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## Estates Tail in Missouri

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# ESTATES TAIL IN MISSOURI<sup>1</sup>

The recent case of *Gray v. Ward*<sup>2</sup> calls attention to the problems which arise in the application of the Missouri statute<sup>3</sup> abolishing estates tail as created by the statute *De Donis Conditionalibus*<sup>4</sup>. It is believed that all of these problems have not been solved in the decisions of the Missouri Court and this study is undertaken to determine what principles have been adopted, and what further principles should control the Court in the application of this statute of entails.

## I.

### HISTORY OF ESTATES TAIL IN MISSOURI.

At the beginning of the last century, estates tail were common in the United States, and common recoveries were not unknown as means of docking the entail.<sup>5</sup> But the feudal atmosphere enveloping them does not harmonize with modern notions of land ownership,<sup>6</sup> and by statute in most of the United States they have been much modified. The most common of these statutes convert the estate tail into a fee simple; some merely provide readier methods of docking the entail. In a few jurisdictions, an attempt is made to preserve the entailing feature, for a time felt to be consistent with changed forms of land tenure, one generation. The policy of such legislation has been sharply criticized,<sup>7</sup> but it has the virtue of partially

1. This article first appeared in VII Illinois Law Review at page 355, and is reprinted here with the permission of the editors of that magazine.

2. (1911) 234 Missouri 291.

3. The present Missouri statute is the same as that which now prevails in Illinois, Arkansas, Vermont and Colorado and similar to that of Ohio, New Jersey, Connecticut and New Mexico.

4. 13 Edward I.

5. Williams, Real Property (17th Int. Ed.) 121; *Sauder's Lessee v. Morningstar* (1793) 1 Yeates (Pa.) 313; *Corbin v. Healy* (1838) 20 Pick. 514, 517.

6. "The entailment of estates is obnoxious to the policy of our laws." Lamm, J., in *Cox v. Jones* (1910) 229 Mo. 52.

7. Dembitz, Land Titles 117-125.

effectuating the intention of the creator of the estate to offset the uncertain mischief of making the land unmarketable for a period. It is only this last class of statutes which now presents the difficult problems in connection with estates tail.

Where the entailment is to some degree preserved, the statutes have followed either the New Jersey statute creating a remainder in fee in the children of the donee,<sup>8</sup> or the first Missouri statute giving the remainder in fee simple to the first taker after the donee.<sup>9</sup> Since Missouri has at various times had both statutes, both will be considered in the present study.

Under the Spanish law which prevailed in Missouri as a part of the Louisiana Territory, estates tail were of course unknown. When in 1816 the territorial legislature substituted for the Spanish law the common law and appropriate statutes of the British Parliament enacted prior to the fourth year of James I (1606), it was expressly excepted that

"The doctrine of entails shall never be allowed, and in all cases when any real estate shall be entailed, the whole right and interest of, in and to the same, shall vest in fee simple in the person having the first reversion or remainder in the said estate, after the life estate is determined in said estate."<sup>10</sup>

The interpretation of this statute is now a matter only of academic interest, no cases having arisen under it. But it may be observed that the inaccurate phraseology, in admitting that land may be entailed,<sup>11</sup> seems to imply that *De Donis* was not excluded from the body of English law adopted.<sup>12</sup> Does "the person having the first reversion or remainder in the said estate" mean the heir of the body of the first donee, taking *per formam doni*, or might it not refer to the owner of the remainder after the estate tail?

8. *Doty v. Teller* (1891) 54 N. J. L. 163. Ohio, Connecticut and New Mexico have copied the New Jersey statute. New Jersey in 1784 recognized "entailment in the first degree only."

9. The Missouri statute was copied in Illinois in 1827 (see notes to Professor Kales' article, 13 Yale Law Journal, 267); in Arkansas in 1837 (R. S. 1837, p. 189, c. 31, § 5); in Vermont in 1840 (R. S. 1840, c. 59, § 1); and in Colorado in 1867 (R. S. 1867, c. 17, § 5). See 1 Stimson, Amer. Stat. Law § 1313.

10. 1 Mo. Terr. Laws, p. 436.

11. The preamble of the statute of 1825 bears this out—"in cases where any person would now be seised in fee tail." But see *Frame v. Humphreys* (1901) 164 Mo. 336.

12. Zane, Determinable Fees, 17 Harv. Law Review 297, 305.

This awkward statute of 1816 was superseded by the statute of 1825 which in terms applied to existing as well as to future estates tail. Unless the later statute is to be taken as a legislative interpretation of the earlier one, changing no property rights thereunder, its constitutionality may be doubted insofar as it affected existing estates tail, as a violation of the provision in the constitution of 1820 prohibiting any law "retrospective in its operation,"<sup>13</sup> and as a deprivation of property not according to "the law of the land,"<sup>14</sup> which means "without due process of law."<sup>15</sup> The inartistic draughting of the statute of 1825 made it apply to cases where "by the common law"<sup>16</sup> estates tail should exist, but obviously "the common law" must here include *De Donis*. In such cases, the donee or first taker in tail is given a life estate, with remainder "in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first donee in tail, first pass according to the course of the common law, by virtue of such conveyance."<sup>17</sup>

In the revision of 1835, this statute was condensed without any change in its effect.<sup>18</sup> In the revision of 1845, the New Jersey statute, which was probably responsible for the first Missouri statute, was copied more nearly completely, and the result is very different from the statute which for a time it superseded, though this difference has been neglected by the Missouri court in several cases.<sup>19</sup> This new statute applied

13. Const. of 1820, Art. XIII, 17.

14. Const. of 1820, Art. XIII, 9. On the violation of a "due process" clause by such a statute as that in question, see *Green v. Edwards*, (R. I., 1910) 77 Atl. 188; 24 Harvard Law Review 144-146.

15. *Jones v. Yore* (1897) 142 Mo. 38; *Hunt v. Searcy* (1902) 167 Mo. 158, 178.

16. Laws of 1825, p. 216.

17. This statute does not expressly apply to any interests after the estate tail for the holders of such interests are not persons to whom the estate tail would pass. But see *Farrar v. Christy* (1857) 24 Mo. 453, 469.

18. Laws of 1835, p. 119. The abbreviated form applied only to future created estates, but it is hardly probable that any real estates tail existed in 1835 unless part of the statute of 1825 be unconstitutional.

19. In *Yocum v. Siler* (1900) 160 Mo. 281, at 294, it is said to be not materially different from the previous statute. And see *Chiles v. Bartleson* (1855) 21 Mo. 344; *Harbison v. Swan* (1874) 58 Mo. 147; *Charles v. Patch* (1885) 87 Mo. 450; *Wood v. Kice* (1890) 103 Mo. 329; *Hunter v. Patterson* (1897) 142 Mo. 310, 317; *Heady v. Crouse* (1907) 203 Mo. 100; *Summet v. Realty Co.* (1907) 208 Mo. 501; *Arnold v. Garth* (1901) 106 Fed. 13. The difference was also neglected in an article on Determinable Fees, by Mr. Zane, in 17 Harvard Law Review 297.

only to future-created estates, and limited the interest of the donee or first taker to a life estate and provided that

"Upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee, and if there be only one child, then to that one, in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs."<sup>20</sup>

This statute was re-enacted in 1855<sup>21</sup> with changes only in punctuation which should not modify its sense.<sup>22</sup> The problems arising under it are obviously different from those arising under the previous statute, and will therefore be treated separately.

In the revision of 1865, the statute of 1825 was restored with a slight modification in its preamble—"where by the common or *statute* law of England"<sup>23</sup>—and in this form it has remained in force since that time.<sup>24</sup> The history of this legislation may therefore be divided into two periods; the first covering the years between 1825 and 1845, and since 1865; the second covering the years between 1845 and 1865. This latter period has more than an academic interest, for cases are still arising to which the statute of 1845 applies.

After a consideration of the situations to which one or the other of these statutes applies, i. e., where estates tail are created in Missouri, it will be profitable to inquire into the character of this statutory remainder, the time of its vesting and the persons in whom it may vest. A closely related topic, the effect of the modern statutes on the common law remainder after the estate tail, will then be studied.

