to convey that fee? No doubt seems to have been agitated on that point.

The next question is, by what organ could the state act in alienating its fee? The validity of the sale depended on the possession by the state's legislature, of the right to make it. Marshall, C. J., thinks that this power is "not to be controverted," unless the state con-

stitution forbade it. The right of the court to hold an act of legislation void which conflicts with the state constitution, is asserted with an expression of reluctance. Whether it is void for repugancy is "at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." But, in a doubtful case, we have since been repeatedly told, the court should not nullify a statute, and the Chief Justice adds "the opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The court finds nothing in the constitution of Georgia inconsistent with the sale of its lands (not of its jurisdiction over them) by the legislature.

The tacit assumption by the court is, that the legislature of a state can pass any law, the power to pass which is not withheld by the constitution.

The next question is, conceding that the legislature has power to sell the state's land, does it pass the title of the state by its conveyance, if its motives in making the conveyance are corrupt?

The second count of the plaintiff's declaration alleges that the original grantees, the four companies, promised divers members of the legislature that, if they voted for the bill, and the bill should pass, they should have a share in the lands purchased from the state; and that these members, thus influenced, voted for the bill.

In dealing with the question whether a corrupt motive, operating in the mind of the legislators, vitiates their act, Marshall, C. J., says that the fact that there is such corruption is "most deeply to be deplored." True! But what is the legal result of the corruption? Ah! That is a question which the courts must approach "with much circumspection." Yes, truly! But what is

the result of the circumspection?" We are not told whether it does or does not affect the validity of the statute. It may "well be doubted," says the Chief Justice, whether the validity of the law depends on the motives of the framers. But, if that is so, the court must hold the law valid, for to doubt its invalidity is no justification for declaring it void.

Suppose the principle admitted, that if an enactment of the legislature were void, if procured by the corruption, then it would be necessary to inquire into the causal force of that corruption. The corruption of two of a majority of 100, would hardly be reason for condemning as void the enactment. To what extent must the corruption be applied, asks the Chief Justice. Must it be direct corruption, or could interest or undue influence of any kind be sufficient? On what number of members must it operate? Would the public opinion need to be consulted, in deciding whether to treat as null, the legislative act? Brushing aside these queries, the writer of the opinion says, that, even "if the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct," but to doubt, is to deny the power of the judges. "If less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned."

But whatever anxiety as to the proper decision of these questions the court might feel, was dissipated when it recalled that it is not the state of Georgia which seeks to annul the sale, nor does it appear by the count that the state is dissatisfied with the sale.[5] "It would

[5]If the court could take judicial notice, it would have known that the new legislature was pledged to the voters of the state, to annul the grant.

be indecent in the extreme, upon a private contract between two individuals to enter into an inquiry respecting the corruption of the sovereign power of a state." But, are the members of the legislature for the time being, the sovereign power of the state? And why the readiness to annul acts of this sovereign power, for supposed explicit prohibitions of legislation in the constitution, if the implicit prohibitions are to receive no support? Surely it was not necessary to say in the constitution that no act shall be passed by the legislature, involving detriment to the state, for the advantage of the individual legislators.

The court thinks that it is indecent to annul an act of the legislature, which has conformed to the "requisite forms of a law" in a suit by A against B. But we are familiar with such annulments, in private suits, for violation of prescribed methods of enactment, or for excess of power with respect to the substance of the law, even when the limitations are not explicitely stated in the constitution.[6] If the court could take judicial notice, it would have known that the new legislature was pledged to the voters of the state, to annul the grant. Implied limitations on legislative power are not unknown, and to say that the legislation must not be due to the corruption of the legislators would not be an abrupt departure from recognized principle.

The Chief Justice, in the course of his opinion, observes "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power." If so, what more rational than to limit the power by the condition that it shall not be corruptly exercised by those who are tenants of it for the time being?

The court might have taken judicial notice of the

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[6]Beveridge, Life of Marshall, p. 562.

almost unanimous declaration[7] of the legislature, at the following session, or the corruption of its predecessor, and regarded its act as evidence of the dissatisfaction of the state, since nearly all the members had been pledged to vote for the repeal.[8]

Much of what was said on the subject of the effect of the corruption of the legislators seems to lack pertinency. The third count alleged the corruption. The plea to the count denied the corruption, but added that the land sold to Fletcher had passed to the predecessors in title, of Peck without any knowledge of such corruption, if such there was. The plaintiff's demurrer to this plea was overruled by the trial court, and properly, says C. J. Marshall.

Who could doubt the propriety of overrruling a demurrer to the defendant's denial of the charge of the plaintiff, that corruption had been used? In sustaining the action of the Circuit Court on this demurrer, nothing is said about the effects, conceding that there had been corruption, of the purchase by Peck's predecessors, and by Peck, in ignorance of the fraud.

The third count alleges the fraud of the legislators; the action of the succeeding legislature in declaring void the act authorizing the grant, and the grant; and the resulting voidness of the title conveyed by Peck to Fletcher. To this count, the plea denies that there was fraud but alleges that, whether there was or not, Peck, and his predecessors were innocent purchasers for value, and not to be affected by the fraud, so that a good title had passed to Fletcher. To this Fletcher demurred. The court sustained the soundness of the plea.

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[7]Beveridge says, "Nearly every man elected to the new legislature was pledged to vote for the undoing of the fraud in any manner that might seem the most effective.

[8]Cooley; Gen. Principles of Constitutional Law, p. 166.

Two principles guide the court to its conclusion. These are (a) the principle that when a legal title to land passes from A to B, although it should be defeasible for fraud, duress, or accident, operating on the grantor, it becomes indefeasible when B conveys for value to C who has no notice of the infirmative circumstances; and (b) the provision in the constitution of the United States, forbidding any state's passing a law which should impair the obligation of a contract.

