THOMAS GRAY.....APPELLANT; 1878.

*Feb'y. 2.

June 3.

AND

WILLIAM RICHFORD AND ANDREW McCONNELL..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ejectment—Statute of Limitations—Acceptance of deed by person in possession—Will—"Any issue of his body lawfully begotten or children of such issue surviving him."

In 1830, *James Gray* took possession of East half of Lot No. 13, in 1st concession of *East Hawkesbury*. He resided on the West half of said lot with his sons, and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-8, while his son *Adam* was working the East half, and in possession, *James Gray* devised it to him by will, and the land was known as "Our *Adam's*." In 1857, *James Gray* made a second will, in which he said: "I give and devise to my son *John Gray*, his heirs and assigns, &c., to have and to hold the premises above

*PRESENT:—Sir Wm. B. Richards, Knight, Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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described to the said *John Gray*, his heirs and assigns forever. But if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then in such case I will and devise the said, &c., to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same at the death of the said *John Gray*."

After the father's death *Adam* remained in possession, and in 1862 he accepted a conveyance with full covenants for title from *John*. On 15th September, 1868, *Adam* conveyed to *A. McC.*, one of the Respondents, and *R.*, the other Respondent, claimed title under *A. McC.* as landlord. In 1874, *John* died without leaving any lawful issue, and on 5th May, 1875, *Thomas* (Appellant) brought ejectment against Respondents, but neither at the trial nor in term was any question raised as to the effect of *John's* deed.

Held,—That *James Gray*, the father, at the time of his death had acquired a title to the lot by length of possession. That, under the will, *John Gray* took an estate in fee, with an executory devise over to *Thomas Gray*, in the event that happened of *John Gray* dying without leaving lawful issue.

2. That *Adam*, having recognized, in 1862, *John's* interest in the land by purchasing from him, by deed of bargain and sale, a limited and contingent estate, its effect was to stop the running of the Statute, and the Respondents cannot set up *Adam's* possession under *John* to defeat the contingent estate.

3. That the Court of Appeal could not refuse to entertain the question as to the effect of *John's* deed, although not raised at the trial nor in term.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), declaring that the rule *nisi* for a new trial in the Court of Common Pleas be made absolute. This was an action of ejectment to recover possession of E. ½ of lot No. 13, and broken part thereof in 1st Concession of the Township of *East Hawesbury*.

The action was commenced on the 5th January, 1875, and was tried before *Galt*, J., without a jury.

The Plaintiff, *Thomas Gray*, claimed title as devisee under the last will of *James Gray*, dated 30th January, 1857. The Defendant, *William Richford*, besides denying the Plaintiffs title, asserted title in *Andrew McCon-*

(1) 1 App. R. Ont. 112.

nell, under whom he claimed as tenant by virtue of a demise for terms of years, dated 24th March, 1870.

Andrew McConnell, having appeared as landlord, besides denying Plaintiff's title, asserted title in himself as having been possessed thereof by himself and those through whom he claims for a period of twenty years before action commenced, and also claimed title by deeds of conveyance from *John Gray* to *Adam Gray*, dated 31st March, 1862, and from *Adam Gray*, dated 20th June, 1862, 26th April, 1858, and 15th September, 1868.

At the trial the Plaintiff claimed and sought to establish by evidence that *James Gray* entered into possession of the land in question in November, 1830, and continued in possession until his death, in August, 1857.

About 1847-8 *Adam Gray* entered into possession of the east half, with the permission of his father. On the 10th October, 1848, *James Gray*, by will, devised the said east half to *Adam*, his son, with the words: "This considered to become in force after the decease of my wife and myself."

On the 30th of January, 1857, *James Gray*, by another will, devised in fee the said east half to *John Gray*, his eldest son, subject to an executory devise over to *Thomas Gray*, in fee, on the death of *John*, without leaving issue, which event happened in September, 1874, the words used being:—"1st. I give and devise to my son *John Gray*, his heirs and assigns, that tract or parcel of land and premises situate in the Township of *East Hawkesbury*, in the said County of *Prescott*, being composed of the east half of Lot number thirteen, in the First Concession of the said Township, including the broken front thereof, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the premises above described to the said *John Gray*, his heirs and assigns forever.

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But, if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then and in such case I will and devise the said above mentioned premises, with the appurtenances, to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same, at the death of the said *John Gray*, to my said son *Thomas*, his heirs and assigns, forever; subject, however, to this condition, that in case my wife *Janette* should survive me, then whoever of my said son *John*, his issue, the children of his issue, or of my said son *Thomas*, or his heirs, shall then be the owner of the said above mentioned premises, by virtue of this my last will and testament, shall support, clothe and maintain my said wife *Janette* in a comfortable and respectable manner, suitable to her age and condition in life; and should they neglect or refuse to do so, then I will and devise the above mentioned premises, with the appurtenances, unto my said wife *Janette*, her heirs and assigns, to have and to hold the same from the time of neglecting or refusing to support, clothe and maintain my said wife, as aforesaid, unto my said wife, her heirs and assigns, forever." Both wills were registered; the first on the 22nd Oct., 1857, and the second on the 20th August, 1858.

The other documents relied on by the parties were the following:—

Deed of bargain and sale and quit claim, *Adam Gray* to *Andrew McConnell*, dated 26th April, 1858, 50 acres clear, E. ½ lot 13.

Bond, *Adam Gray* and *William McAllister* to *Andrew McConnell*, £140, for payment whereof *Adam Gray* mortgages middle lot, after reduction of the superficial extent of 66 acres sold this day to *Andrew McConnell*, according to form of law of *Lower Canada*, providing "if title held good from *Adam Gray* and wife," said

bond to be void, signed at *St. Andrews*, in the Seigniory of *Argenteuil*, on 17th October, 1859.

Deed, of bargain and sale, *John Gray* to *Adam Gray*, dated 31st March, 1862.

Deed, by way of mortgage, *Adam Gray* to *A. McConnell*, dated 20th June, 1862, E. ½ lot 13.

Deed of bargain and sale, *Adam Gray* to *Andrew McConnell*, dated 15th September, 1868, E. ½ lot 13, and broken front.

Evidence was also given as to *Adam Gray's* and *James Gray's* possession, and the value of the improvements, extracts of which evidence are given at length in the judgments of their lordships.

No question was raised at the trial nor in term as to the effect of *John's* deed.

The learned Judge at the trial found that the testator had acquired title to the lot by length of possession, and on that ground rendered a verdict for the Plaintiff.

The Defendants in the following Term moved to set aside the verdict on the ground that the Plaintiff had not shown a paper title to the land, but had sought to establish a title by statute of limitations in testator *James Gray*, which title was not made out. The Plaintiff showed cause to this rule, claiming that he had shown the testator to have acquired title by 20 years' possession. No other point or question was raised on the argument of the rule.

The Court of Common Pleas gave judgment (1) in favor of the Defendants—they made the rule absolute to set aside the verdict and enter it for the Defendants.

The Plaintiff then appealed to the Court of Appeal, for *Ontario*. That Court acquiesced in the conclusion arrived at by the Court of Common Pleas on the question of possession, but were equally divided in opinion

(1) 1 App. R. Ont. 116.

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upon the effect of *John's* deed, raised in that Court for the first time. The appeal was thereupon dismissed, and the Plaintiff appealed to the Supreme Court.

Mr. *James Bethune*, Q.C., for Appellant:—

The Appellant claimed title under the will of *James Gray*. The evidence establishes the fact that *James Gray*, the father of the Appellant, and of *Adam Gray*, under whom the Respondents claim, was the owner of the land in question, and went into possession of it in November, 1830, and that it was used by the whole family in common for some years. In 1848, *Adam* took possession of the lot under *James Gray*, and until his father's death in 1857, was a tenant at will and could not dispute his title. *Doe Johnson* v. *Baytup* (1). In 1857, *James Gray* devised by will the property to *John Gray*, his eldest son, and the Appellant submits that this case depends very much on the construction of this will. It is contended on the part of the Appellant that the title which *John Gray* got under the will was a fee, with an executory devise over in favor of *Thomas Gray*. *Coltsmann* v. *Coltsmann* (2) is express on the point.