20. Laws of 1845, c. 32, § 5.

21. Laws of 1855, c. 32, § 5.

22. But see *Clarkson v. Clarkson* (1894) 125 Mo. 381.

23. Laws of 1865, c. 108, § 4. The revised law did not go into effect until August 1, 1866. It did not purport to apply to existing estates tail.

24. R. S. 1909, § 2872.

## II.

## THE LIMITATION OF ESTATES TAIL.

When does the situation exist to which one or the other of the Missouri statutes must be applied? When, under the present statutes of construction, may a person be said to be seised of an estate which would be an estate tail "by the common or statute law of England?"

The usual form of a limitation in tail is "to A and the heirs of his body."<sup>25</sup> But "heirs" is the only word of art in the limitation, and any sufficient words of procreation may follow—as "to A and his bodily heirs,"<sup>26</sup> or "to A and his heirs by B,"<sup>27</sup> the latter being a special tail. A fee tail may also be created by implication, as in the following cases—"to A and his heirs, but if A should die without issue to B and his heirs," and "to A for life, and if A die without issue to B and his heirs,"<sup>28</sup>—but this implication depends upon the indefiniteness of the failure of issue on which the gift over is made,<sup>29</sup> and since 1845 the statute requires this failure of issue to be construed as a definite failure<sup>30</sup> with the result that in Missouri

25. Challis, Real Property (3rd ed.) 294. In Littleton, the usual form is, "to A and to the heirs of his body begotten."

26. *Hall v. French* (1901) 165 Mo. 430; *Chew v. Kellar* (1902) 171 Mo. 215; *Uller v. Sidman* (1902) 170 Mo. 284; *Clarkson v. Clarkson* (1894) 125 Mo. 381; *Donnell v. Mateer* (1840) 5 Ired. Eq. 9. But see *Righter v. Forrester* (1866) 1 Bush. 278; *Mitchell v. Simpson* (Ky., 1889) 10 S. W. 372.

27. *Reed v. Lane* (1894) 122 Mo. 311; *Gray v. Ward* (1911) 234 Mo. 291. But see *Fanning v. Doan* (1895) 128 Mo. 328. On the comparative weight to be given to granting and *habendum* clauses see *Uller v. Sidman* (1902) 170 Mo. 284.

28. *Farrar v. Christy* (1857) 24 Mo. 453; *Chism's Admrs. v. Williams* (1860) 29 Mo. 288. It is sometimes erroneously thought that the abolition of the old estate tail should now preclude such implication. The modern statute of entails does not, in this sense, lay down a rule of construction.

29. The implication had its origin in the effort of the courts to escape the rule against remoteness which would otherwise apply. It was not extended to definite failures, therefore.

30. R. S. 1845, c. 32, § 6. Unlike the English statute from which it is copied (1 Victoria, c. 26, § 29), the Missouri statute makes no exception even where a contrary intention appears. Though in terms it applies only to "remainders," it has been given a broader construction. *Faust v. Birner* (1860) 30 Mo. 414; *Naylor v. Godman* (1891) 109 Mo. 543; *Yocum v. Siler* (1900) 160 Mo. 281; *Gannon v. Albright* (1904) 183 Mo. 238.

an estate tail is no longer created by implication in such a case.<sup>31</sup> Similarly, the course of taking being changed by statute, no reason exists for creating estates tail on the doctrine of *cy pres*, which obtains as to devises, since that doctrine is never applied except as it accomplishes an otherwise impossible succession.<sup>32</sup> Closely resembling an implied estate tail is the somewhat anomalous case of a limitation "to A and the heirs of the body of an ancestor whose heir by lineal descent A is," in which A takes an estate tail transmissible as though the ancestor had held it;<sup>33</sup> and this is extended in *Mandeville's Case*<sup>34</sup> to a limitation in remainder to the heirs of the body of one to whom the holder of the particular estate bears no relation. So it would seem that a limitation "to the heirs of the body of A," with no prior estate, creates an estate tail, transmissible as from A. Unless A is dead at the time, such limitation must be by way of use or contingent remainder.

The complete abolition of the Rule in Shelley's Case in 1845<sup>35</sup> further restricts the application of the statutes abolishing estates tail. A limitation to A for life, with remainder to the heirs of his body, will, since 1845, create a life estate in A, with

31. *Yocum v. Siler* (1900) 160 Mo. 281; *Yocum v. Parker* (1904) 134 Fed. 205; *Gannon v. Albright* (1904) 183 Mo. 238; *Gannon v. Pauk* (1906) 200 Mo. 75. But see *Harbison v. Swan* (1874) 58 Mo. 147. Cf. *Nott v. Fitzgibbon* (1900) 107 Tenn. 54. In *Turney v. Sparks* (1901) 88 Mo. App. 363, the possible implication of a fee tail was not noticed.

32. The typical case for applying the doctrine is in a limitation to A for life, remainder to his unborn son for life, remainder to the children of that unborn son in tail either successively or as tenants in common with cross-remainders, where as a result of its application the unborn son of A takes a fee tail. *Pitt v. Jackson* (1786) 2 Bro. C. C. 51. The doctrine is extended to an indefinite series of life estates in *Parfitt v. Hummer* (1867) L. R. 4 Eq. 443. See Gray, *Perpetuities* (2nd ed.) §§ 643-670; 17 *Harvard Law Review* 559.

33. Challis, *Real Property* (3rd ed.) 298.

34. Co. Litt. 26 b. See Leake, *Property in Land* (2nd ed.) 136.

35. It was abolished in Missouri as to devises in 1825—R. S. 1825, chapter on wills, § 18, p. 794; R. S. 1835, p. 620; *Riggins v. McClellon* (1859) 28 Mo. 23, 29—at least where the later gift is to the "children or heirs or right heirs" of the taker of the prior life estate. Strictly this statute does not apply to a later gift to heirs of the body, for a gift to children of one to whom a previous life estate is given does not call for an application of the rule even in a devise unless the word is clearly intended to mean heirs of the body. And since the Rule of Shelley's Case is not one of construction, 1 Tiffany, *Real Property* 313, a devise might have been made between 1825 and 1845 to which the rule would have applied. In 1845 (R. S. 1845, c. 32, § 7) the rule was completely abolished as to heirs of the body as well as to right heirs, in both wills and deeds. *Tesson v. Newman* (1876) 62 Mo. 198.

a remainder in the heirs of his body who will take as purchasers.<sup>36</sup> But in *Emerson v. Hughes*<sup>37</sup> such a limitation was held to create an estate tail upon which the statute of entails acted at once.<sup>38</sup> Even where the Rule in Shelley's Case is in force, it would seem folly to apply it so as to create an estate tail which the statute of entails would at once dissolve into the interests which would have existed but for the operation of the rule.<sup>39</sup> By the Rule in Wild's Case,<sup>40</sup> a devise to A and his children creates an estate tail in A, if he at the time has no children.

### III.

#### THE STATUTORY REMAINDER.

##### A. Under the statute of 1825.

Having determined that the statute of entails applies to a particular case, what is its effect? Does the statute operate on an estate tail of which the grantee actually becomes seised?

36. The statute of 1845 (R. S. 1845, c. 32, § 7) simply provided that they should take as purchasers. So the statute of 1855 (R. S., c. 32, § 7). But the statute of 1865 (R. S. 1865, c. 108, § 6) provided that they should take as purchasers in fee simple. R. S. 1909, § 2874. Under the statute of 1845, it would seem that they would take as purchasers in fee tail, subject to the statute abolishing fees tail, under the rule in *Mandeville's Case* already noted in the text. Leake, *Property in Land* (2nd ed.) 132, 136. "To A for life, remainder to the heirs of his body," would therefore read, "to A for life, remainder to the heirs of his body for life, remainder as to the share of each heir to the children of that heir in fee." The last remainder being too remote, it is improbable that this result would be reached, though it seems to follow logically. In *Utter v. Sidman* (1902) 170 Mo. 284, the statute of entails may have applied, though under the interpretation put on the *habendum* the point now discussed would seem to have been presented. See also *Miller v. Dunn* (1904) 184 Mo. 318; *Shepherd v. Fisher* (1907) 206 Mo. 208.