(a) When fraud is practiced on the grantor a court of equity may be resorted to by him, as against the guilty grantee, but not as against the innocent grantee of this grantee. No bill was filed by the state of Georgia, to annual the conveyance, but the legislature attempted to annul it, by a later act.

But, the legislature was a party to the transaction, and its annulment of the grant "must be considered as a mere act of power." But the decree of a court is an act of power. What is the force of the word "mere?" Does it mean improper, unjust, void?

To the suggestion that, since the legislature is the mere agent of the people, the acts of their unfaithful agent must cease to be obligatory, the answer deemed sufficient is, that the people "can act only by these agents," and hence, if the agents are corrupt others may be chosen, but the later agents can not annul the act of the original agents. The Justice intimates that the later agent, the legislature, should apply to a court to annul the act of the earlier agent. In annulling itself, it was acting in the character of a court of justice; it was performing a duty usually assigned to a court, or it was "exerting a mere act of power." Note again the attempt to stigmatize the act by calling it a "mere" act of power.

The justice intends, apparently, to say, that the

undertaking by one legislature, to set aside the grant of a preceding legislature is of questionable competence; but, were it unquestionably correct, it should and must be guided by the principles which the so-called courts of equity have established for their own guidance, and in particular by the principle that although fraud on the grantor by the grantee will justify the annulment of the grant as to the latter, it will not justify it as to one who has innocently purchased the land granted, from the grantee. "The rights of third persons who are purchasers without notice for a valuable consideration, cannot be disregarded." "A court of chancery, therefore, had a bill been brought to set aside the conveyance, made by James Gunn and others (the original grantees) as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers without notice for a valuable consideration."

The principles of equity were judge-made. The legislature can alter them. It is absurd to assert that any part of the common law or of equity, is superior to the modifying or repealing power of the legislature, one of whose principal functions is to correct the judicial legislation, legal or equitable.

What sanctifies, beyond legislative control, the doctrine that a title which is in B, but defeasible, for a fraud practiced on A, the former owner, shall become indefeasible if B succeeds in conveying the land to C for value, C having no knowledge of the fraud? A thief can not improve his title by selling the thing stolen to another however innocent that other may be. Why should one whose right is destructible, have the

power to make it indestructible by a conveyance? At all events, whether he should or not is a matter of policy, over which the legislature of a state has unquestionable authority. How singular that a justice of the Supreme Court should undertake to impose limits on the state legislature, which neither the state constitution, nor the federal constitution, nor the people of state or United States have prescribed.

A futile refutation of defence of the power of the Georgia legislature, to pass the repealing and annulling act is attempted. The defence was that one legislature may repeal any act which a former legislature was competent to pass. This, concedes the chief justice, is correct "so far as respects general legislation." But, he retorts, "if an act be done under a law a succeeding legislature can not undo it. The past cannot be recalled by the most absolute power." How profound! But, if an act is done under one statute which creates continuous rights in consequence of such act, a future statute which cuts off the continuance of these rights is not an abrogation of or an attempt to abrogate the act done, but simply the consequences for the future. The Georgia legislature did not make the act of the preceding legislature not to have been, nor the grant made in pursuance of it, not to have been. It simply enacted that for the future no legal consequences of their having been should exist.

Were Georgia a single state, the validity of the annulling act "might well be doubted" says the justice. He seems not to have got beyond a doubt, by his reasoning, whether the act was valid or not. Would he, by such a doubt, have felt himself left under a duty to enforce it?

(b) But Georgia became a state of the American Union. What is the bearing of that act? The Consti-

tution of the Union declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Georgia's repealing act of Feb. 13th, 1796, was not a bill of attainder, or an ex post facto law. Did it impair the obligation of a contract?

If effectual, it annulled the grant of the lands; it reassumed for the state, the ownership with which it had parted. The justice conceives that Georgia first made a contract with the four companies, to make a grant, and then made the grant. "The contract between Georgia and the purchasers" he says, "was executed by the grant". But, if so, the contract, and its obligations, ceased to exist. When a man is under an obligation to pay a sum of money, he puts an end to the obligation by paying the money. It is idle to talk of the subsistence of the contract, or of its obligation, after full discharge of it by both parties.

The difficulty of believing a contract or its obligation to exist after its full discharge, was felt by Johnson J. in his opinion. "Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is functus officio the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done."

Chief-Justice Marshall states that a contract is either executory or executed. "A contract executed is one in which the object of contract is performed.." He then surprises us by saying that "a contract executed, as well as one which is executory, contains obligations binding on the parties". But A and B being contracting parties, what obligation remains on either, after he has fully performed? He bound himself to

do thus and thus. He has so done. Then surely the contract is discharged. It no longer exists. It is remembered, the bond or note expressing it may still be in existence, but the contract and its obligation, were, not are.

Marshall, C. J., invents a new contract by the very act of discharging the old. A grant, he says, is an execution of the contract, an extinguishment of the grantor's right, and it "implies a contract not to reassert that right". When A sells a horse to B he makes the horse B's, and he is no longer entitled to do to that horse what he could not do to C's and D's. He has created ownership in B destroying his own, and his duty henceforth is not a contractual one with regard to the horse.. B has no right **in personam** against A, but only the right **in rem** which is precisely the same as to A, as it is as to any other human being. The origination of a contract by implication, not to infringe his vendee's right, is a mere, and an unnecessary fiction.