In 1862, *Adam Gray* accepted a conveyance from *John Gray*, and signed the deed of the 31st March, 1862. His possession thenceforward was under the title which *John Gray* acquired under his father's will, and he could not afterwards set up title against the Appellant any more than could *John*.

The Plaintiff's title was saved by the statute, as he could bring no action until the death of *John*. *See James* v. *Salter* (3); *Day* v. *Day* (4); *Brown* on the Statute of Limitations as to real property (5); *Coke* on *Littellon* (6). Other cases, *Persse* v. *Persse* (7); *Kernag-*

(1) 3 A. & E. 188.
(2) L. R. 3 H. L. 121.
(3) 3 Bing. N. C. 544.
(4) L. R. 3 P. C. C. 764.
(5) P. 622.
(6) P. 267 (B).
(7) 3 Ir. Chy. R. 196.

han v. *McNally* (1); and more particularly *Board* v. *Board* (2), show beyond doubt, when a person has entered under a will, it does not belong to him to set up an adverse title.

Mr. *Stephen Richards*, Q.C., for Respondents:

The only question raised on the trial was, whether the Appellant had made out title in *James Gray* (the testator) by 20 years possession. If, as is contended by Respondents, they have failed to do this, the Appellant cannot be allowed to raise in appeal that he showed a possession of the land by the testator previous to *Adam Gray's* possession, and that such possesion is *primâ facie* evidence of ownership, entitling him to recover.

If intended to be relied on, the Plaintiff should have raised the point at the trial: had he done so, the Defendant might have shown as the fact was, that the testator had not the legal title. *Stephens* v. *Allen* (3); *Jones* v. *Duff* (4); *Armstrong* v. *Bowes* (5); *Donnelly* v. *Rawden* (6); *Doe* v. *Needs* (7).

Previous possession is not itself a title, but at most merely raises a presumption of title; if the other facts of the case rebut the presumption it will not prevail. *Doe Carter* v. *Bernard* (8); *Henderson* v. *Munson* (9); *Wallbridge* v. *Gilmour* (10).

Moreover, the Defendants are not estopped from showing that testator had not the legal title. It was intended the land should be *Adam's*. The testator abandoned all possession of it to him, and treated it as his. *Adam* took possession of it, cleared, built and made the improvements on it, and in equity and good conscience it was his.

(1) 12 Ir. Chy. R. 89.
(2) L. R. 9 Q. B. 48.
(3) 2 U. C. Q. B. 282.
(4) 5 U. C. Q. B. 143.
(5) 12 U. C. C. P. 539.
(6) 40 U. C. Q. B. 611.
(7) 2 M. & W. 129.
(8) 13 Q. B. 945.
(9) 18 C. P. 221.
(10) 22 C. P. 135.

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The Plaintiff disclosed at the trial what he claimed was testator's title (namely, a title by statute of limitations) and that having proved defective, it is not to be presumed, in face of what he alleged and set up, that there was any other title. *Doe Woodhouse* v. *Powell* (1).

There is not sufficient evidence of possession by testator to warrant presumption of title in him as against *Adam's* possession, which was actual and real. *Shaver* v. *Jamieson* (2); *Wallbridge* v. *Gilmour* (3).

Previous possession is said to be evidence of title as against a wrong-doer: *Taylor* on evidence (4); but neither *Adam Gray* nor Defendants can be considered as wrong-doers.

As to the Appellant's contention, that *Adam* had not possession for 20 years when the deed of 31st March, 1862, was made by *John Gray* to him, and that the statute ceased to run from that date, and did not commence again until *John's* death, on 14th September, 1874, I submit that the Plaintiff cannot be allowed now to raise this question, not having raised it at the trial. Had it been raised there the Defendant's might have shown in answer to it that *John* had not, and did not claim to have, title under the will, but under a deed which he had acquired from *William Forsyth* for the whole of Lot No. 13, dated 9th April, 1860, or might have met it by other evidence showing under what circumstances the deed from *John* was made and accepted—or might have shown more clearly that *Adam's* possession extended back to more than 20 years before the deed from *John* was given. But *Adam Gray* did not enter under the deed of 31st March, 1862, from *John Gray*, nor was his possession held under that deed, nor did that deed prevent the operation of the statute during any part of the time he or Defendant *McConnell* had possession.

(1) 8 Q. B. 576.
(2) 25 U. C. Q. B. 156.
(3) 22 U. C. C. P. 135.
(4) Sec. 110.

The mere taking of a deed, as Chief Justice *Harrison* says, for value from a person out of possession and claiming under a will, by a person who held independently of the will, should not be deemed such a recognition of the title of the testator as to estop the person accepting the deed from afterwards showing that the right of entry now set up accrued more than twenty years before action, and is now extinguished.

The Respondent further contends that the right construction of the will of *James Gray*, gives a fee tail to *John Gray*, and as tenant in tail he could convey the whole estate. Cons. Stats. U. C., c. 83.

The words "without issue" are to be read "without issue generally."

There is nothing in the will to show that the testator intended to use the words "should die without leaving any lawful issue," in a sense different from their ordinary and legal construction of an indefinite failure of issue.

The learned Counsel referred to, 2 *Jarman* on Wills (1); *Doe d. Cadogan* v. *Ewart* (2); *Doe d. Todd* v. *Duesbury* (3); *Bamford* v. *Lord* (4); *Walter* v. *Drew* (5); *Broadhurst* v. *Morris* (6); and more especially to *Peyton* v. *Lambert* (7); *Jones* v. *Ryan* (8).

Mr. *Bethune*, Q.C., in reply.

Upon the point of the construction of the will, see *Coltsmann* v. *Coltsmann* (9); and *Finch* v. *Lane* (10). It was testator's clear intention that *Thomas* should succeed personally at death, if latter died without children or grand children, for we find the following words "or the children of such issue surviving him." The charge

(1) 2nd Ed. 472-473.
(2) 7 Ad. & El. 636.
(3) 8 M. & W. 530.
(4) 14 C.B. 708.
(5) 1 Comyns Reports, 373.
(6) 2 B. & Ad. 1.
(7) 8 I. C. L. R. 485.
(8) 9 I. Eq. Rep. 249.
(9) L. R. 3 H. L. 121.
(10) L. R. 10 Eq. 501.

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is to be a burthen upon the estate in whosoever hands it should go.

The following authorities were also cited as to the effect of *John's* deed and *James Gray's* possession :—

Bigelow on Estoppel, 359-381 ; *Glynn* v. *George* (1) ; *Orr* v. *Orr* (2) ; *Smith* v. *Smith* (3) ; *Hyde* v. *Baldwin* (5).

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RITCHIE, J. :—

The Plaintiff's evidence in this case shows that *James Gray* went into possession of this lot on November 30, at which time *Adam*, his son, was between 13 and 14 years of age; that *James Gray* worked on the lot, but never lived on it, and that *Adam* worked with his father both before and after he was married; that they "were using it, pretty much all together; that *James Gray* had the control of it, what he said was to be done had to be done;" that his sons never disputed his authority; that he was working on the lot a few days before he died; that for a number of years the father and the sons all worked together; that after *James Gray's* death *McConnell* got control of it; that *Adam*, while *McCallum* was assessor, was assessed for lot, though not living on it, the assessor says: "because he asked me to do so." *McCallum* was first assessor in 1833, and was so 13 years. That *Adam* moved on lot, long before his father's death.