37. (1892) 110 Mo. 627; a proper result was reached in this case.

38. Accord, *Godman v. Simmons* (1892) 113 Mo. 122. *Contra* on this point, *Waddell v. Waddell* (1889) 99 Mo. 338; *Tindall v. Tindall* (1902) 167 Mo. 218; *Clark v. Sires* (1906) 193 Mo. 502; *Heady v. Crouse* (1907) 203 Mo. 100; cf. *Garth v. Arnold* (1893) 115 Federal 468, 474.

39. *Lehndorf v. Cope* (1887) 122 Ill. 317; *Griswold v. Hicks* (1890) 132 Ill. 494, 500. But see Kales, *Future Interests in Illinois*, § 131.

40. 6 Coke, 17. In *Allen v. Claybrook* (1874) 58 Mo. 124, children were in existence at the time of the devise. *Kinney v. Matthews* (1879) 69 Mo. 520, was a case of a deed to one "and all her children she has now or ever will have;" the court talked about its creating an estate tail, but it does not seem to have been so held. *Carr v. Estill* (Ky., 1855) 16 B. Monroe 309, in which *Wild's Case* was not followed, was cited with approval.



Or does it change the effect of the words which would have created an estate tail, to make them create a life estate followed by a remainder in fee simple? The statute of 1825 is explicit to the latter effect, for it says "instead of becoming seised in fee tail." The statute of 1845 though it says "shall become seised," later corrects it with, "such conveyance or devise shall vest." And the statute of 1865 says that the donee "shall become seised" of a different estate, as a result of the conveyance. These statutes operate "only to cause one form of language to be equivalent to another appropriate to confer the statutory estates."<sup>41</sup> Such a result seems necessary, though in one case it means the remoteness and consequent invalidity of the statutory remainder—a devise to A for life, remainder to B, the unborn son of A, and the heirs of his body. Unless exempted by the statute of entails by force of the declaration that "the remainder shall pass," the rule against perpetuities would defeat all except the life estates in A and B.<sup>42</sup>

No difficulty arises with respect to the life estate in the first taker—it is an ordinary life estate with the usual incidents.<sup>43</sup> But what is the nature of the estate or interest of the "person or persons to who the estate tail would on the death of the first grantee, devisee, or donee, in tail, first pass, according to the course of the common law," and upon what principles must the identity of such person or persons, be determined?

Whether the heir of the body of a tenant in tail under *De Donis*, takes as a purchaser substituted for the ancestor *per formam doni*,<sup>44</sup> or by descent from the ancestor,<sup>45</sup> he is not con-

41. This view is supported by the result of *Burris v. Page* (1849) 12 Mo. 358; and see Zane on Determinable Fees, 17 Harvard Law Review 297, 309. But see *Spencer v. Spruell* (1902) 196 Ill. 119, and remarks on that case in Kales, Future Interests in Illinois, § 115.

42. The question might have been raised in *Brown v. Rogers* (1894) 125 Mo. 392. *Lockridge v. Mace* (1891) 109 Mo. 162, and *Shepperd v. Fisher* (1907) 206 Mo. 208 would hold the devise bad as a whole. *Sed quaere*. *Whitby v. Mitchell*, (1890) 44 Ch. Div. 85, might apply to the case in the text. But see Gray, Perpetuities (2nd ed.) §§ 298a *et seq.* No reason is perceived why the statute should not apply as well to estates in remainder as to estates in possession.

43. *Burris v. Page* (1849) 12 Mo. 358. Note that under the Ohio statute the donee's estate has all the qualities of an estate tail during the donee's lifetime. *Pollock v. Speidel* (1875) 27 Ohio St. 86.

44. 1 Tiffany, Real Property 68.

45. Challis, Real Property (3rd ed.) 266-7.

ceived to have any interest during the life of the ancestor. In addition to restraining the alienation of conditional fees simple, *De Donis* prescribed the succession on the death of the tenant, but the prospect of this succession could create no interest in advance, for *nemo est haeres viventis*. It would seem obvious then that under the statute of 1825, the statutory remainder must be contingent during the life of the "first grantee, devisee, or donee"—it falls within Fearne's fourth class of contingent remainders, being "limited to a person not ascertained."<sup>46</sup> Numerous decisions in Missouri have upheld such a definition of a contingent remainder,<sup>47</sup> and the New York statutory definition<sup>48</sup> has never been consciously applied in this state. It is the condition precedent incorporated into the description of the remainderman which should make this statutory remainder contingent, if the accepted English definition is to apply, and this is the law in Arkansas<sup>49</sup> and Vermont.<sup>50</sup>

It is a more difficult task to identify the remainderman. "According to the course of the common law," the heirs of the body were determined by such of the canons of descent as were applicable, and those canons named the eldest son as heir, preferring the males to females,<sup>51</sup> for the law of descents of fee simple names heirs of the body as well as heirs generally.<sup>52</sup> A change in the law of descents of fees simple does not necessarily include the succession to estates tail, and the earlier cases indicate a tendency to exempt estates tail from the operation of modern statutes of descent though the terms of such statutes were broad enough to include them.<sup>53</sup> But a court may well

46. 1 Fearne, Contingent Remainders 9.

47. *Emison v. Whittlesey* (1874) 55 Mo. 254; *Delassus v. Gatewood* (1880) 71 Mo. 371; *Tindall v. Tindall* (1902) 167 Mo. 218; *Heady v. Crouse* (1907) 203 Mo. 100; *Shepperd v. Fisher* (1907) 206 Mo. 208; *Lich v. Lich* (1900) 158 Mo. App. 400. But see *Frame v. Humphreys* (1901) 164 Mo. 336.

48. N. Y. Laws of 1896, c. 547, § 30; Gray, Perpetuities (2nd ed.) § 107; the New York definition was adopted without statute in Illinois, *Boatman v. Boatman* (1902) 198 Ill. 414; *Chapin v. Nott* (1903) 203 Ill. 341; but these cases are now overruled. *Galladay v. Knock* (1908) 235 Ill. 412. See 3 Ill. Law Review 375.

49. *Horsley v. Hilburn* (1884) 44 Ark. 458.

50. *In re Well's Estate* (1897) 69 Vt. 388.

51. 1 Cooley's Blackstone 446.

52. Williams, Real Property (17th ed.) 259-60.

53. Kales, Future Interests in Illinois, § 118.

hesitate to conclude that primogeniture has been perpetuated even to this extent.<sup>54</sup> Must the words "according to the course of the common law" be read literally? In the preamble of the statute in which it first appeared,<sup>55</sup> "the common law" had been used to include *De Donis*, and in the most recent statute, the phrase being, "by the common or statute law of England," without a similarly liberal interpretation so much of the phrase is senseless. If in one place "the common law" must necessarily include a statute such as *De Donis*, may it not in another place in the same act include the statute of descents? This interpretation, though not literal, is not shockingly violent since the Statute of Descents of 1825<sup>56</sup> devolved the "title to any real estate of inheritance," and it need not be extended to prevent the designation of special heirs of the body, as in what under *De Donis* would have been a fee tail male or female, or a fee tail special.<sup>57</sup> The only alternative, if this argument for a liberal construction be unacceptable, is to say that primogeniture still prevails as to the statutory remainder substituted for the estate tail.<sup>58</sup>

Examination of the decisions under this statute of 1825, and the similar statutes of 1835 and 1865, does not, unfortunately, resolve all of the doubts which may have appeared in the foregoing analysis.

The first case in which the statute was applied, *Burris v. Page*,<sup>59</sup> has frequently been cited for the survival of primogeniture. The eldest son of the donee was permitted to recover in ejectment from an execution purchaser from the donee's husband, but it is not shown that any of the other five

54. In *Rozier v. Graham* (1898) 146 Mo. 352, the court said, "There are no mourners for the doctrine of primogeniture in this state."