The justice seems to assume that grants are performances of a contract. They often are. They often are not. A may grant land to B without any contract to do so. In such a case, the grant is not the discharge of a contractual obligation. As, says Pollock, in his Essays on Jurisprudence and Ethics, p. 40, "When a sale (a grant) is complete, the seller is bound to respect for an indefinite time the right of ownership acquired by the buyer, * * but we do not say that the contract of sale is perpetual".

What the Chief-Justice is endeavoring to assert is the inability of a state to authorize a seller of things subsequently to impair the ownership of the vendee, without asserting its inability to authorize in general any man to impair the ownership of another. The original federal constitution does not forbid a state's

impairing, in favor of X, the property rights of Z, but he is attempting to forbid its impairing in favor of X, when a vendor, the property rights of Z, the vendee.. He observes that "it would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected". But, is it not as strange that the property rights of a vendee should be protected against a vendor, and the property rights of others not protected at all?

But, let us consider for a moment the obligation of the contract. The contract was, with the grant in pursuance of it, with the four companies. But, was the state obliged by it, if fraud, duress, or mistakes affected it? The obligation was conditioned on the absence of these facts. There being fraud, there was no obligation to recognize the title of the grantee as sound. The refusal to recognize its soundness was therefore no denial of, no impairment of an obligation.

Could the act of the grantee impart qualities to the contract which were not given to it by the grantor? Are we to say that the state was bound by the judge-made principle that a fraudulent grantee may make indefeasible his title by a conveyance? The grantor, shall we say, contracts with the grantee to respect as inviolable the title he is conveying, if there is no fraud, and to respect it as inviolable, even if there is fraud, provided that the grantee has assigned the subject of the grant to an innocent buyer? Apparently we must allow the court to invent such a contract, in order to subject it to the operation of the principle of the sanctity of the obligation of contracts.

Having convinced himself that grants are comprehended in the word contracts, in the constitution, the Chief-Justice advances to the consideration of the question whether the obligation of grants made by the state

itself, as well as of grants made by others, is protected.

Bills of attainder are forbidden to the legislatures of the states, as are ex post factor laws. If the state cannot seize the property of individuals in this mode, why should it be permitted to do so, in violation of its contracts?

The unanimous opinion of the court was declared that the land sold by Peck to Fletcher, having been obtained from the four original grantees for a valuable consideration without notice of the fraud practiced on the state, Georgia "was restrained either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

Thus Georgia is stripped of a power, not certainly by the constitution of the United States, but either by it or by "principles which are common to our free institutions", a grandiose phrase which means simply the one principle that an estate in a vendee, defeasible by the vendor for fraud practiced on him, becomes indefeasible by the conveyance of it for value, to a bona fide purchaser, a principle common not to "our free institutions", but to the courts of equity in the various states.

Other constitutional authorities are unwilling to concede the right of the courts to annul statutes, because they supposedly violate "principles." Cooley observes, when dealing with this subject, "nor can a court declare a statute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates rights and privileges of the citi-

zen ,unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed by the Constitution,"[8] nor because the statute "violates one or more of the fundamental principles of republican liberty."[9] In 1853, Chief Justice Black declared[10] "I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments based on general principles outside of the constitution must be addressed to the people and not to us". Not so modest was C. J. Marshall, who, not content with the restrictions upon state legislation created by the federal constitution, undertakes to make general "principles" invented by the English and American judges, of equal power to restrain legislation, thus arrogating to himself the authority of the convention of 1787 and of the various ratifying conventions of 1788 and 1789.[11]

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[9]Id. p. 168.

[10]Sharpless vs. Philadelphia; 21 Pa. 147.

[11]From the American Law Review for September-October, 1920, by William Trickett.

MOOT COURT

F. & M. BANK vs. SEAFORD.

Negotiable Instrument—Consideration—Bona Fide Purchaser—Agency—Banks and Banking.

STATEMENT OF FACTS.

Seaford executed a note for $1,000 to Jenkins or order. The consideration was ten horses which were to be delivered within twenty days. The note was payable ten days after date. Jenkins on the fifth day had the note discounted by the plaintiff of which he was the president. The Bank was a purchaser for value bona fide unless the knowledge of the failure of consideration on the part of Jenkins could be imputed to it.

Caldwell for Plaintiff.

Chylak for Defendant.

OPINION OF THE COURT.

Beaver, J.—The one important and controlling question in the case presented is, whether or not the bank could be presumed to possess the notice of the failure of consideration for the note in question, and whether or not the knowledge of its president can be imputed to it.

The general rule of imputation of knowledge of officers is: A bank is charged with the knowledge acquired by its cashier, president, or other officers pertaining to transactions within the scope of the bank's business, altho such knowledge be acquired in another transaction than to which it relates. However we must go farther in the present case, and apply this rule: When an officer is individually interested in a note or other matter, the better opinion is that his knowledge is not to be imputed to his bank, since his interest is best served by concealing it. 5 Cyc. 460-461.

The rule that knowledge or notice on the part of the agent is to be treated as notice to the principal is founded on the duty of the agent to communicate all material information to his principal, and the presumption is that he has done so. But legal presumptions ought to be legal inferences from the natural and usual conduct of men under the circumstances. But no agent who is acting in his own antagonistic interest, or who is about to commit a fraud by which his principal will be affected, does in

fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature, and no agent who is acting in his own antagonistic interest or has committed a fraud by which his principal is affected, can be presumed to have disclosed such fraud. United Security Co. vs. Bank, 181 Pa. 600. It is laid down without qualification that an exception to the general rule that notice to the agent is notice to the principal "arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal." I Amer. & Eng. Ency. of Law 2nd ed. 1145. The act of Jenkins is that of an independent fraud committed by an agent beyond the scope of his employment, and bears analogy to a tort wilfully committed by a servant for his own purpose, and not as a means of performing the business entrusted to him by his master. Gunster vs. Scranton 181 Pa. 338.