That *McCallum* drew *Jas. Gray's* will, dated October, 1848; that *Adam* was living on W. ½ when will was made; that *Adam* had a house, barn and sheds on the lot, lived on it for a good many years, for 1½ or 2 years, and when he left that *Adam*, *McConnell*, or his tenants, have lived on it ever since; that *Adam* was living on the lot before the last will of *Jas. Gray*, 30th January,

(1) 20 New Hamp. 114.
(2) 31 U. C. Q. B. 13.
(3) 14 Gray, 532.
(4) 17 Pock. 308.

* The Chief Justice was absent when judgment was delivered.

1857, was made, that *Adam* had been living on the lot and in the receipt of the rents and profits to his own use before his father's death; that the last years *Adam* was carrying on work on the lot, he had a house, barn, sheds, stables, and a stock of cattle on the lot of his own, and the crops were put in his barn.

The evidence for the defence of *Jas. Scott* shows that *Adam* built his house and barn on the lot in '47 or '48; that the crops were taken to the west half until he had his own barn built; that he had often heard *Jas. Gray* say the E. ½ was "our *Adam's*;" that *Adam* did statute labor of lot. And by *H. Bradford*, that he knew lot since '46, that *Adam Gray* was in possession of it, for he got wood off it by his permission. *Jas. Gray* sent him to *Adam* and he made the bargain with him in '46, but on cross-examination he says the old man was the owner of the land.

The evidence of *William Gray* shows that *Adam* was in possession of lot from '45 to '60; that his father, brother, *Andrew* and himself were all working together on both E. ½ and W. ½; but he says: "notwithstanding we all worked together, each had his own 100 acres. *Adam* would get the crop off the E. ½. *John* off the W. ½. *Thomas* had 100 acres of lot 14, and *Andrew* also 100 acres of lot 14; *my father paid for the land.*" And, on cross-examination, that *John*, *Adam*, and the old man were working pretty much all together; up to the old man's death, they had to do as the old man ordered them. "My father gave me a deed, gave *John* a deed, he gave *Thomas* a deed and *Andrew* a deed. *He kept the E. ½ half for himself;*" and, on re-examination, he says: "I got my deed in '45 or '46; we got them all at the same time; *none was prepared for Adam*, my father wanted to keep 100 acres for himself."

Andrew McConnell, one of the defendants, says he was often at *Adam's* place, he was living on the E. ½

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separate and apart from the old man. *Adam* was the reputed owner. On cross-examination, he says: "*Adam* told me the land came from his father, the same as the rest of the brothers; he said his father gave it to him and afterwards made a will of it to him. At the time I made the first purchase, there was a dispute between *John* and *Adam* about the title."

Jas. Gray, on being re-called, says: "I built the house on E. ½ under contract with *Adam Gray*, it was built 26 years ago; the barn was previously built; *Adam* was to pay me," and, on cross-examination, "my grand father, *John* and *Adam* were all working together; part of the lumber in the house came from *Cushin's* mill, and part from the old man's mill. The building was, I think, put where my grand father wished it to be;" on re-examination, says: "*John* and *Adam* worked together in the mill after the barn was built on the E. ½; the crops raised on that half were put into it; if more wheat was grown on one ½ lot than on the other, it was divided between them."

And *Andrew McConnell* says: "*Adam Gray* told me before the date of his deed to me that his father had willed the lot to him."

The evidence shows, I think, very clearly this: that the land in dispute was the property of old *James Gray*, and that he owned and paid for it, and was in possession of it while *Adam* was yet but a child, and continued his possession and control over it until the time of his death; for, though it is quite true that his son *Adam* was also in possession, it seems very clear from the evidence that it was conjointly with his father, and with his concurrence and subject to his control. I take it to be a well established principle of law that if two parties are in possession of a lot of land, one having title to it and the other without title, the possession will enure for the benefit of the one having title, and though the land was

called "our *Adam's*," and the father may have intended to give it to *Adam*, and *Adam* may have had reasonable grounds for thinking that he would do so, the evidence very clearly establishes that he never did give it to him in his life time, and that neither the father nor *Adam* considered that it belonged to the latter, or that he had any title to it while the father lived. One of the witnesses for the Defendant proves that while the father gave the other sons deeds "he kept the E. ½ of 13 for himself, and no deed was prepared for *Adam*, because the father wanted to keep 100 acres for himself," and we find the father devising it to *Adam* by his will, dated 10th Oct., 1848, in these words:—

And lastly, after all my just debts are paid, I give and bequeath to my son *Adam Gray*, and his heirs, my lot of land. being East half of lot number thirteen, in the first concession of *East Hawkesbury*, County of *Prescott*, *Ottawa* District, and Province of *Canada*, aforesaid, this considered to become in force after the decease of my wife and myself.

And afterwards, revoking this will by another, and devising it to his son *John*; and after the death of the father we find *Adam*, under his hand and seal, propounding the will of his father of the 10th of October, giving him, in the words of the father, "my lot of land to become in force after the decease of my wife and myself," and requiring the same to be registered on the 22nd October, 1857, thereby, so far as he could, virtually adopting that will and recognizing the statement of the testator therein contained, that the lot in question was his at the time of the making of the will, and that he, *Adam*, considered it continued his father's up to and at the time of his death, and he not only then registered that will, but claimed under it. The evidence of *McCallum*, who drew the will, shows that this will was in the possession of *Adam*, and *McCallum*, to whom *Adam* sold, he says:—

Adam told me that the land came from his father, the same as the

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rest of the brothers; he said his father gave it to him and afterwards made a will of it to him.

And again, he says:—

Adam Gray told me before the date of his deed to me, that his father had willed the lot to him.

This will having been revoked by the subsequent one of the 30th day of January, '57, became wholly inoperative, and again we have *Adam* recognizing this last will as conveying the property to his brother *John* by taking a deed of it from him of the 31st March, '62, and under which deed Defendant now claims title, and for which *Adam* appears to have paid the consideration of $1,100. It is now claimed that Defendant has a title by possession, that is to say, by virtue of the united possession of *Adam* and himself, and if not, that he has title under the deed from *John* to *Adam*. Now, as to *Adam's* possesion, *William Gray* says *Adam* was in possession from '45 to '60; this was before he had built on the lot, for Mr. *Scott* says, *Adam* built his house and barn in '47 or '48.

James Gray died in '57, and on 31st March, '62, *John* and *Adam* executed the deed whereby *John* conveyed his interest in the land to *Adam*, so that there is no doubt that up to that time *Adam* had acquired no sufficient possession to give him a title, assuming that he actually went into the exclusive possession of the whole of the E. ½ in '47. It becomes necessary to ascertain what estate *John* took under the will of his father, for it is a proposition too plain to require authority to support it, that if *John* was the lawful owner or had a limited estate, and *Adam* took a deed from him, he must be considered in possession, as under the title, he so acquired from *John*, and if the estate of *John* was a limited and contingent estate, he cannot set up his possession under *John* to defeat the contingent estate, for the very obvious reason, that while he held *John's* title, he

was in of right and could be interfered with by nobody.

The deed from *John Gray* to *Adam Gray*, dated the 31st March, 1862, in consideration of $1,100, purports to convey the land to *Adam*, his heirs and assigns, with a covenant that the grantor is seized in fee, but, as *John's* title thus conveyed to *Adam* is devised under his father's will, the extent of that title necessarily depends on the construction of that will. The devise is in these words:—

I give and devise to my son *John Gray*, his heirs and assigns, the East half Lot No. 13, &c., to have and to hold, &c., to the said *John Gray*, his heirs and assigns, forever. But if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then, and in such case, I will and devise the said above mentioned premises with the appurtenances to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same *at the death* of the said *John Gray* to my son *Thomas*, his heirs and assigns, forever.