55. R. S. 1825, p. 216, Chapter on Conveyances, § 4.

56. R. S. 1825, p. 326, Chapter on Descents, § 1.

57. *Reed v. Lane* (1894) 122 Mo. 311. It becomes an interesting question, whether a change in the statute of Descents would *ipso facto* constitute a change in the statute of entails. See Professor Kales' article in 13 Yale Law Journal 267, 274.

58. In *Frame v. Humphreys* (1901) 164 Mo. 336, the court applied the alternative. The attention of the court has not been directed to this point in any other case in which it was involved. In *Rozier v. Graham* (1898) 146 Mo. 352, the court refused to consider it. Whether *Frame v. Humphreys* is law on this point, *vide post*.

59. (1849) 12 Mo. 358.

children of the donee survived her,<sup>60</sup> and the opinion is too short to judge of the reasoning by which this result was attained.

In *Farrar v. Christy*<sup>61</sup> it is said that the remainder after the fee tail was vested, "subject to be divested by the birth of issue of the donee," but no issue were born. But in *Harbison v. Swan*,<sup>62</sup> erroneously decided under the statute of 1835 when the will did not go into effect until 1852, the court spoke of the remainder over as becoming vested on the death of the donee without issue—here, one donee had issue when the estate was created, and it is not clear when the remainder in this donee's estate became vested. Since the statute of 1845 made the failure of issue definite the case should have involved no consideration of estates tail.

*Emmerson v. Hughes*<sup>63</sup> was improperly treated as a case of an estate tail,<sup>64</sup> and its *dictum* would permit a son of a daughter of the donee in tail to take, though the daughter had previously conveyed her contingent interest, and the donee was survived by sons and other daughters.<sup>65</sup> So far as the case is of authority, it must say that the statutory remainder is contingent, and that the succession is to be governed by the Statute of Descents.

*Reed v. Lane*<sup>66</sup> recognizes a fee tail special, and contains a *dictum* that "upon the death of the grantee the fee became vested in her children" by the special husband. The decision is only to the effect that children by another husband cannot take, so that the Statute of Descents is not so completely adopted as to convert a fee tail special into a fee tail general,<sup>67</sup>

60. In Missouri one tenant in common cannot recover the whole premises in ejectment against a stranger. *Baber v. Henderson* (1900) 156 Mo. 566. It is possible that this rule did not obtain when *Burris v. Page* was decided. If primogeniture did not exist, and if others of the donee's children survived her, the plaintiff would have been a tenant in common.

61. (1857) 24 Mo. 453, 470.

62. (1874) 58 Mo. 147.

63. (1892) 110 Mo. 627.

64. *Garth v. Arnold* (1893) 115 Fed. 468, 474.

65. The *dictum* is repeated in *Godman v. Simmons* (1892) 113 Mo. 122. See remarks on *Emmerson v. Hughes* in *Garth v. Arnold* (1893) 115 Fed. 468, 474.

66. (1894) 122 Mo. 311.

67. This is the law in Illinois also. *Cooper v. Cooper* (1875) 76 Ill. 57; *Welliver v. Jones* (1897) 166 Ill. 80. But see Kales, Future In-

though that result would seem to follow if "according to the course of the common law" be read "according to the Statute of Descents."

In *Rozier v. Graham*<sup>68</sup> specific performance of a contract to purchase was denied to a grantee of all<sup>69</sup> the living issue of a donee in tail who was alive but of very advanced age,<sup>70</sup> because "a contingency exists as to the heirs of" the donee. Unfortunately the court added that "though a fee may vest as a contingent remainder, it may be divested upon contingencies, until the death of the life tenant, at which it vests finally,"<sup>71</sup> thereby casting doubt on the real ground of its decision,<sup>72</sup> which may be placed on the ground of unmarketability of the title though vested so long as other heirs might come into existence.<sup>73</sup> A contention for a survival of primogeniture as a result of the statute of entails was dismissed with the observation that "however plausible the theory evolved from the mere words of the statute, no such construction ever has been given that statute in this state, or ever will be."

But in the very next case involving this latter question, the prophecy was not fulfilled. For, in *Frame v. Humphreys*,<sup>74</sup> where the donee in tail had fourteen children living at the time of the conveyance to her, and some of them predeceased her, leaving issue, who survived the donee, a grantee from such grandchildren was held to be barred by a prior conveyance

terests in Illinois, § 119. But cf. *Summet v. Realty Co.* (1907) 208 Mo. 501.

68. (1898) 146 Mo. 352. The deed was given 17 April, 1845, but the statute of 1845 did not go into effect until 1 August, 1845 (R. S. 1845, § 18, p. 698). The case is properly placed under the statute of 1835, therefore.

69. The fact that one child was still-born was not considered and was probably immaterial. *Marsellis v. Thalheimer* (N. Y. 1830) 2 Paige 35, 21 Am. Dec. 66, holds that a still-born child must be considered as if it had never been born or conceived.

70. While one of advanced age is legally capable of having children, a court need not hesitate to deal with an estate where such an event is practically impossible. *Leng v. Hodges*, Jac. 585. In *Rozier v. Graham*, it is the possible death of living children as well as the possible birth of other children of the donee, which makes the interest unmarketable.

71. *Rozier v. Graham* (1898) 146 Mo. 352, 360.

72. Professor Kales says of this case, "If the remainder was not actually held contingent, it was at least held subject to be divested."—*Future Interests in Illinois*, § 117.

73. *Milchner v. Holmes* (1893) 117 Mo. 185.

74. (1901) 164 Mo. 336.

by the father of some of the grandchildren, on the ground that "by virtue of the grant \* \* \* the title in fee simple absolute vested in" him, the father, as the eldest son of the donee, "subject only to the life estate of his mother." This result is supportable without the doctrine as to primogeniture, by saying that the donee's children held a vested remainder the conveyance of which barred their issue, but the force of the statement that "the common law of descents was preserved in the statute of conveyances," is not so easily overcome. Since this same statute of conveyances of which the court was speaking was restored in 1865, it is astonishing to read the *dictum* that by the statute of 1845, "this last vestige of the system of feudal tenures was swept from our statute book." Curiously enough, the court refrained from any examination of its previously decided cases under this same statute, though it did cite *Burris v. Page* and *Farrar v. Christy*. On the question of primogeniture the case is not supported by *Burris v. Page*, and it is in conflict with *dicta* in *Emmerson v. Hughes*, *Godman v. Simmons*, *Reed v. Lane*, and *Rozier v. Graham*; on the question of the vested nature of the remainder, it is opposed to the *dicta* in *Emmerson v. Hughes*, *Godman v. Simmons*, *Reed v. Lane*, and to the *dictum* if not the decision in *Rozier v. Graham*; and the circumstance that the donee's children were born at the time of the conveyance to the donee, while distinguishing the case from *Rozier v. Graham*, does not distinguish it from *Emmerson v. Hughes* and *Godman v. Simmons*.<sup>75</sup>

In the same year, *Hall v. French*<sup>76</sup> was decided; in which no reference is made to *Frame v. Humphreys*, the court continually speaking of *remaindermen*, and the six children whose grantee is allowed to recover, are not shown to have included the eldest son, who, though the fact does not clearly appear, was probably born before the conveyance to the mother in tail.

Under the interpretation placed on the *habendum* clause in *Utter v. Sidman*,<sup>77</sup> it is not clear that the statute of entails ap-

75. If *Frame v. Humphreys* adopts a new definition of a contingent remainder (Kales, *Future Interests*, § 116), it is opposed to the cases cited in note 39 *supra*.

76. (1901) 165 Mo. 430.