Where an officer of a corporation who is also a share-holder has embezzled the funds of the company, whereby the company has a lien upon his stock, the knowledge of the officer of the fact that some of his shares had been pledged is not constructive notice of that fact to the corporation. Sproul vs. Standard Glass Co., 201 Pa. 110.

In the recent case of First National Bank vs. Fideliy Trust Co. 251 Pa. 530 Mestrazat, J., held that where, in an action of assumpsit on two promisory notes, the defence was, that the knowledge of the president of the bank as to the intended use of the funds was imputable to the bank, and would be a bar to its recovery, the knowledge of the president was not imputable to the bank even though the president of the bank was a member of the firm and presented the notes in suit for discount.

The defendants cite Bank vs. Cushman 121 Mass. 490, to sustain the proposition that notice to an officer of a corporation as to a matter in his department is notice to the bank. But in that case, the director acted in conjunction with the cashier of the bank, and each had knowledge of the fraud. The director did not act under a veil of secrecy; neither did the cashier; they acted together, and working as they did, in conjunction with each other, I feel that no injury was sustained in holding that as a finding of fact, the jury was justified in inferring that the knowledge of the director and the cashier can be reasonably imputed to the bank and their knowledge, the knowledge of the bank.

Counsel for the defendant calls to our attention, section 28 of the Act of May 16, 1901, P .L., 194, which is "Absence or fail-

ure of consideration is a matter of defence as against any person not a holder in due course, and partial failure of consideration is a defence pro tanto whether the failure is an ascertained and liquidated amount or otherwise." The view we take of the knowledge of the failure of consideration by Jenkins, being imputed to the bank, renders unnecessary an examination of the question of want of consideration; the bank was a bona fide purchaser for value; it was a holder in due course, and the defendants' defence is not good against the bank as it would be against the original holder, Jenkins.

After careful consideration, and a thorough examination of the authorities, we are of the opinion that if Jenkins alone had acted in discounting the note, and in placing the proceeds to his own credit, the bank would be bound by his knowledge of the circumstances under which he had obtained it from the defendants. Atlantis Cotton Mills vs. Indian Orchard Mills, 147 Mass. 68. First National Bank of Grafton vs. Charles Babbidge, 160 Mass. 563. But he did not act alone. The cashier of the bank was the officer who actually did these things. Jenkins in this transaction was not the representative of the bank. He was obtaining from the bank the discount of a note for his own benefit, and thereupon on the face of the transaction he was on one side of the bargain and the bank on the other. The cashier was the sole representative of the bank, at any rate there is no suggestion that he was in collusion with Jenkins, or that he had any reason to doubt that what he did was for the interest of the bank. If the bank might have repudiated his agency, it did not do so; and even though he may have gone beyond his authority, he was a financial officer and agent of the bank ,and was acting for it and nobody else, and his agency has not been disavowed and under these circumstances, Jenkin's knowledge is not to be imputed to the bank, and the bank is therefor entitled to recover on the note.

OPINION OF SUPERIOR COURT

The defence to the note is the failure of consideration. But, the plaintiff, the endorsee, is a bona fide purchaser of it unless the knowledge of its president is imputable to it.

He caused, for his own benefit, the bank to discount the note. It is well settled that what he knew in such a case concerning the failure of consideration cannot be attributed to the bank. A bank officer who offers to his bank a note for discount is to be regarded in that transaction as a stranger, and the bank is not chargeable with the officer's knowledge of fraud or want of con-

sideration for the note. Dominion Trust Company vs. Hildner; 243 Pa. 253.

To what the learned court below has so well said, it is unnecessary to add anything. The judgment is

AFFIRMED.

ROPER vc. SYLVAN

Easements—The Right of Lateral Suport to Enjoy the Easement A Bill in Equity to Compel the Defendant to Supply the Support.

STATEMENT OF FACTS.

Sylval by deed granted to Roper who owned land adjoined to his own, a right of way 10 feet in width in order that Roper might reach the rear of his lot with wagons. After Roper had used the way for five years Sylval began excavating coal from his tract and continued the process under the way. Although the surface did not cave in, Roper justly fearful that the road would do so if the weight of a loaded wagon came down over it, filed this bill to compel Sylval to supply support that would make the way safe to use.

F. W. Davis for plaintiff.

Delestranto for defendant.

Coover, J.—The main question in this case and upon which the outcome depends is whether the grant of the right of way by Sylvan by deed was a license or an easement. Upon the given facts there is no question in our mind as to which of the above two exists.

By the admitted facts of the case Sylval granted the right of way to Roper by deed. Roper was justly fearful that by the act of the defendant, Sylval, his rights would be cut off or disturbed to such extent that the grant by Sylval would be of no avail.

The injury threatened is of a character that would prevent a recovery in damages. By an adequate remedy such recovery would not give the plaintiff the use of the road for which he is contending. As bearing upon the same subject we cite 133 Pa. 189-178 Pa. 543 and 186 Pa. 443. The defense contends that the grant from Sylval to Roper was a license only. The plaintiff insists that the instrument conveyed to him was an easement.

An easement is a liberty, privilege or an advantage in land without profit existing distinctly from the ownership of the land and because it is a premanent interest in the land of another with the right to enter at all times and enjoy it, it must be founded

upon a grant by writing or upon a prescription which presupposes a grant. A license is authority to do a particular act or a series of acts upon land of another without possessing any estate, and in a license, is founded personal confidnece. It is not assignable and requires no writing. It is not within the Statue Frauds; it is ordinarily recoverable at will and determined by the conveyance of the land by the party giving the license, while the grant of an easement is within the Statute of Frauds, and it must be in writing, 19 CJH 70.