Subject to a condition that in case his wife *Janette* should survive him, then whoever of his said son *John*, his issue, the children of his issue, or of his son *Thomas* or his heirs, should then be the owner of said premises, by virtue of the will, should support, &c., his said wife, &c., and should they neglect or refuse to do so, then:—

I will and devise the above mentioned premises with the appurtenances unto my said wife *Janette*, her heirs and assigns, &c.

What estate, then, did *John* take under this will? I am of opinion he took an estate in fee, subject to an executory devise over in the event of there being no issue of his body lawfully begotten, or the children of such issue, surviving him, living at the time of his death. This depends on the question, whether the testator intended the contingency to depend on a definite or indefinite failure of issue, and this intention must be collected from the will itself. The distinction between a definite and an indefinite failure of issue is very clearly stated by

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a learned Judge in the U. S A., and adopted by Mr. Justice *Blackburn*, in his commentaries, thus :—

A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A., but if he dies without lawful issue living at the time of his death. An *indefinite* failure of issue is a proposition the very converse of the other, and means the failure of issue whenever it shall happen, sooner or later, without any fixed, certain or definite period, within which it must happen. It means the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event ; or, in the words of the Statute, *de donis*, referring to the first taker, if his issue shall fail.

There are to be found in the books any number of cases on this branch of the law. No doubt the rule is, that where real estate is devised, either directly to or by way of executed trust for, a person and his issue, the word *issue* will be construed a word of limitation so as to confer an estate tail on the ancestor, unless there are expressions *unequivocally* indicative of a contrary lawful intent.

But, I take it to be equally well established that if the testator meant that the limitation was ever to take effect on failure of issue living at the time of the death of the person named as the first taker, then the contingency determines at his death, and no rule of law, as is said, is broken, and the executory devise is sustained, but the difficulty arises in determining whether the testator, by the expression he uses, meant a dying without issue living at the time of the death of the first taker, or whether he meant a general or indefinite failure of issue. In 2 *Sanders* (1), it is said :—

If, however, the testator makes use of words in his will which indicate an intention to confine the generality of the expression of *dying without issue* to dying without issue *living at the time of the person's decease*, they will be so construed to effectuate the intent.

In speaking of the case of *Pells* v. *Brown* (2) ; which

(1) 388 L.

(1) 12 Cro. Jac. 590.

has been called the Magna charta of this branch of the law, a learned judge says :---

Reverting then to *Pells* v. *Brown*, that case settled the doctrine which obtains at the present day that any words which certainly indicate an intention in the testator to confine the failure of issue on which the estate is given over to a dying without issue living at the death of the first taker, will be sufficient to rebut the construction of an indefinite failure of issue.

In *Doe* v. *Wetton* (1); the devise was to the testator's daughter in fee, but if she should happen to die leaving no child or children lawful issue of her body, living at the time of her death, then over, and the limitation over was held good as an executory devise, as indeed it seems perfectly clear.

In *Fetherstone* v. *Fetherstone* (2), *Tindal*, C. J., delivering opinions of judges, says :—

We think the rule of construction laid down by Lord *Alvanley* in his judgment in the case of *Poole* v. *Poole* (3), being at once the result of the former cases, and being consistent with the principles of legal construction and of good sense, is the safe and correct rule to be applied to cases of this description, namely : " that the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it.

And Lord *Brougham* says :—

Agreeing entirely with the opinion of the judges, &c., * * I take the principle of construction as consonant to reason, and established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator used the former words of purchase contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent, inconsistent with an estate tail, being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions and regarding the expressions as words of purchase. Thus, (he says) : If there is a gift first to A. and the heirs of

(1) 2 B. & P. 324. (2) 3 C. & F. 73.
(3) 3 B. & P. 627.

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his body, and then in continuation the testator, referring to what he had said plainly, tells us, he used the words "heirs of the body" to denote a first and other sons, then clearly the first taker would only take a life estate.

In *Lees* v. *Mosely* (1), *Alderson*, B. says:—

The word issue is used in different senses, either as including all descendants, in which case it is, of course, a word of limitation or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor; it might even perhaps be considered that this is *primâ facie* its meaning. But the authorities clearly show that whatever be the *primâ facie* meaning of the word "issue" it will yield to the intention of the testator to be collected from the will, and that it requires almost less demonstrative context to show such intention than the expression of heirs of the body would do.

In *Coltsmann* v. *Coltsmann* (2), Lord Chancellor *Cairns* says:—

The words in the Codicil, then, are these: "And if it should happen that my son *John Coltsmann* die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby devise and direct that my lands, castles, tenements and premises, at and about *Flesk Castle*, and mentioned in my said will, together with the plate, furniture and library in said will specified, also, my lands, farms, tenements and premises situate lying and being at *Dick's* Grove near *Castle Island*, all subject to and charged with the payment of the aforesaid annuity to my dear wife of eight hundred pounds a year, and also, with the payment of any reasonable provision made with my consent by my son for his wife, to be paid and payable to her during her natural life, shall, at my son's death, descend and be transferred to my grandson, *Daniel Cronin*, his heirs, executors and assigns forever, the heir for the time being to add the name "*Coltsmann*," to the name "*Cronin*." Also, if it should happen that my son, *John Coltsmann*, die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the monies I have at interest, and specified in my said will, the sum of six thousand pounds to my daughter, *Mary Godfrey*, for her own use and benefit, and so as that the said sum of six thousand pounds shall not nor

(1) 1 Y. & C. 589. (2) 16 W. R. 944.

shall any part of it be subject or liable to the debts, engagements, management or control of her husband, but at the same time, said sum of six thousand pounds shall be subject to and charged with the payment of the said annuity to my dear wife, *Christina Coltsmann*."

The question as to *Flesk Castle* is, do these words cut down the estate in fee, or *quasi* fee previously given to any estate in tail or *quasi* tail? Or, on the other hand, do they amount to an executory gift over in the event of *John Coltsmann* dying without heirs of his body living at the time of his death? In support of the argument for cutting down the gift in fee simple to an estate tail, it is said, in the first place, that the words "dying without heirs of the body, and in default of such heirs" point not to the non-existence of one heir, but to the failure of a succession of heirs. In the second place, that we cannot suppose that the testator intended that if his son should leave an infant child, who should die under age, the estate should not go over to *Daniel Cronin*, as much as if the son died without issue living at his death. And it is argued, thirdly, that if the estate of *John Coltsmann* remained during all his life subject to an executory devise, he would not be able in his life-time to provide for his issue, as he might do by means of an estate tail.

As to the words of these arguments, I cannot admit that the words "die without heirs of the body" are necessarily inflexible. They are technical words, and they are strong words, but they are notwithstanding words the technical meaning of which may, on construction, be controlled by the context. A gift over "if A shall die without heirs of his body at his death, or living at his death," would imply a failure of heirs of the body at that *punctum temporis* only, and the question in this case is, does the context limit the words "heirs of the body in the same way?" The second argument proceeds upon *a priori* assumption of what the testator would naturally intend, which cannot be allowed to weigh against the proper construction of the words which he has used.

And, as to the third argument, if the testator can be supposed to have contemplated a provision to be made by the son for his issue generally, he must be supposed to have contemplated cutting off of the entail, for in no other way could provision for his issue generally be made, a proceeding which would put an end to the gift over altogether.

I turn, therefore, my lords, to the considerations which satisfy my mind, that as to *Flesk Castle* the codicil created an executory devise operating upon the absolute interest given by the will. In the first place, reading the codicil without the parenthetical or superfluous expressions, it runs thus:

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"If *John Coltsmann* die without heirs of his body and in default of such heirs, I direct that *Flesk Castle* with the plate, furniture and library shall at my son's death, descend and be transferred to *Daniel Cronin*, his heirs, executors and assigns forever."