77. (1902) 170 Mo. 284. On p. 301, it is said, "The deed in question granted to Mrs. Clark an estate for life only with a remainder in fee

plied to the case. And in *Chew v. Keller*,<sup>78</sup> where the statute of entails must have applied, the court speaks of the deed's having "vested a remainder in fee in the heirs" of the grantee, but no attention is given to the nature of the estate created, and "heirs" must have been used for "heirs of the body." *Miller v. Dunn*<sup>79</sup> presents the same proposition as *Utter v. Sidman*, the *habendum* clause, which contained the limitation to the heirs of the body, being interpreted as creating a remainder in such heirs. In both *Miller v. Dunn* and *Utter v. Sidman*, it would seem that the statute of entails should have been applied to achieve a result apparently reached by interpretation of *habendum* clauses without it.<sup>80</sup>

A *dictum* in *Summet v. Realty Co.*,<sup>81</sup> where the statute of 1865 was erroneously applied, is to the effect that the statutory remainder was a "contingent remainder in the children" of the donee.

*Cox v. Jones*<sup>82</sup> is clear in holding that where an estate tail was created in each of several daughters, "the heirs of their respective bodies, alive at the life tenant's death, took a fee simple absolute when the respective estates lapsed" (expired), and is difficult to reconcile with *Frame v. Humphreys*.<sup>83</sup>

*Gray v. Ward*<sup>84</sup> decided under the present statute is the last word on its effect. A deed "to Sallie Gray and her heirs by James Gray" was said "to vest in Sallie Gray a life estate only, with remainder to her children then living and thereafter

to the heirs of her body." It was not determined whether this remainder was vested or contingent, though it must have been contingent. *Emmerson v. Hughes* (1892) 110 Mo. 627.

78. (1902) 171 Mo. 215.

79. (1904) 184 Mo. 318.

80. Such a result was reached by applying the statute in *Bone v. Tyrrell* (1892) 113 Mo. 175.

81. (1907) 208 Mo. 501.

82. (1910) 229 Mo. 52.

83. In marshalling the established rules for the construction of wills, Lamm, J., says, at p. 63: "The entailment of estates is obnoxious to the policy of our laws. Therefore, if an estate tail be granted by will or deed either by express words or by necessary implication, it is at once struck down by our statute and another substituted for it, viz., an estate for life to the first taker, remainder over in fee-simple absolute to the next taker, nominated, or by the course of the common law." This statement as to the statutory remainder is extremely hazy and unsatisfactory.

84. (1911) 234 Mo. 291.

born to her by her said husband," and during the life of Sallie one of seven children (a child had died in infancy) was decreed: "to have an undivided one-sixth interest in remainder, subject to the life estate" of the mother. This is a recognition of special estates tail, and a repudiation of primogeniture. In speaking of "the remainder vesting in her children then alive and thereafter born," the court could not have meant it was a vested remainder, else it would seem that the mother should have inherited a portion of the share of the child who had died in infancy.<sup>85</sup> The date of the deed was not given, so that it is impossible to say whether any children were living at the time of the conveyance.

The foregoing decisions seem to isolate *Frame v. Humphreys*. It may be said with certainty that primogeniture does not prevail since *Gray v. Ward*, and that part of *Frame v. Humphreys* would seem to have been overruled. Until *Emmerson v. Hughes* and *Rozier v. Graham* are expressly repudiated, the statutory remainder may, with practical certainty, be said to be contingent so long as the donee in tail survives, and if they should be repudiated a special definition for a contingent remainder will have to be applied to this statutory interest.<sup>86</sup> If the remainder vests during the life of the donee, since *Gray v. Ward* it must be subject to being divested, so that *Frame v. Humphreys* cannot be law on this. If the remainder vests where the donee has children at the time of the conveyance, there would seem to be no reason why it should not vest where none exist at that time, when they are later born.<sup>87</sup>

#### B. Under the statute of 1845.<sup>88</sup>

The same inquiries must again be made with reference to the remainder created by the following words of the statute:

"Upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee."

85. A contingent remainderman may maintain a bill to quiet and determine a title. R. S. 1909, § 2535.

86. But cf., *Heady v. Crouse* (1906) 203 Mo. 100.

87. And the cases contain no reference to any distinction of this sort. It can be of importance only in considering the validity of the remainder over. *Cox v. Jones* (1910) 229 Mo. 52.



The fact that the statute proceeds to dispose of the interest of any child who may be dead at the time of the donee's death, as the Statute of Descents would have disposed of it, is indicative; and this does not exclude a reference to children dying before, as well as to those dying after the conveyance. Under this statute, a conveyance to A and the heirs of his body, if it need not be read as, should have the effect of a conveyance to A for life, and upon his death remainder to his children and the issue (if such, and if none such, the heirs,) of any deceased child.<sup>89</sup> No question of the existence of primogeniture is here presented. But it must be determined whether the remainder is vested or contingent, and what is the effect of the death of a child both before and after the conveyance during the life time of the donee.

This statute very plainly does not provide for the event of the death of the donee without having had any children, for the last clause, "and if there be no issue, then to his or her heirs," refers to the issue and heirs of children of the donee, the possessives "his" and "her" being used in apposition with "him" and "her" in the preceding clause, "the part which would have come to him or her."<sup>90</sup>

The statute provides that the land "shall go and be vested" upon the death of the donee, and the gift over on the death of any child rather implies that it is not vested before that time. But neither of these features necessarily impels the conclusion that it is contingent while the donee is alive and after children are born; the first may refer only to the time of enjoyment,<sup>91</sup> as in a gift "to A for life and at his death to B and his heirs"<sup>92</sup>—B has a vested remainder in spite of the future words,<sup>93</sup> and the second may, so far as it effects no different results, only constitute

88. The material part of the statute is quoted *supra*. It has never been contended that the statutory remainder is in only those children who were alive at the time of the conveyance.

89. An adopted child cannot take under the statute. *Clarkson v. Hatton* (1897) 143 Mo. 47.

90. *Contra, Brown v. Rogers* (1894) 125 Mo. 392. The different punctuation in the statute of 1855 did not change this meaning. *Clarkson v. Clarkson* (1894) 125 Mo., 381, is *contra*.

91. *Clarkson v. Clarkson* (1894) 125 Mo. 381.

92. See *Garth v. Arnold* (1902) 115 Fed. 468, 474.

93. *Byrne v. France* (1895) 131 Mo. 639; *Doe d. Poor v. Considine* (1867) 6 Wall. 658; *Gray Perpetuities* (2nd ed.) § 103, note.

the issue of the deceased child purchasers and takers of shifting executory interests where they would otherwise have taken by descent.

The statute was first applied in *Chiles v. Bartleson*,<sup>94</sup> where the lower court said that the remainder was in the heirs of the body of the donee, and the higher court said the remainder was in the children of the donee, but only the donee's interest was in question and the case is of little authority because the date of the testator's death is uncertain.

In *Charles v. Patch*,<sup>95</sup> the remainder is said to be in the heirs of the body of the donee, but this was not controverted and no especial attention is given to the point.

*Phillips v. LaForge*<sup>96</sup> permitted children of the donee to recover the land from their parents' grantee, the donee having died.

In *Wood v. Kice*<sup>97</sup> the deed was dated June 3, 1865, and the statute of 1855 was still in force. But the court erroneously placed the case under the statute of 1889 (which is the same as that of 1865) and said that the conveyance gave a fee to the heirs of the body of the donee, though this error did not affect the result of the case.

*Bone v. Tyrrell*<sup>98</sup> applied the statute, but adds nothing, though the court may have thought the remainder to be vested inasmuch as there is no reference to the possibility of alienating contingent remainders, a doctrine established at the same term of court in *Godman v. Simmons*.<sup>99</sup>

In *Clarkson v. Clarkson*,<sup>100</sup> a child or children of the donee had died prior to the conveyance, but as the donee "had no children or their descendents living, either at the date of the deed or at his death, the remainder vested in his brothers and sisters and the heirs of those who are dead, he having no father or mother living at his death." And in a later opinion on the

94. (1855) 21 Mo. 344.

95. (1885) 87 Mo. 450.

96. (1886) 89 Mo. 72. The statute of 1845 applied to equitable as well as legal fees tail. The statute of uses would seem to have operated in the principal case.

97. (1890) 103 Mo. 329.

98. (1892) 113 Mo. 175.

99. (1892) 113 Mo. 122.