According to the facts, a deed passed between the parties.. If Sylval had mean to grant a license to Roper why then should a deed have been granted, accompanied by all the solemnity possible to surround an instrument of this nature? While there are no facts to prove that there was a pecuniary consideration, yet one should reasonably presume that such was the case, because of the passing of the deed. In other words why should any person go to the expense and trouble of drawing up a deed, having it acknowledged and recorded and giving constructive notice to all the world of the transaction, unless it was prompted by consideration.

An easement, defined, is the right which one person has to use the right of another for a specific purpose 9 RCL 735. It is not a tenancy but a privilege in the lands of another. Because it is an interest in the land of aother it must be founded upon a grant in writing or by a prescription, which presupposes a grant. 14 cyc 1144.

In Gumbert & Huey vs. Watson Kilgore, 4 Sadler 84, it is stated: Where the surface is owned by one person and the coal underneath by another, the owner of the surface has a right to actual support for his soil, and the owner of the coal has a right to take out the coal in any way he pleases, so that he supports the surface in its ancient condition.

Under the powers and rights to him by the easement, Roper stands in the light of the owner of the soil He is the dominant owner and has a right of action against any one who interferes with his right. But it is contended that no actual harm has been done, no one as yet has suffered any material damage but the plaintiff is only justly fearful of something which may happen in the future. Is being justly fearful, sufficient grounds for an action of this nature? Should it not be taken to a court of law and there decided as to whether or not a right of action accrues? In the majority of cases there must be a prior adjudication at law, but a court of equity will restrain a threatened interference with the

exercise of a right without a prior adjudication where the right is clear and there is no serious dispute as to any of the material facts. It is not enough for the defendant to deny the plaintiff's right; his denial must be based upon facts which show a substantial dispute. Piro vs. Shipley, Appellant, 211 Pa. 36.

Has a substantial dispute been shown? We think not.. The defendant does not deny the plaintiff's right to use the road. In fact Roper had used it for five years. His rights have never been interfered with. He has enjoyed, we can safely presume, all the rights of ownership. Nothing in the admitted facts show that he has been restrained from doing anything inconsistent with an owner's rights.

Finally, if the instrument which passed between Sylvan and Romper was a license only—we are at a loss to understand why the license was not revoked when Roper began this action. That a license is revokable at will there is little dispute.. Had the agreement been a license only, Sylvan could have revoked it immediately upon hearing that Romper intended bringing this action; and Roper would have been barred for, he would have no grounds for a complaint.

Therefore in view of all the surrounding facts we enter judgment in favor of the plaintiff.

OPINION OF SUPREME COURT.

Roper required a right of way over the strip of land 10 feet in width. He did not become the owner of any of the constituents of the soil. They continued as before to be the property of Sylvan.

But, Sylvan lost the right to do on the 10 feet strip what could interfere with the use of it as a way by Roper. He could not build on it, nor excavate it so as to make the passage along it impossible or difficult.

It is alleged that he is excavating the coal below the surface, and that, as a result the adding of the weight of a loaded wagon to the surface, would probably cause a cave in.

There is no dispute as to the probability of this cave in, nor of the legitimacy of the apprehension that it would be realized were the right of passage by Roper to be executed. He is virtually debarred from the use of the way.

This is a result that denies Roper's right, and he is entitled to a remedy. He is not to be compelled to drive his wagon on the insecure road, and take the risk of its breaking thru. While conceivably he would be entitled to damages, for the past deprivation of the use of the way, arising from its unsafe state, this, we think

is not his only remedy. He has a right to the restoration of the safety of the road and it is proper to enjoin the defendant to supply the necessary support for the surface so that its utilization by Roper may be again possible. Library Co vs. Trust Co., 235 Pa. 5..

The decree of the learned court below must thus be affirmed, and the appeal.

DISMISSED.

CORRY'S ESTATE.

Will—Probate and Contest—Undue Influence—Delusion—Right of Testator to Prejudices.

STATEMENT OF FACTS.

John Corry had two sons. William married a woman whom John disliked very much, but without reason. Incensed at this act he threatened to disinherit William, and a few days after the marriage, he made a will, giving all his estate except $57 to his son John. The probate of this will was excepted to by William as produced by an unreasonable and baseless prejudice, akin to a delusion.

Crunkleton for the Plaintiff.

Daugherty for the Defendant.

OPINION OF THE COURT.

BLOOM, H J.—The question in this case is, was this will, executed by John Corry, Sr., produced by an unreasonable and baseless prejudice, akin to a delusion? Vital to the solution of this question is the determination as to whether or not the marriage of a son to a woman whom the father dislikes very much is such an unreasonable and baseless prejudice, akin to a delusion, which is sufficient to sustain an objection to the probate of a father's will by which a son is disinherited.

We are of the opinion that the marriage of a son to a woman whom a father dislikes very much is not an unreasonable and baseless prejudice akin to an insane delusion sufficient to sustain an objection to the probate of the father's will.