These words appear to me to be clear and distinct, and the expression "at my son's death" appears to operate on every part of the sentence, and to point to a succession to *John Coltsmann*, which, if it arises at all, is to open upon *John Coltsmann's* death, and at no other time. The exigency of the words was attempted to be surmounted by reading them "at my son's death as aforesaid,"—that is, "at my son's death, without leaving heirs of the body." But this construction, in the first place, interpolates words which are not found in the will, and in the next place, it is open to the even more serious objection, that in an unbroken sentence it attempts to fix the meaning of the first part, and then to square the second part with the meaning so fixed, in place of reading the whole and interpreting the whole together.

The words of this will clearly indicate, I think, an intention on the testator's part to confine the failure of issue on which the estate is given over to a dying without issue living at the death of *John Gray*, the first taker.

The context, I think, shows that the testator did not intend that the words "die without leaving any issue" should receive the general construction. The words as applied to the issue or the children of such issue, coupled with the words, "then in such case to *Thomas*, his heirs and assigns, to have and to hold the same at the death of the said *John Gray*, to my said son *Thomas*, his heirs and assigns for ever," in connection with the condition that, in case his wife *Janette* should survive him, then whoever of my said son *John*, his issue, the children of his issue, or of my said son *Thomas*, or his heirs, shall then be owner, &c., shall support, &c., my said wife in a comfortable &c., and should they neglect or refuse to do so, then I will, &c., unto my said wife, &c.," all point, I think, with certainty to the death of *John Gray*, as the time at which the failure of issue contemplated

is to be ascertained, and indicate very clearly to my mind that he meant a failure at the time of the death of *John Gray*. I think it, therefore, clear that the testator meant to devise the land to *Thomas* if *John* died without issue, of his body or children of such issue living at the time of his death, and this limitation to *Thomas* being, in my opinion, good, by way of executory devise, and *John* dying without issue, I think the title vested in *Thomas*, and, therefore, the learned Judge was right on the trial in ordering a verdict to be entered in his favour.

STRONG, J.:—

The Plaintiff made out a *primâ facie* case by proving: first, the possession of his father, *James Gray*, then, that *Adam Gray*, under whom the Defendants claim, was let into possession by *James*, the father, as a tenant at will in 1847, and lastly, the will of *James Gray*, under which, according to the construction of the court below, with which I entirely agree, but as regards which I have some further observations to make, *John Gray* was the devisee in fee of the land in question, subject to an executory devise over to the Plaintiff in fee on the death of *John*, without leaving issue at his death, which event happened in September, 1874. The first objection urged against this appeal was, that there had been surprise at the trial, the Plaintiff having opened a case of title in *James Gray*, the father, under the Statute of Limitations, failing to establish which, he afterwards fell back on the bare possession of *James Gray* as *primâ facie* evidence of a seisin in fee.

Without expressing any opinion on the sufficiency of evidence of a possession for less than twenty years as establishing a presumption of a seisin in fee, which *Cole*, in his Treatise on Ejectment, says, is insufficient,

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inasmuch as any presumption arising from such possession is destroyed by the conflicting presumption arising from the present possession of the Defendant, a doctrine which at least commends itself as reasonable, I may observe, that in the present case, it was not only shown that *James Gray* had been in possession, but also that *Adam Gray*, under whom the Defendants claimed, had been let into possession by his father, *James*, and so became his tenant at will, which was manifestly to establish a sufficient case. Then, as the Defendants would have been estopped from proving an outstanding title in a stranger, which they might certainly have done, if the evidence had consisted of proof of former possession alone, without the fact of the tenancy at will and consequent estoppel, it does not appear possible that the Defendant could have been prejudiced by the Plaintiff's abandonment of the case, under the Statute of Limitations. As regards the will of *James Gray*, I am clearly of opinion, that the proper construction of that instrument was that which the Court below attributed to it, namely, that *John Gray* took an estate in fee simple, subject to an executory devise over in favor of the Plaintiff, on the death of *John*, without issue at the time of his death. The case referred to *Coltsmann* v. *Coltsmann* (1), is directly in point, and if that case is inconsistent with the previous decision in *Jones* v. *Ryan* (2), the answer must be that the last mentioned case is over-ruled by *Coltsmann* v. *Coltsmann;* but there is, between the two cases, a distinction, though but of one word, which is pointed out by the text-writers and has been supposed to make a difference. In *Jones* v. *Ryan*, the words were "*after* the death of the first taker"—in *Coltsmann* v. *Coltsmann* the words were "*at* my son's death," as in the present case, they are "*at* the death of the said *John Gray*." Therefore, if *Jones* v. *Ryan* is

(1) L. R. 3 H. L. 121. (2) 9 Ir. Eq. Rep. 249.

distinguishable from *Coltsmann* v. *Coltsmann*, this case is governed not by the former, but the latter authority. Indeed, without any reference to authorities, it is hard to see how a testator, who desires to give an estate over in the event of failure of issue not indefinitely, but at the death of the first taker, can do so more effectually than by using the words in which the testator expressed himself in the present case:—

To have and to hold the same *at the death* of the said *John Gray* to my said son *Thomas*.

The defence of the Statute of Limitations has, in my judgment, entirely failed. *Adam Gray* went into possession as a tenant at will to his father in 1847, so that the Statute began to run in 1848, at the expiration of a year from the commencement of that tenancy. *James Gray*, the testator, died in 1857, having made the will already referred to. The Statute having begun to run in the lifetime of the testator, it is well settled, and beyond the reach of controversy, that the Plaintiff is not entitled to the protection accorded by the Statute to remainder-men, reversioners, and other owners of future estates, as he would have been if the Statute had only commenced to run after the testator's death. If, therefore, there had been nothing to interrupt the running of the Statute, a title under it would have been acquired by *Adam Gray*, or the Defendant, *McConnell*, in 1868. That there was such an interruption, however, seems very clear. In 1862, *Adam Gray*, being then in possession, took a conveyance from *John Gray*, the devisee in fee, subject to the gift over to the Plaintiff, under the will of *James Gray*.

The effect of this conveyance does not seem to have been pressed in the Court of Common Pleas, and in the Court of Appeals the learned Judges were equally divided on the question which arose upon it. It appears to me, that from the date of this deed the

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Statute of Limitations was out of the question. I put the doctrine of estoppel aside, not because I do not entirely agree with Mr. Justice *Moss* and Mr. Justice *Patterson* in their well supported judgments on that point, but because I think the same conclusion is arrived at in a more simple way upon the Statute itself.

Mr. Justice *Patterson* points out that the aphorism that when the Statute once begins to run nothing stops it, has reference only to disabilities, and that it does not mean that if a man has been for nineteen years in tortious possession of an estate, and then gets a conveyance of the fee from the true owner, he can, after the lapse of a year, say, he is in with a good title under the Statute. The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acqusitive prescription—in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 *Wm.* 4 says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of *James*, which only barred the remedy by action, but its operation is by way of extinguishment of title only.

Mr. Justice *Patterson* quotes from Baron *Parke's* judgment in *Smith* v. *Lloyd* (1) this passage :—

> There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.

This authority does not controvert what I have just propounded, for in order that the Statute may operate against the owner out of possession, actual possession

(1) 9 Ex. 562.

in fact in another is essential, in order that the rule of law which attributes a possession actually vacant to the person who has the legal title may be rendered inapplicable.

Then applying this view of the Statute to the facts before the Court on this Appeal, let me inquire who was the owner out of possession between the 31st of March, 1862, the date of the deed from *John Gray* to *Adam Gray*, and the 14th September, 1874, the day on which *John Gray* is proved to have died, to be affected by the Statute? Not *John Gray*, for he had conveyed to *Adam*, not the Plaintiff, for his possessory title had not accrued. There was, therefore, no one whom the Statute could affect. It had ceased to operate, for the possession was rightful from that date.