100. (1894) 125 Mo. 381.

same deed,<sup>101</sup> it is said to be beyond the power of the donee "to take away the statutory estate so created and vested in his brothers and sisters, if he had no bodily heirs, and confer the same upon an adopted child." This is a clear decision to the effect that the heirs of a child dead before the conveyance do not take under the statute, at least where he left no descendants who lived beyond the conveyance. The interpretation of the last clause as conferring the estate on the heirs of the donee, has already been noticed and disapproved. Even accepting this interpretation it is indefensible to speak of a vested interest in the heirs prior to the donee's death, and in *Brown v. Rogers*<sup>102</sup> this is perceived, but the interpretation is extended so as to invalidate a gift over which would seem to have been unobjectionable as a contingent remainder, or if not, as an executory devise.

*Hunter v. Patterson*,<sup>103</sup> which seems to have been placed erroneously under the statute of 1889, adds nothing. *Frame v. Humphreys*<sup>104</sup> has a *dictum* to the effect that if the statute of 1845 had been in force, the deed in that case would have created a contingent remainder which "would not have vested, until the death of Mary Ann Walker [the donee], when it would have vested in her then living children and grandchildren." This is verily a paradox, for it is much easier to read the statute of 1845 as creating a vested remainder than to give that effect to the statute of 1825.

But *Garth v. Arnold*,<sup>105</sup> where the donee had children at the date of the conveyance, clearly held the remainder to be vested in the children as a class as soon as any were born, though the opinion of the lower court<sup>106</sup> contained a statement to the effect that "on the death of Ann [the donee] the estate in remainder vested in the surviving heirs of her body," evidently overlooking the difference between the statutes of 1845 and

101. *Clarkson v. Hatton* (1897) 143 Mo. 47.

102. (1894) 125 Mo. 392.

103. (1898) 142 Mo. 310.

104. (1901) 164 Mo. 336, 346.

105. (1902) 115 Fed. 468. *Preston v. Smith* (1886) 26 Fed. 884, was under the earlier statute but involved only the nature of the remainder over.

106. *Arnold v. Garth* (1901) 106 Fed. 13.

1865. No applicable authority is cited by the higher court,<sup>107</sup> though its opinion professes to have been formed "in view of the local decisions on the question."

In *Miller v. Ensminger*<sup>108</sup> no reference is made to *Garth v. Arnold*, but there is a plain *dictum* that "an estate tail by disposition of the statute, was an estate for life and upon the death of [the donee] descended in fee to his children living at the time of his death." The plaintiffs in *Miller v. Ensminger* may have been the only children of the donee—the fact does not appear.

The statute now being considered should have been applied in *Summet v. Realty Co.*,<sup>109</sup> but the error in placing that case under the later statute did not affect the result.

*Charles v. White*<sup>110</sup> is to the effect that a deed to five daughters and "the heirs of their bodies forever" conveyed a life estate to the said daughters, with a remainder over to their respective children "born and to be born." But in *Charles v. Pickens*,<sup>111</sup> the same deed was said to have "had the effect of conveying a life estate to each of the daughters with a remainder over to 'the heirs of their bodies,' " the difference not being perceived.

This state of the authorities does not answer the questions presented. It cannot be known whether descendants of a child of the donee who died before the conveyance will take, though they are included in the statute, nor what effect the death of such descendants prior to the death of the donee will have on what they may possibly take. And if *Garth v. Arnold* be adopted by the state court, a qualification must be made on the interpretation of the last clause of the statute established by *Clarkson v. Clarkson*, for if the donee has children to take a vested remainder at the time of the conveyance, the statute can hardly be held to divest it on their non-survival without issue in favor of the donee's heirs.

107. *Farrar v. Christy* (1857) 24 Mo. 453, being under a different statute.

108. (1904) 182 Mo. 195.

109. (1907) 208 Mo. 501.

110. (1908) 214 Mo. 187.

111. (1908) 214 Mo. 212.

If after the death of a child without issue the donee should die leaving children, a conflict between *Garth v. Arnold* and *Clarkson v. Clarkson* will be presented necessitating a repudiation of one or the other. A strict adherence to *Clarkson v. Clarkson* must eventually result in a holding that the children of the donee, and their issue in the event of their deaths, take remainders contingent on their surviving the donee, which holding will be consistent with the clear *dicta* of *Frame v. Humphreys* and *Miller v. Ensminger*. If the children have a vested remainder in any case, prior to the donee's death, it should make no difference whether they are born at the time of the conveyance, or later.<sup>112</sup>

If a child should die without issue prior to the death of the donee, whether his heirs shall be determined as of the time of his, or the donee's death, must depend upon the ultimate fate of *Garth v. Arnold*.<sup>113</sup>

#### IV.

##### THE REMAINDER OVER.

To A and the heirs of his body, but if A should die without heirs of his body, to B and his heirs. Apart from modern statutes, B has a valid remainder which may be enjoyed in possession whenever the line of the heirs of the body of A fails. Being vested,<sup>114</sup> it cannot be objectionably remote. The words which apparently introduce a precedent contingency, only prescribe the determination of the preceding estate.

Now the modern statutes of entails<sup>115</sup> do not expressly affect this remainder over. Whatever doubt may have arisen on this point under the statute of 1816 which purported to "vest the fee simple in the person having the first reversion or remainder in the said estate, after the life estate is determined,"<sup>116</sup> it is impossible to contend that the holder of the ultimate

112. *Supra*, note 88.

113. 2 Jarman on Wills (5th Amer. ed.) 616.

114. Gray, *Perpetuities* (2nd ed.) §§ 111, 447.

115. This is not a misnomer where, as in Missouri, the entailing feature is preserved for one generation.

116. 1 Mo. Terr. Laws, p. 436.

remainder is a person "to whom the *estate tail* would first pass" within the meaning of the statutes of 1825, of 1835, and of 1865. It is therefore difficult to know what was meant in *Farrar v. Christy*<sup>117</sup> when the court said that "the words employed in the act sufficiently indicate that another than the heir in tail may be the first taker according to the course of the common law by virtue of the grant."

But in conferring the "fee simple absolute" upon the taker of the statutory remainder, all the statutes, that of 1845 as well as the others named, attempt a disposition so complete as to leave nothing for the ultimate remainderman to enjoy. It is probable that the framers of these statutes had in mind cases in which the ultimate interest was undisposed of and would therefore pass to a reversioner. If under the statutes an estate tail first comes into existence,<sup>118</sup> such a destruction of vested remainders and reversions already in existence would be unconstitutional; and this interpretation of the statutes ought logically to mean the absolute invalidity of the ultimate interest as an attempt to create a vested remainder after the statutory remainder in fee.<sup>119</sup> But on the better view of the statutes, that they operate "only to cause one form of language to be equivalent to another," the limitation now under consideration should be read, "to A for life, remainder in fee to the heirs of his body, and if A should die without heirs of his body to B and his heirs."<sup>120</sup> The ultimate interest must then be supported if at all, as a contingent remainder, or as a shifting executory interest.

What is the nature of B's interest? And to what extent is it valid? A further task of construction—the determination of the definiteness or indefiniteness of the failure of A's issue on which B is to take—must precede an attempt to answer these questions. Then three situations must be studied: (1) where A

117. (1857) 24 Mo. 453, 469.

118. *Spencer v. Spruell* (1902) 196 Ill. 119; Kales, *Future Interests in Illinois*, § 115.