We have reached this conclusion through the application of the facts of the case to several definitions as to what will amount to a delusion sufficient to overthrow a will. An insane delusion is a belief which has no basis in reason and cannot be dispelled by argument. A mistaken belief as to a matter of fact or illogical conclusion therefrom is not necessarily an insane

delusion, neither is any belief or prejudice however mistaken which has some basis for it. Even mistaken immaterial prejudice may not be an insane delusion, all persons being subject to likes and dislikes, and to prove it was an insane delusion it must appear that there was no basis for it and that attempts were made by reason to dispel it." 40 Cyc 1014-1015. This definition says that an insane delusion is "a belief which has no basis in reason and cannot be dispelled by argument." Now the facts of the case state that John Corry, Sr., 'disliked' William's wife very much, but "without reason." The word 'belief' in the definition is a very much stronger and a more meaningful word than 'dislike found in the case. 'Belief' implies an existence of facts or reason upon which the opinion is based and we believe when we are willing to act upon the existence of such facts or reasons. Now a person who would be willing to act upon a set of facts or reasons, which plainly are the product of a fertile imagination or an abnormally deficient imagination, but which to a normal and average reasonable man would seem to be an obsession might be said to be suffering from a delusion. 'Dislike' on the other hand might be the result of an actual state of facts or an imagined state of facts in the same reasonable man, so it cannot follow that because a person likes or dislikes, with or without reason, that the subject is the victim of a delusion, for who shall judge the sufficiency or insufficiency of the reason if there be one, or the motives for the lack of a reason if there be no reason upon which to predicate the like or dislike. Certainly not a judge or jury or possible county receivers. The only one to judge would be the testator. Alexander's Estate 206 Pa. 58.

Making further introspection of the portion of the definition, "even mistaken unnatural prejudice may not be an insane delusion, all persons being subject to likes and dislikes, and to prove it was an insane delusion, it must appear that there was no basis for it and that attempts were made by reasoning to dispel it." Herein it is admitted that persons may have likes and dislikes without being the victim of an insane delusion. In the case at hand the contestant cannot prove that there was no basis for the prejudice because the testator and not he, was the judge of the sufficiency of the basis. To the father the marriage of a son against his will probably was a reason for disinheriting his son and if so he was the sole judge. The facts do not site a single instance of an attempt made by William Corry to dispel the father's dislike by reasoning. Rather, we do find

that William exhibits a most hateful contempt for the father's judgment, because without any effort to dispel the father's prejudice he married the object of his father's dislike.

It is said in Annotated Cases, 1916 C, at page 30,—"An insane delusion is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact. It is distinguishable from a belief which is founded upon a prejudice or aversion, no matter how unreasonable or unfounded the prejudice or aversion may be and if it is the product of a reasoning mind, no matter how slight the evidence on which it is founded, it cannot be classed as an insane delusion" Here we have the spontaneous product of a diseased or perverted mind, sufficient to be set aside as a will opposed to the product of a reasoning mind, insufficient to be set aside as a will. Certainly our case falls within the latter class. The fact that the father made the will but two days after the marriage is to us no evidence of a delusion, because, for anything we know he may have been acquainted with the woman from the time of her infancy and entertained a dislike for her for a similar period.

That the will in this case is most natural we most affirmatively hold, for it is in entire accord with what the testator from his known views, feelings and intentions might have been expectted to make under the facts of the case. Morgan's Estate 219, Pa. 357.

As an illutration most pertinent to the case in hand we cite the case, "In re Spencer," 31 Pacifiic Reporter 453, wherein a testatrix disinherited her grandson, because as claimed by the grandson of the existence of an insane delusion, caused by a dislike of the testatrix for her daughter-in-law and the daughter-in-law's family. The court held it was not an insane delusion but that, "It was simply such a feeling arising out of the recondite principles of attraction and repulsion as is most common among people of undoubted sanity."

Upon the whole, we are of the opinion that the marriage of a son to a woman whom a father dislikes very much is not an unreasonable and baseless prejudice akin to a delusion; further, that the will of John Corry ,Sr., was not the product of a spontaneous belief arising out of a diseased or perverted mind, but that, it was the result of a deep, inner, dislike of the heart, strengthened in conscience by a reasoning and perfectly functioning mind; —that the prejudice of John Corry, Sr., was merely a part of his personal liberty and that therefore the issue must be denied the petitioner.

OPINION OF THE SUPREME COURT.

One of the two sons of John Corry had announced his purpose to his father to marry a certain woman. This woman was much disliked, "but without reason," it is said. Does reason mean cause? Hardly, for all emotions lake all other phenomena must have causes. Does "reason" mean such cause as is not generally believed to properly follow the anticipation of the marriage, or such effect as should not follow the emotion awakened by the foreknowldge of the marriage.

John "disliked very much" the woman. William did not dislike her. Perhaps few acquainted with her disliked her. But does the non action of Corry's mind ,as do the minds of others, deprive him of the ordinary testamentary power? Concede that the dislike was such as few would have felt But, few were about to have the woman made their daughter-in-law despite their known opposition. It is quite imaginable that in the dispute over so delicate a subject, the son said and did things which tended not to allay the father's resentment but to exacerbate it. How can we say that the emotion is to be penalized by denying to the testator the usual power of testation? One has a right to his own prejudices. Jones' Estate, 235 Pa. 1—Cauffman v. Long, 82 Pa. 72,—Morgan's Estate, 219 Pa. 355,—even the prejudice flowing from a marriage of a daughter with a disliked man. Jones' Estate, supra.

A man has a right to give all his estate to charities so called, even at the cost of all his children. He can give all to one or some of the children and nothing to the other or others. Nor need his act be explained nor need it be shown in order to execute the testamentary purpose, what the motives were nor make them seem reasonable to people, judges or jurors, who think that men are not reasonable in being not quite as they themselves are.

It is evident that the only facts to show that the will should not be upheld are the purposed marriage the father's announced dislike of the marriage with the woman, and of the woman herself. Human beings are of very different types. Some who are much liked by a class, some as strongely disliked by another class of equally good and competent persons. And though the dislike of a woman in a father's mind apart from the introduction of this woman into his family might be very tepid or scarcely a dislike at all it might become pronounced against her and the son if he persisted in the prosecution of his purpose.