The proposition, that time can never be said to run against a remainder-man, so long as a tenant for life under the same will or settlement is in possession, which is, in effect, the present case, seems so plain that scarcely any authority is called for, but in addition to the case of *Anstee* v. *Nelms* (1), referred to by the learned Judges of the Court of Appeals, I may make a short quotation from text writers to the same effect.

Darby and *Bosanquet*, in their treatise on the Statute of Limitations (2), say :—

> Though the Statute may be running against a settlor at the time the settlement is made, yet the fact of the grantee of a particular estate taking possession under the settlement will re-vest the title of all persons entitled to remainders under the settlement, as well as that of the settlor and his heirs in reversion.

This is a succint statement of the law as I interpret the Statute. In short, the Statute has no application, except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required.

(1) 1 H. & N. 232. (2) P. 236.

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The learned Chief Justice of the Queen's Bench lays it down as the practice of the House of Lords on Appeals, that a point of law could not be argued upon an Appeal which had not been raised in the Court below, and for this proposition the case of *Oakes* v. *Turquand* (1) was cited. A reference to that case shows, however, that what was there said had no connection with this point, but was in condemnation of the practice, which prevails more or less in most equity appeals, of raising a discussion as to the minutes at the conclusion of the judgment, and was no authority at all for the rule it was assumed to have established, which is directly contradicted by the treatise writers on the practice of the appellate jurisdiction both of the House of Lords and the Privy Council.

I am of opinion, that the order of the Court of Appeals should be reversed, and that the rule *nisi* for a new trial in the Court of Common Pleas should be discharged, with costs to the Appellant in this Court, and in both the Courts below.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

This case comes to us by appeal from the Appeal Court of *Ontario*. It is an action of ejectment brought to recover a lot of land containing about one hundred and thirteen acres of land, being the eastern half part of Lot 13 in the First Concession of lots at *Hawkesbury*, and the broken front thereof. The suit was brought against *Richford*, and *McConnell* was subsequently admitted to come in and defend as his landlord. The Plaintiff, by his notice, claims title under the last will and testament of his late father, *James Gray*.

The Respondent, *Richford*, by his notice of title, denies

(1) L. R. 2 E. & I. App. 325.

the title of the Appellant, and claims as tenant of the other Respondent, *McConnell*.

The Respondent, *McConnell*, by his notice of title, denies the title of the Appellant, and asserts title in himself, by possession of himself and by those through whom he claims for upwards of twenty years before action commenced. He also claims title by deeds from *John Gray* to *Adam Gray*, dated 31st March, 1862, and from *Adam Gray* to him, dated, respectively, 20th June, 1862, the 26th of April, 1858, and the 15th September, 1862.

The Appellant, claiming title as I have before stated, under the will of his late father, *James Gray*, shows, by evidence uncontradicted, that as far back as 1830, he (*James Gray*) went into possession of the locus; and, according to some of the evidence, continued in possession till he died, in August, 1857, a period of twenty-seven years. When he went into possession, as proved by his son-in-law, *McCallum*, he had three sons, *John*, *Andrew* and *Adam*. The latter was then between 13 and 14 years of age. It is in evidence that *Adam* lived on the locus for some years before the death of his father; but the evidence is not clear that his possession of it was exclusive, for one witness, *James H. Gray*, asserts that he (the witness) lived with his grand father, whose house was on the west half of Lot 13, for many years, and that the east half was worked also by the testator. He says:—

We were using it pretty much together. My grand-father had control of it. I have worked with him on both the east and west half—the last time I saw him working, which was a few days before he died, was on the east half. *My grand-father had control of both halves of the lot.* What he said was to be done, had to be done—his sons never disputed his authority.

He is re-called by the Respondents, and states that:—

I built the house on east half under a contract with *Adam Gray* 26 years ago, (that would be in 1850, or about 20 years after *James*

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Gray went into possession). The barn was built previously. *Adam* was to pay me.

On cross-examination, he says:—

My grand-father, *John*, and *Adam* were all working together * * * the building was, I think, put where my grand-father wished it to be. *John* and *Adam* worked together in the mill. After the barn was built on the east half the crops raised on that half were put into it; if more wheat was grown on one half the lot than on the other, it was divided between them.

William Gray, a son of *James*, and a brother of *Adam*, says *Adam* was in possession of the east half from 1845 to 1860. He says his father paid for all the lots his sons had. That, although they all worked together on the east and west halves "*Adam* would get the crop off the east half" and "*John* would get the crop off the west half."

James Scott proves that *Adam* built his house and barn on the east half in 1847 or 1848—he was then married. "The crop was taken to the west half until he had his own barn built—often heard the old man say, the east half was "Our *Adam's*." Heard him and his wife say so in 1842 and 1843.

Henry Bradford says, *Adam* was in possession since 1846. In that year he got wood off it by his permission —his father referring him to *Adam*—and he concludes: "Mr. *Adam Gray* appeared to be in possession until Mr. *McConnell* got it." "I supposed the old man was the owner of the land." On his cross-examination, *William Gray* adds:—

John and *Adam* and the old man were working pretty much all together up to the old man's death—they had to do as the old man ordered them. My father gave me a deed—he gave *John* a deed—he gave *Thomas* a deed, and *Andrew* a deed—he kept the East half of 13 for himself.

On his re-examination, he says, they all got their deeds in 1845 or 1846—"none was prepared for *Adam*. My father wanted to keep 100 acres for himself." Upon the

evidence of the alleged possession of *Adam*, previous to the death of his father, there is some doubt, whether, under all the circumstances, it was sufficiently exclusive in its nature to amount to a disseisin of the whole lot, or any part of it. The line between the east and west half was run. That might have been done not to mark the boundaries of *Adam's* possession, but to divide the lot as between the old man and *John*, who got a deed of the western half in 1845. There is no evidence that the survey had any reference to *Adam's* possession. The lines were not shown to have been run for *him*. According to the evidence, *Adam* admitted the title of his father, and if the latter permitted him to use a portion of the lot, which, by the late Statute, would oust him and those claiming under him of the title in 20 years from the end of a year from the beginning of his tenancy at will, that would not, I take it, divest him of the title to that portion which remained in a wilderness state, and never in the manual possession of *Adam*, but, by contemplation of law, in the possession of his father. *Adam* admitted the title of his father *to the whole lot*, and to hold the whole of it he must show a disseisin of the whole. *Adam's* possession, under the circumstances, must, I think, be "by the foot," and therefore would cover only that part in his actual occupation.

From the time that the possession of *Adam* is alleged to have commenced to the time he received the deed from *John*, he had not possession long enough to give him a title, and so we may presume he himself then considered. By that deed, dated 31st March, 1862, he is shown to have made a purchase of the land for a valuable consideration, for he appears to have paid for it eleven hundred dollars, which, we may presume, was at that time, about its full value. He and those deriving title through him are therefore estopped, I think, from setting up the previous possession. Taking the

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deed, under the circumstances, is an admission of holding solely under *John*. Had he not then purchased, or made some other arrangement with *John*, the latter might have evicted him, through his title under the will. Besides he, by that deed, has a covenant from *John*, that at the time of the ensealing thereof, "he was solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple, of and in the land, tenements and heriditaments, and all and singular other the premises thereinafter described," and further, "that the grantor now hath in himself good right, full power, and lawful and absolute authority to grant, sell a lien, convey and confirm" the premises to the grantee, "his heirs and assigns in manner and form aforesaid," with covenants for quiet enjoyment, and for further conveyances and assurances of the title, as might "be lawfully and reasonably devised, advised, or required."