119. See the *dictum* in *Brown v. Rogers* (1894) 125 Mo. 392.

120. This is under the statute of 1825. The statute of 1845 would make it read: "To A for life, remainder to his children and the issue (if none such, the heirs) of any deceased child, and if A should die without children, to B. and his heirs." But see *Clarkson v. Clarkson* (1894) 125 Mo. 381; *Brown v. Rogers* (1894) 125 Mo. 392.

never has children who may take the statutory remainder; (2) where he has such children, but they are born after the conveyance; (3) where he has such children at the time of the conveyance.<sup>121</sup>

Is the limitation to B on a definite or an indefinite failure of issue?<sup>122</sup> Under the Missouri statute of 1845<sup>123</sup>,—providing that

"Where a remainder \* \* \* shall be limited \* \* \* to take effect on the death of any person without heirs, or heirs of the body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor"

—it would seem that all failures of issue are to be construed as definite. For the term "remainder" in the statute has been held to include an executory devise.<sup>124</sup> The statute is so peremptory that it would probably be applied though an indefinite failure of issue were plainly intended.<sup>125</sup>

1. *Where A never has children who may take the statutory remainder.*<sup>126</sup> The statutory remainder must, on any proper definition, be contingent on the birth, and perhaps the survival, of issue, throughout its existence. Since a vested remainder cannot follow a contingent remainder in fee,<sup>127</sup> B cannot have a vested remainder. But since B's interest may, in an event, immediately follow A's life estate, B must have a contingent remainder of Fearn's second class,<sup>128</sup> for "no limitation is [to

121. This classification is adopted from Professor Kales' article, 13 Yale Law Journal 267.

122. On this general question of construction see Lewis, Perpetuities, c. 15, 174-407; *Forth v. Chapman* (1720) 1 P. Wms. 663.

123. R. S. 1845, c. 32, § 6. Now, R. S., 1909, § 2873. It has been in force continuously since 1845.

124. *Gannon v. Albright* (1904) 183 Mo. 238, 262; *Yocum v. Siler* (1900) 160 Mo. 281. See also *Naylor v. Godman* (1891) 109 Mo. 543; *Faust's Admr. v. Birner* (1860) 30 Mo. 417.

125. 5 Kent's Commentaries (14th ed.) 280, quoted in *Gannon v. Albright* (1904) 183 Mo. 238, 258. The English Wills Act contained a proviso: "Unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail." 1 Vict. c. 26, § 29.

126. Here it will make no difference whether the statute of 1825 or of 1845 is in force at the time of the conveyance. But in *Brown v. Rogers* (1894) 125 Mo. 392, the gift over was held to be void altogether.

127. *Loddington v. Kime* (1551) 1 Salk. 224; 1 Tiffany, Real Property 287.

128. 1 Fearn, Contingent Remainders 6. "An uncertain event, collateral to the determination of the preceding estate, is to precede the remainder."

be] construed as executory which can take effect as a remainder."<sup>129</sup> It is a case of contingent remainders in double aspect. Even if the statute making the failure of issue definite should not be applied,<sup>130</sup> still the indefinite failure, being broader than, must include, a definite failure, and since in the event of a definite failure the limitation to B would have to take effect as a contingent remainder while in the event of a later indefinite failure it would have to take effect as a shifting executory interest, the two may be separated under the rule of *Evers v. Challis*<sup>131</sup> and the contingent remainder to B is not invalid for remoteness, though the shifting executory interest on an indefinite failure is fatally remote.

2. *Where A has children who are capable of taking the statutory remainder, but they are born subsequently to the conveyance.* Prior to the birth of a child, the situation is the same as in (1), and if the proper definition<sup>132</sup> of a contingent remainder be applied, the statutory remainder under the statute of 1825 will be held contingent, and the situation will remain as in (1) after children are born. But under the *Frame v. Humphreys*<sup>133</sup> application of the statute of 1825, and under the statute of 1845, if *Garth v. Arnold*<sup>134</sup> be followed, the statutory remainder becomes vested on the birth of a child, and it is then impossible for B to have a contingent remainder, for a contingent remainder cannot follow a vested remainder in fee. Logically, if the statutory remainder under the statute of 1825 is a vested remainder prior to A's death, it would seem that on the same definition B's ultimate remainder should be vested prior to the birth of children. Whether B's remainder be vested or contingent prior to the birth of A's child, it ceases to exist as a remainder upon the happening of that event and B can thereafter have only a shifting executory interest. It is difficult to

129. Challis, *Real Property* (3rd ed.) 123.

130. It was overlooked in *Harbison v. Swan* (1874) 58 Mo. 147, and was not in force when the conveyance in *Farrar v. Christy* (1857) 24 Mo. 456, was made.

131. (1859) 7 H. L. C. 531.

132. *Emison v. Whittlesey* (1874) 55 Mo. 254; *Delassus v. Gatewood* (1879) 71 Mo. 371; *Emmerson v. Hughes* (1874) 110 Mo. 627; *Tindall v. Tindall* (1902) 167 Mo. 218; *Heady v. Crouse* (1907) 203 Mo. 100; *Lich v. Lich* (1911) 158 Mo. App. 400.

133. (1901) 164 Mo. 336.

134. (1902) 115 Fed. 468.



see how a remainder of any sort can be converted into a shifting executory interest by an event happening subsequently to its creation as a remainder. The destruction of contingent remainders is familiar enough, but such transformation is unknown. Our law has never said "that any kind of a future interest may be turned into any other kind at any time by any event if necessary in order to carry out the intention of the creator of the interest."<sup>135</sup>

Can it be said that B had a shifting executory interest all along, in addition to this remainder? If a child should be born subsequently to the conveyance, and should die while A is yet living, and if as was suggested in *Rozier v. Graham*<sup>136</sup> it be held to have had a vested remainder which was divested upon its death, B's shifting executory interest would become a remainder, and this in turn might be defeated by the birth of a second child whose death in the lifetime of its father could confer nothing on B, for his shifting executory interest must have been exhausted on the death of the first child.<sup>137</sup> Is it not therefore entirely possible that under the *Garth v. Arnold* view of the statute of 1845 and the *Frame v. Humphreys* view of the statute of 1825,<sup>138</sup> the birth of a child to A entirely destroys B's ultimate interest, whether it be vested or contingent prior to such birth?<sup>139</sup> Such a result may be avoided by a repudiation of *Frame v. Humphreys* for cases arising under the present statute of 1865, but it may be unavoidable for cases arising under the statute of 1845.<sup>140</sup>

Here, as in (1) the indefiniteness of the failure of A's issue does not seem to be material. But it must be remembered that if in the event of either a definite or an indefinite failure of issue the ultimate interest will take effect as a shifting executory

135. Quoting Professor Kales' query, 13 Yale Law Journal 279.

136. (1898) 146 Mo. 352.

137. This hypothesis is under the statute of 1825, not under the statute of 1845.

138. See the discussion of these cases, *supra*.

139. The court which decided *Brown v. Rogers* (1894) 125 Mo. 392, may have had in mind this reasoning, but it is nowhere expressed in the decision.

140. In *Brown v. Rogers* (1894) 125 Mo. 392, this question was not presented for the ultimate interest was given "to surviving heirs," which the context shows to mean "to surviving children," and the plaintiff's mother did not survive any of her sisters who had children.

interest, then the rule of *Evers v. Challis* will not apply and a separation will be impossible though remoteness result.

3. *Where A's children are living at the time of the conveyance.* If the children take a contingent remainder, contingent on their surviving A as heirs of his body, B has an alternate contingent remainder which is valid whether the failure be considered definite or indefinite. This is the proper result under the statute of 1825. But if the statutory remainder be held to be vested, following *Frame v. Humphreys*, and subject to being divested, B has a shifting executory interest which might become a contingent (not properly a vested) remainder in the event of the death of A's children during A's lifetime, but which could not thereafter be reconverted into an executory interest. If the children survive A, of course B's interest would be void for remoteness, even if he could take in spite of the statute as to failures of issue, for he could not then take as remainderman.

Under the statute of 1845, if *Garth v. Arnold* be followed, B has a shifting executory interest which, whether the failure be construed to be definite or indefinite, must be invalid unless it may be converted into a contingent remainder by the death of A's children in his lifetime; which is very doubtful, for what would be the effect upon the remainder which the statute confers upon the issue or heirs of deceased children? It is entirely possible that under the statute of 1845, the existence of children at the time of the conveyance, or their later birth, would wholly destroy the ultimate interest, though it be limited on a definite failure of issue.<sup>141</sup> This is the position taken by Mr. Zane.<sup>142</sup>

The actual decisions are at variance with the foregoing conclusions.