That the will was provoked by an unreasonable and baseless prejudice akin to a delusion is not legally evidenced, but is a mere inference by those who do not like the act of the testator To dislike the woman cannot be found to be unreasonable, except by Wlliam. The testator may have had cause enough and, disclosed to his family, cause enough for his dislike .To affirm the equivalence of the prejudice with a delusion is the result of the lame psychology of the caveators. That any fact was believed to exist by John Corry, which he had no evidential cause of believing, which only a lunatic would have believed, it would be gratuitous for any one to affirm.

We affirm the act of the learned Orphan's Court in admitting the will to probate.

APPEAL DISMISSED.

BROMWELL vs. COLERIDGE.

Mortgage—Scire Facias Sur Mortgage—Conveyance of Land Subject to Mortgage—Failure to Record Deed—Failure to File Affidavit of Ownership—Act April 20, 1905, P. L. 239—Notice to Terra Tenant.

STATEMENT OF FACTS.

A, owning land, put a mortgage for $1,000 on it, payable to B. Subsequently A conveyed the land to Coleridge who did not put his deed on record. B dying, his executor entered scire facias on the mortgage naming A as mortgagor and not serving any true tenant although he knew of Coleridge's interest. On the judgment obtained the land was sold and Bromwell became the purchaser. This is a petition by him ,as such purchaser to obtain possession under the Act of April 20th, 1905, P. L. 239.. The defense was that the defendant had not been made a defendant to the scire facias

Morehead for plaintiff.

Perry for defendant

OPINION OF THE SUPERIOR COURT.

Mashank, J.—The case at bar presents the question, "Must a terra tenant be made a party to the action of scire facias, and is the failure to name him as a party, fatal to the cause of the plaintiff in the case?"

A terra tenant is one other than the debtor who becomes seized or possessed of the debtor's lands subject to the lien thereof. The defendant in this case, is the terra tenant.

According to the Act of 1901, as amended by the Act of 1903,

the plaintiff in any writ of scire facias sur mortgage shall file with his praecipe and affidavit setting forth to the best of his knowledge ,information and belief, who are the real owners of the land charged, and all such persons shall be made a party to the writ. The mortgages in this case, although knowing of the interest of the defendant has failed to file this affidavit as directed by the act. The act however, does not specify any penalty for the failure to file such affidavit. It does not contain any clause, that would render any judgment which is given in such action, void.. It prescribes no remedy for the party who is not in fault. It was held by this court in the case of Galton vs. Donnon, 44 Superior 280, that no omission to file an affidavit of ownership with a praecipe for a scire facias sur mortgage as provided by Act of 1903, P. L. 261, does not render a judgment entered in the case, invalid as against the land. The effect of the omission is, that the liens may make any available defense against the purchaser of the land at the sheriff's sale, that they might have set up on the trial of the scire facias in case they had been made parties to that proceeding in manner as prescribed by the act.

Now we arrive at the question, "Would Coleridge have any defense at the trial of the scire facias? A person who takes title to real estate subject to a mortgage cannot, after he has allowed the interest on the mortgage to remain unpaid longer than the time limit provided by the mortgage, be allowed to complain that the judgment on the land accompanying the mortgage was entered up and the property sold without notice to himself. 186 Pa. 589.

Bromwell had no notice of the ownership of Coleridge of the land Coleridge did not place his deed on record. How was Bromwell to know or have notice that Coleridge was the owner? A purchaser of land is not affected with notice of anything which does not lie within the course of his title, or is connected with it. 7 Watts 382. A purchaser at a sheriff's sale is meant in the above case. If the purchaser of land does not record his deed, or takes possession but leaves the vendor in undisturbed possession of the land, so that the plaintiff has no knowledge of the conveyance, actual or constructive, he does not become a terra tenant of the land and has no interest therein. As between himself and his vendor he may have a good title, but as to the lien creditor he has none. 170 Pa., 611. A purchaser at a sheriff's sale on a judgment is protected as against the unrecorded title of an equitable owner. 144 Pa. 312.

We have discussed the questions presented in the case at bar,

and now since the Act of 1903 specifies that the failure to file an affidavit of ownership as directed by the act does not of necessity, in our judgment, abate the action and since the defendans have no available defense as is permitted by the Act of 1903, in case of omission to file an affidavit of ownership, we give judgment in favor of the plaintiff.

OPINION OF SUPREME COURT.

It is unnecessary to add anything to the clear and satisfactory opinion of the learned court below. Lyle vs. Armstrong, 235 Pa. 227; Gelston vs. Donnon, 44 Pa. Superior Ct. 280

AFFIRMED.

HENRY GILFILLEN vs. JACOB THOMPSON.

Contingent Remainder—Wills—Contingent Remainders May be Devised—Action of Ejectment for the Recovery of a Farm.

STATEMENT OF FACTS.

John Gilfillen devised his farm to his son William for life, at his death, to his children in fee, if any children survived him; if not, then to the testator's heirs. He had two sons, William and Henry. William devised the farm to Jacob Thompson, a friend, and died without issue. In this ejectment Henry seeks to recover the land. Jacob Thompson claims an undivided half of it.

Lehmayer for plaintiff.

Marcus for defendant

Kelchner, J.—We must ascertain from the face of the will itself, what was the intention of the testator. And after having discovered this it will be our duty in construing the devise in question, to carry it into effect, so far as it shall be found consistent with the rules and policy of the law to do so.

The testator devised his farm to his son William for life, at his death to his children in fee, if any children survived him: if not, then to the testator's heirs. He had two sons, William and Henry. William devised the farm to Jacob Thompson, a friend, and died without issue. In this ejectment Henry seeks to recover the land. Jacob Thompson claims an undivided half of it. The question presented is, what estate did William take under the will of his father?