The title under which the Respondent claims is by a deed from *Adam Gray* to him, dated the 20th of June, 1862, less than three months after the deed from *John* to *Adam* of one acre of the lot, with covenants the same in substance as in the deed from *John* to *Adam*. Also, under a mortgage on the lot from *Adam* for £275, with a covenant from the Respondent, *McConnell*, for quiet possession by *Adam*, until default in payment of the mortgage. And a deed from *Adam*, dated 15th September, 1868, "in pursuance of the Act respecting short forms of conveyances" of the east half of the lot for a consideration of $1,660.00, reserving the acre previously conveyed, with covenants for quiet possession, and against encumbrances. A party is not permitted to continue in possession under a deed, and afterwards say that he acquired the property by a possessory title. See *Hawksbee* v. *Hawksbee* (1), also *Anstee* v. *Nelms* (2),

(1) 11 Hare, 230.

(2) 1 H. & N. 225.

where it is said by Baron *Martin* and agreed to by *Pollock*, C. B.,

That the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such a possession was unlawful, so as to give his heirs a right against a remainder-man.

See *Persse* v. *Persse* (1); *Kernighan* v. *McNally* (2); *Morton* v. *Woods* (3); all which sustain the views I have expressed on this point. The cases all propound the principle that if parties have no other *title* than a will, they are estopped from denying the title under the same will. The principles laid down by Lord *Chelmsford* in *Archibald* v. *Scully* (4) fully accord with the position I have taken, that the possession of *Adam*, up to the taking of the deed from *John*, was in law the possession of *John* claiming under the will. Although by the Statute it is only necessary to show the Plaintiff out of possession twenty years, and there is now no question of adverse possession, is there evidence that, in this case, the parties through whom the Appellant claims were so out of possession? I think not. *Adam*, in the first place, admits the title of his father by receiving possession from him, as his tenant at will, and *John*, as his devisee, would be entitled to claim the benefit of that admission, and *Adam* in purchasing the land from him, *by his own act* admits *John's* title as well as that of his father; and virtually agrees to hold the land as grantee of *John*. *John's* title being then vested in him, and the party (if any) entitled as executory devisee not being able to claim during the life of *John*, there is no one against whom the Statute will run, for the title and possession are both in the same party. It is a general principle, well settled, that when the Statute

(1) 3 Ir. Chan. R. 196.
(2) 12 Ir. Chan. R. 89.
(3) L. R. 3 Q. B. 658, and L. R. 4 Q. B. 293.
(4) 9 H. L. 384.

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begins to run nothing will stop it. The act of the party himself, however, may do it, as I think *Adam* did, by the purchase and conveyance from *John*, even if his possession up to that was an adverse one, which it was not. We are not, however, trying the question of adverse possession in *Adam*; but whether *John's* father and he, together, were out of the possession 21 years from the inception of *Adam's* exclusive possession, if he ever had such.

The possession of *Adam* and his grantees, after the deed was, so far as relates to the interests of the executory devisee the same, I take it, as if it had been that of any other party to whom *John* conveyed. The Statute in that case would only run from the death of *John*. As a question of law, in view of the authorities, *Adam*, having made the purchase of the land from *John*, whose title was solely under the devise from his father, is estopped from saying he had no right to make that devise. See *Broad* v. *Broad* (1).

In that case (in 1873), *R. A.*, being tenant by the curtesy of certain premises, devised them by his will to trustees for his daughter *Rebecca* for life, with remainder to his grandson *William*. Upon the death of testator, *Rebecca* entered into possession of the land purported to be devised, and paid some annuities charged by the will upon the premises, and was suffered by the heir at law to remain in possession, undisturbed, for more than twenty years. *William* conveyed his remainder to the Plaintiff. *Rebecca*, after she had been in possession more than twenty years, conveyed the premises to the Defendant, who, upon her death, took possession. The Plaintiff, the assignee of *William*, the remainderman, having brought ejectment, it was held that *Rebecca*, having entered under the will, the Defendant claiming through her was estopped, as against all those in re-

(1) L. R. 9 Q. B. 48.

mainder, from disputing the validity of the will, and that the Plaintiff was entitled to recover.

In delivering judgment, Mr. Justice *Blackburn* said :---

Rebecca claimed under the will and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity. My brother *Martin*, in *Anstee* v. *Nelms* says: "that the Statute of Limitations can not be so construed that a person claiming a life estate under a will shall enter, and then say, that such possession was unlawful, so as to give to him or his heir a right against a remainder-man." That seems directly in point. It is good sense and good law.

Mellor, J., says :—

It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest under a will after she has been in possession for twenty years under it to convert her limited interest into a fee. A person cannot say that a will is valid to enable him *to take a benefit under it*, but invalid so far as regards the interests of those in remainder, who claim under the same will.

The case just cited is like the one before us, with the exception that *Adam* was in possession at the time he purchased and got the deed. That possession was not then, however, in any respect an adverse one; but, as the tenant at will of *John*, under his title as devisee, *Adam* never repudiated the title of the testator, or of *John*, but held under them, and finally purchased from the latter. The testator was in possession by *Adam*, as his tenant, and, until by force of the statute, which in the meantime does not alter the character of the holding or the relation of the parties, the possession ripened into a title, the testator was in contemplation of law in possession as fully as the Respondent, *McConnell*, claims to be by his tenant, the other Respondent; and, as such, up to the time of his death, might, as the landlord of *Adam*, have come in and defended the title in an action brought against the latter, and he could have made up his title by possession by the addition of his own previous one to that of his said tenant. I think, therefore,

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the learned Judge who tried the cause was on this point quite right in his finding.

How does the possession of *Adam*, after the deed from *John*, operate as regards the executory devise over? The defence upon the point is, that at the death of *John*, the testator and he together had been out of possession 20 years. Suppose *John*, instead of *Adam*, had sold and conveyed to another, and the latter had, in 1862, gone into possession under that conveyance, how then could it be asserted that they were so out of possession. I take it that *Adam's* possession, after he purchased and got the deed, is an admission that he held thence forth under it, and consequently under the will; and I think such possession must enure to the benefit of the executory devisee under the will, in the same way, and to the same extent, as if the possession had been in another party under a similar conveyance. I cannot, on any principle, ascertain why it should not be so.

Having settled the question of possession in favor of the Appellant, the further result will depend upon the construction of the devise in the will. The testator devises the lot of land in question to his son *John*, his heirs and assigns:—

To have and to hold the premises above described to the said *John Gray*, his heirs and assigns, for ever.

Were these words contained in a deed of conveyance, they would be uncontrolled by a subsequent clause giving any estate less than a fee simple. In a will it is different. In the next clause of the will there is contained this proviso:—

But if my said son, *John*, should die without *leaving* any issue of his body lawfully begotten, or the children of such issue *surviving him*, then and in such case I will and devise the said above mentioned premises, with the appurtenances to my son, *Thomas Gray*, his heirs and assigns, to have and hold the same *at the death* of the said *John Gray*, to my said son *Thomas*, his heirs and assigns, for ever.

These devises are all subject to a condition, that if

his wife survived him, whoever of his said son *John*, his issue, the children of his issue, or of his said son *Thomas*, or his heirs, should then be the owner of the above mentioned premises by virtue of the will, should support his widow; and on failure to do so, he devised the land, from the time of neglecting or refusing such support, to his wife, her heirs and assigns, for ever.

There is no contention that the construction of the will is to be affected by the latter condition, providing for the support of testator's wife. We have, therefore, to ascertain whether, under the devise to *John*, he took an estate in fee simple with an executory devise over *at his death* to the Appellant, in case he died without issue; in which case, *John* would be held to have but a life estate, and not an estate in fee tail. *John* died unmarried, and leaving *at his death* no child or children "of his body lawfully begotten." If his title was an estate tail, the conveyance to *Adam* would have given him an estate in fee simple, and barred the title or entry of the remainder-man. If, on the contrary, he took an estate in fee simple contingent on his *leaving* children or grand-children *at his death*, with a devise over, on failure at that time, then his estate was one for life, and a title made by a conveyance by him would cease at his death.