In *Farrar v. Christy*<sup>143</sup> two separate tracts of land had been conveyed in 1832 to Edmund and Howard respectively, with a proviso that if either should die without issue, the survivor should take the land of the one so dying, and if both should die without issue, the land should revert to the grantor's heirs.

141. But in *Brown v. Rogers* (1894) 125 Mo. 392, one donee had died without ever having had issue.

142. Article on Determinable Fees, 17 Harvard Law Review 297, 310. But this writer failed to perceive the difference between the Missouri statutes of 1845 and 1825.

143. (1857) 24 Mo. 456. One of three judges dissented.

Neither Edmund nor Howard ever had issue. After implying estates tail in Edmund and Howard, the court read the word "survivor" to mean "other," and held that each took a vested remainder in the land of the other "subject to be divested by the birth of issue of the first grantee of the estate tail." This error was due to a misconception that "if the fee simple was judged to be in abeyance," the ultimate interest would fail on the death of its owner—such a contingent remainder might have passed to the heirs of the owner;<sup>144</sup> and to a misinterpretation of the statute of 1825, by which it was made to confer the statutory remainder on the holder of the ultimate interest because it was "intended that the fee simple should pass presently." The gift over on the death of both without issue was not noticed—there is probably no ground upon which it might have been saved from fatal remoteness. The conveyance here was prior to the statute of 1845, making such failures of issue definite, but the rule of *Evers v. Challis* might have been applied to save the separate gifts over from remoteness, for it was probably an indefinite failure as a result of the meaning given to the word "survivor."<sup>145</sup> Following *Farrar v. Christy*, whether the statutory remainder became vested on the birth or survival of children, the ultimate interest must be wholly destroyed by their birth, for a vested remainder cannot be converted into a contingent remainder.

*Harbison v. Swan*<sup>146</sup> is much like *Farrar v. Christy*. Two tracts of land were devised to Harriett and Juliet, respectively, with a proviso that on the death of either without issue, "the part devised to the one deceased to descend to the survivor," and on the death of both without issue, both tracts should go to the heirs of Mary and Clarissa. The testator died in 1852, but the statute making the failure of issue definite was overlooked. So estates tail were held to have been created. Harriett never had issue—so, following *Farrar v. Christy*, Juliet took a vested remainder in Harriett's tract "subject to be di-

144. 1 Fearn, Contingent Remainders 366.

145. Compare with *Farrar v. Christy*, *Chapin v. Nott* (1903) 203 Ill. 341, which was decided when the New York statutory definition of a contingent remainder prevailed in Illinois.

146. (1874) 58 Mo. 147. It was decided solely on the authority of *Farrar v. Christy*.

vested on the birth of children to Harriett," which condition did not happen. Juliet had a son, living at the death of the testator, who survived her—it was held that "Harriett's interest in the estate of Juliet ceased." But Juliet's son did not survive Harriett, and since the failure of issue was treated as indefinite for the implication of estates tail, the shifting executory interest in Harriett should have received some attention.<sup>147</sup>

In *Preston v. Smith*<sup>148</sup> the plaintiff who claimed through a devisee of one to whom the will purported to give an interest after an estate tail, sought to protect his title against acts of the original donee in tail who was of advanced age and without issue. The bill was dismissed as "an effort to establish a doubtful title" in equity, but the court said by way of *dictum* that it was a "very doubtful question as to where the remainder in fee is vested." Though apparently a refusal to follow *Farrar v. Christy*, the fact that the gift over, as well as the original gift, purported to be of an estate tail may have been the basis of the doubt.

In *Wood v. Kice*<sup>149</sup> the holder of the ultimate interest is admitted to have an estate, but there is no attempt to define it. It does not appear whether the donee in tail had issue, and it was an equitable estate tail.<sup>150</sup>

*Brown v. Rogers*<sup>151</sup> squarely presents the question, under the statute of 1845. After a devise to his daughters and the heirs of their bodies, the testator gave the property, in the event of any daughter's dying without issue of her body, to his "then surviving heirs, the same to vest absolutely in them and the heirs of their body." The intention was probably, "in case of a failure of issue to any of the devisees, to have the estate pass to the other devisees and the heirs of their bodies,"

147. This latter was probably void for remoteness, since the word "survivor" was read as "other." In *Thompson v. Craig* (1876) 64 Mo. 312, the authority of *Farrar v. Christy* and *Harbison v. Swan* was recognized by way of *dictum*.

148. (1886) 26 Fed. 884.

149. (1890) 103 Mo. 329.

150. Though equitable contingent remainders need not fit immediately on to prior equitable estates, and are therefore remote where legal remainders would be valid, the fact is unimportant where, as here, the nature of the contingency requires that it must happen at or before the expiration of the prior estate, or not at all.

151. (1894) 125 Mo. 392.

so that "surviving heirs" may be read as "surviving children." Some of the daughters died without issue, one on the day of her father's death, though whether before or after her father's death does not appear; if after, as the fact must have been, the plaintiffs, who were the children of the second daughter to die, were clearly entitled to the statutory remainder in the portion of their aunt's lands to which their mother was entitled for life by force of her remainder in tail. But, curiously the court held that

"The attempt of the testator \* \* \* to follow up the estate tail first created, with a succession of others limited upon cross remainders, \* \* \* is in direct contravention of the clearly expressed intention of the statute. After the devises were made to his daughters and the heirs of their bodies, his power of disposal ended."

This does not seem to have been put on the *Clarkson v. Clarkson* interpretation of the statute of entails of 1845—though such an interpretation be accepted, it ought still to be possible for a testator to create a contingent remainder which would cut off the contingent statutory remainder in the heirs of the donee. The judgment in *Brown v. Rogers* may be rested entirely on the adverse possession of the defendants,<sup>152</sup> otherwise the plaintiffs must have had some interest as heirs of their aunts, and of children of aunts, who died after the death of the plaintiffs' mother.

In *Cox v. Jones*<sup>153</sup> where there was a devise to a daughter and to the heirs of her body, but if she should die without heirs of her body, then to the testator's other heirs, the court said by way of *dictum*, "it created a life estate with a remainder over in fee (in the event of the death of the devisee without heirs) in the heirs of [the testator] mentioned in the will, and, in the event the devisee died with heirs of her body in being, then in them." This would seem to be a proper recognition

152. *Brown v. Rogers* was followed in *Buford v. Kerr* (1898) 86 Fed. 97, and (1898) 90 Fed. 513, the higher federal court holding that its decision was "in accordance with the doctrine announced in the previous cases" of *Farrar v. Christy*, *Harbison v. Swan*, and *Thompson v. Craig*—but such is not a fact as the learned reader will readily perceive, and those cases were under a different statute. In *Cross v. Hoch* (1899) 149 Mo. 325, there is no suggestion of the invalidity of the remainder over, though the event had not happened. See also, *Prosser v. Hardesty* (1890) 101 Mo. 593.

153. (1910) 229 Mo. 52.

of the alternate contingent remainders, but the slight attention given the point hardly warrants the conclusion that the court intended to intimate a willingness to overrule the earlier cases.

This state of the authorities does not admit of any satisfactory conclusions concerning the remainder over. It is to be hoped that the question will receive the attention which it merits when it again arises, and since *Farrar v. Christy* and *Harbison v. Swan* were both decided without reference to the statute of 1845 concerning failures of issue, and *Brown v. Rogers* under the statute of entails of 1845, the Missouri court is free to deal with the remainder over without the embarrassment occasioned by the premises of these decided cases.

It is submitted that the way is now clear for the court to say, under the statute of 1865, that primogeniture does not obtain; that the statutory remainder is contingent in the donee's heirs of the body in general, or in special heirs of the body if designated; and that the ultimate interest is an alternate contingent remainder, limited on a definite failure of issue. The few cases which may yet arise under the statute of 1845, will present more difficulty, but it is not too late to correct the error of *Clarkson v. Clarkson* and to adopt the view of *Garth v. Arnold* that the statutory remainder becomes vested in the donee's children (or their issue or heirs) at the time of the conveyance, or as soon as any child is born. It should then be held that the ultimate interest will immediately perish upon the statutory remainder's becoming vested.

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