The plaintiff rightly contends that the rule in Shelley's Case does not apply to the above facts. The general rule is that under a devise to A for life, with a remainder to his or her children, the first taker has no freehold of inheritance. Primarily and

generally the word "children", in a will is a word of purchase, and while it may be used to satisfy "heirs" or "heirs of the body", it will not be so construed unless the testator has employed other words indicative of an intention to use it as a word of limitation.. Wilde's Case, 6 Coke 277; Ellet v. Paxson, 2 W & S. 436; Haldeman v. Haldeman, 4 Wright 29; Smith's Estate, 9 Phila. 348; Guthrie's Appeal, 37 Pa. 12; Hoover v. Strauss, 215 Pa. 130; Kiem's Appeal, 125 Pa. 487; Chambers v. Union Trust Co, 235 Pa. 610.

Thus we ascertain that the rule in Shelley's Case does not apply to the above state of facts; thereby to vest a fee simple estate in the son, William.

We look to the will and find that a life estate was given to William, and at his death the remainder in fee was given to William's children. The remainder in fee is contingent, upon the birth of a child or children. Further it is given at the death of the life tenant, if any children survive him.

A remainder is contingent if those who are to take in remainder are not in existence, or are uncertain, or where the vesting in right as distinguished from taking affect in possession is dependent upon some uncertain event or contingency.. McCay v. Clayton, 119 Pa. 133; Keller v. Lee's, 176 Pa 402; Manderson v.. Lukens, 23 Pa. 31; Safe Deposit & Trust Co. v. Wood, 201 Pa. 427; Neel's Estate, 252 Pa. 405..

The testator further provides, if any children survive the life tenant; if not, then to the testator's heirs.. This is not a fee limited on a fee for, that would not be sustained The devise is called a fee with a double aspect.. The fee passes to the child or children at the death of the life tenant if none survive him, then it passes to the testator's heirs Both are contingent remainders, and neither vest until the contingency happens which determines where the fee shall go. That contingency is determined at the determination of the life estate. Goodright v. Dunham, 1 Dougl. 265; Crump v. Norwood, 7 Taunt 362; Davy v. Burnsall, 6 Term Rep. 30..

The early common law of England recognized two well settled rules with reference to remainders. First, that a particular estate of freehold was necessary to support a freehold contingent remaindr. Fearne on Contingent Remainder, 281; 2 Bl. Com-165, and secondly, that a contingent remainder must vest during the continuance of the particular estate or eo istante that it determined, otherwise it would fail and could never vest. 2 Bl Com. 168.

The final question presented by the above stated facts, is whether a contingent remainder is devisable?

At common law it was formrly held that a contingent remainder was not such an interest as could be devised by the remainder man. This opinion seems to have arisen from too narrow a construction of the word "having" in the statute of wills. But later decisions have held the contrary and it is now well settled that such interest may be devised. Roe v. Jones, 1 H. Bl 30; 3 Term Rep. 88; Ingilby v. Amcots, 21 Beav. 585; Stewart v. Neely. In Jackson v. Waldron, 13 Wendell 178; it was held that a mere naked possibility without being coupled with an interest, as that where there is a devise of a farm to A, and of a second farm to B, and if either die without issue, his estate go to the survivor, and both be living, such a possibility cannot be assigned or released, or devised ,or pass by descent, and can only be extinguished by estoppel. On the other hand, if the possibility be coupled with an interest, as when the person who is to take upon the happening of the contingency, is ascertained, and fixed, such a possibility may be released, devised, or assigned like any other future estate, in remainder. Further, all contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration. Wright v. Wright, 1 Vesey 411.

The devise to the children of William in fee, being made on a contingency which never happened, the fee consequently was in the testator's heirs, (William and Henry).. They are tenants in common in the farm and each has an undivided half interest therein. Stewart v. Neely, 139 Pa. 309, Held: A contingent remainder can be conveyed by devise, a deed purporting to convey it operates only as an estoppel, unless the conveyance is made after the contingency happens. Thus we conclude that William devised his half interest in the fee to the defendant, who can recover, and judgment is rendered for the defendant

OPINION OF SUPREME COURT.

We approve the decision of the learned court below, in this case, and are thoroughly satisfied with the signal industry and learning which are manifested by the opinion. We shall state briefly, the view which we take of the problem.

(a) The devise was to William for life. This gave a life-estate ,unless what follows enlarges the gift.

(b) At William's death, the gift is to his children in fee, if any children survive him. This does not increase the estate of

William.. Children is not a word of limitation equivalent to heirs or issue ,without more. The gift to the children is a remander in fee to them.

(c) But it is a contingent remainder. It is contingent until there are children (the actual case). It would have continued to be contingent, even after their birth for the takers of this remainder are to be children who survive William. Throughout his entire life, then the remainder was contingent. At his death there bing no children this remainder lapsed and disappeared

(d) But, the will then provides, if any children do not survive William, then the remainder shall pass to the testator's heirs. What heirs? Those who were such at the time of the testator's death, or those who should be such at the death of William? Nothing in the will indicates that the testator meant the latter, and in the absence of such indication, it must be assumed that the former was intended.. McFillin's Estate, 235 Pa. 175.. Under the will then, the two sons being the heirs, took the remainder as tenants in common.

(e) But, were this not so, the testator would have died intestate, as to the remainder, in the circumsances that actually developed, and the sons would have taken under the intestate law.

(f) William devised the farm to Thompson. A contingent remainder may be devised, Stewart v Neely, 139 Pa. 309; Tiffany Real Property, p. 307. As an undivided half thus passed to Thompson ,only the other undivided half can be recovered from him by Henry. But Henry can recover so much.

JUDGMENT AFFIRMED.