The cases in the books have been found somewhat conflicting, and the distinctions have been so closely drawn between the two different estates that for many years in *England*, it will be found, there were, apparently, decisions both ways. For several years past, however, the definitions are more clear, and the decisions uniform, which go to sustain the proposition that *John* took, under the will, an estate in fee simple with an executory devise over to *Thomas*, his heirs and assigns, at *John's* death, in case he (*John*) died without *leaving*

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any issue of his body lawfully begotten, or the children of such issue *surviving him.*

It is by the express terms of the will a devise of a fee simple to *John* determinable on a particular event with a devise over in fee simple to *Thomas*, on the occurring of that event. We have not, therefore, to construe an indefinite devise to *John* to be considered a fee simple, or fee tail, according to other provisions of the will. By the devise, no person taking under it was to have a less estate than one of fee simple. It is true, by the failure to leave issue, *John's* estate was at an end, but while he lived he held a fee simple contingent, and, at and from his death, *Thomas* was to hold a fee simple. I can discover no principle or decision in pursuance of which *John's* estate could, at any time, or under any circumstances, be called an estate in fee tail.

The devise of what otherwise would be an estate tail may be raised to one in fee simple, by a condition on the tenant to pay a sum of money in the shape of legacies and otherwise, and an estate apparently created by a devise in fee simple may be reduced to an estate tail, where it is necessary to carry out the intention of the testator clearly shown in subsequent dispositions or limitations inconsistent with an estate in fee simple; but here there is nothing of the kind. There is no legal prohibition to the testator's executory devise, and the language of it being free from doubt as to his intentions, we have simply to give effect to them by our judgment. To create an estate in fee tail it is necessary to confine the descent to the issue of the donee; but here there was no such limitation, for the estate was, in the first place, given to *John, his heirs and assigns in fee.* And the subsequent provision is not, and was not intended, to, in any event, reduce his holding to that of an estate less than a fee simple.

Had, however, the devise to *John* been limited to him

and his heirs only, it would still have given him a title in fee simple, by the effect of the gift over to *Thomas* at his (*John's*) death, in fee simple, it being considered to denote that the prior devisee should have the inheritance in the alternative event of his leaving issue. If *John* had therefore left the defined issue surviving him, the title of *Adam*, and those claiming under him, would have also been in fee simple, the condition of the devise being then fulfilled to the exclusion of the executory devise. In *Doe* v. *Webber* (1) it was held that by a devise to *M. H.*, her executors, administrators or assigns, forever; "but in case *M. H.* shall happen to die and leave no child or children, then to *J. B.*, and her heirs, forever, paying the sum of £1,000 to the executor or executors of *M. H.*, or to such person as *M. H.*, by her will shall appoint," it was held that the words "child or children," were here synonymous with issue, and that this was not the devise of an estate tail to *M. H.*, but of an estate in fee to *M. H.*, with a good executory devise over to *J. B.*, in case *M. H.*, died leaving no issue living *at her death*.

Per Lord *Ellenborough*, in giving the judgment of the Court:—

> And if the event on which the two tenements named in the will are given over be, as we think it is, to be confined to a failure of issue at *Mary Hile's death*, not only the above case of *Roe* v. *Jeffery* (2); but also the cases of *Power* v. *Bradley* (3) and *Barnsfield* v. *Whelton* (4) are directly applicable to the present case, to show that the prior estate in fee simple, given to *Mary Hiles*, is not by the limitation over upon the failure of her issue at the time of her death, narrowed into an estate tail. * * * We think, therefore, that the first devise gave a fee, and that the devise over is an executory devise and not too remote. Consequently, that it is not barred by the recovery, and that judgment must be for the Plaintiff.

The case just cited is "on all fours" with the one before us. It has never been over-ruled, but, on the

(1) 3 B. & Ald. 713 (in 1818).
(2) 7 T. R. 589.
(3) 3 T. R. 143.
(4) 2 Bos. & Pull. 324.

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contrary, has been cited with approval, and, as far as the reported cases go, is now settled law and doctrine.

Vice Chancellor *Wood*, in his judgment in *Parker* v. *Birks* (1), in 1854, refers to and adopts the ruling of Lord *Ellenborough* in that case. He says:—

> The words were leaving "no child or children," which are as strong as the words in this case, and Lord *Ellenborough*, C. J., said that the gift must be construed as a devise in fee to *M. H.*, which would enable her to give the estate to her issue, if she had any. * * * This is, therefore, like the case of *Roe* v. *Jeffery*, 7 T. R. 589, which was a devise to *J. F.*, and to his heirs, for ever; but in case *J. F.* should depart this life and leave no issue, then the testator devised over estates for life only. In that case, the first devise was held to be in fee and not in tail, and the limitation over a good executory devise upon the event of a failure of issue *at the time of his death.*

The learned Vice Chancellor, after reviewing and quoting previous decisions and authorities, says:—

> In no case in which a clear estate in fee simple has been limited by the first words, has that estate been reduced to an estate tail in order to construe the words of the gift over on the death of the devisee without issue, to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder, because it is necessary, first to make out that the gift in fee is cut down to an estate tail. * * * I think, therefore, that I must decide according to the authorities of *Doe* v. *Frost*, 3 B. & Ald. 546, and exparte *Davies*, 2 Sim. N. S. 114, and having regard to the clear gift in fee simple to *William Shaw* in this case, that the true construction of this will is, that he took an estate in fee simple, subject to an executory devise over on his death, if he should die without issue.

In *Doe* v. *Frost* the devise was to *W. F.*, the son of the testator, in fee "and if he should have no children, child or issue, the said estate was, on the decease of *W. F.*, to become the property of the heir at law." Held, that *W. F.*, took under this will an estate in fee with an executory devise over to the person, who, on the happening of the event contemplated by the will, should become the heir at law of the testator.

(1) 1 K. & J. 162.

In *Roe* v. *Jeffery* in 1798, cited, as before mentioned, by Lord *Ellenborough*, in *Doe* v. *Webber*, the devise was as already shown, and Lord *Kenyon*, C. J., in giving the opinion of the Court, says :—

We had occasion a few days ago to advert to this doctrine when we said that this is a question of construction depending on the intention of the party, and nothing can be clearer in point of law, than that if an estate be given to A in fee, and by way of executory devise, an estate be given over which may take place within a life or lives in being and twenty-one years, and a fraction of a year afterwards, the latter is good by way of an executory devise. The question, therefore, in this and similar cases is, whether from the whole context of the will we can collect that, when an estate is given to A and his heirs for ever; but if he die without issue then over, the testator meant dying *without issue living at the death* of the first taker. The rule was settled so long ago as in the reign of *James the First*, in the case of *Pells* v. *Brown*, Cro. Jac., 590., where the devise being to *Thomas*, the second son of the devisor, and his heirs, forever, and if he died without issue living, then *William*, his brother, should have those lands to him and his heirs forever, the limitation over was a good executory devise. That case has never been questioned or shaken, but it has heen adverted to as an authority in every subsequent case respecting executory devises; it is considered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the established law of the land, as (it was supposed by the Defendant's counsel) we should do, if we decided this case against him.

In conclusion, I can most profitably adopt and make use of the words and conclusions of the learned Chief Justice :—

On looking through the whole of this will we have no doubt but that the testator meant that the dying without issue was confined to a failure of issue *at the death of the first taker*, for the persons, (person) to whom it is given over were (was) then in existence * * * and, if so, the rule of law is not to be controverted. It is merely a question of intention, and we are all clearly of opinion that there is no doubt about the testator's intention.

The result of all these authorities is, that *John* had only a life interest in the property, and that at his death it vested in fee in *Thomas*, under the executory devise,

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and, therefore, the appeal should be allowed and judgment on all the points given for the Appellant with costs.

Appeal allowed with costs.

Solicitors for Appellants : *Bethune, Osler & Moss.*

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