38. *Does the English practice of opening biddings on a sale of mortgaged premises, under a decree, prevail to any great extent in this country?*—192.

No.

LECTURE LIX.

OF ESTATES IN REMAINDER.

1. *Of what two kinds are estates in expectancy?*—197.

The first is created by the act of the parties, and called a *remainder;* the second by the act of law, and is called a *reversion.*

2. *Under how many heads are remainders treated?*—197.

Under nine, viz.,

1. Of the general nature of remainders.
2. Of vested remainders.
3. Of contingent remainders.
4. Of the rule in Shelley's case.
5. Of the particular estate.
6. Of remainders limited by way of use.
7. Of the time within which a contingent remainder must vest.
8. Of the destruction of contingent remainders.
9. Of some remaining properties of contingent remainders.

3. *What is a remainder?*—197.

It is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it.

4. *How, by the New York Revised Statutes, is a remainder defined?*—198, *n.* (*a.*)

It is defined to be an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate, created at the same time; and

where a future estate is dependent on a precedent estate, it is a remainder, and may be created and transferred as such.

5. *Of what may a remainder consist?*—198.

It may consist of the whole remnant of the estate; as in the case of a lease to A for years, remainder to B in fee; or it may consist of a part only of the residuary estate, and there may be a reversion beyond it left vested in the grantor, as in the case of a grant to A for years, remainder to B for life; or there may be divers remainders over, exhausting the whole *residuum* of the estate, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee.

6. *Can a remainder be created after a grant of the fee?*—199, *n.* (*a.*)

Not at common law; but, by the New York Revised Statutes, a contingent remainder in fee may be created on a prior remainder in fee, and to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. So, by the same statutes, a fee may be limited on a fee, upon a contingency which, if it should occur, must happen within two lives in being at the creation of the estate.

7. *What are cross-remainders?*—201.

They are another qualification of these expectant estates, and they may be raised expressly by deed, and by implication in a devise. If a devise be of one lot of land to A, and of another lot to B, in fee, and if either dies without issue, the survivor to take, and if both die without issue, then to C in fee, A and B have cross-remainders over by express terms; and on the failure of either, the other, or his issue, takes, and the remainder to C is postponed; but if the devise had been to A and B of lots to each, and remainder over on the death of both of them, the cross-remainders to them would be implied.

8. *Of how many sorts are remainders?*—202.

Two; vested and contingent.

9. *What is the definition of a vested remainder, by the New York Revised Statutes?*—202.

It is "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate."

10. *How does the law regard vested remainders?*—203.

The law favors vested estates, and no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested.

11. *What distinguishes vested from contingent remainders?*—203.

The present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines.

12. *What is a contingent remainder?*—206.

A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate.

13. *What distinguishes contingent from vested interests?*—206.

The uncertainty of the *right* of enjoyment in future, and not the uncertainty of that enjoyment itself.

14. *What must be the nature of the contingency on which the remainder is made to depend?*—206, *n.* (*a.*)

At common law it must be a common or near possibility, and not what the law terms a possibility on a possibility. But in New York, under the Revised Statutes, no future estate, otherwise valid, shall be void on account of the probability or improbability of the contingency on which it is limited to take effect.

15. *Into what four classes are contingent remainders divided?*—207, 208.

1. The first sort is where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in futuro* will ever vest.

Thus, if A makes a feoffment to the use of B, till C returns from Rome, and after such return, remainder over in fee, the remainder depends entirely on the uncertain or contingent determination of the estate in B, by the return of C from Rome.

2. The second sort is where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate, and must precede the remainder. As if a lease be to A for life, remainder to B for life, and if B dies before A, remainder to C for life; the event of B dying before A does not affect the determination of the preceding estate, but it is a dubious event which must precede, in order to give effect to the remainder in C.

3. A third kind is where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. Thus, if a grant be made to A for life, and, after the death of B, to C in fee; here, if the death of B does not happen until after the death of A, the particular estate is determined before the remainder is vested, and it fails from the want of a particular estate to support it.

4. The fourth class of contingent remainders is, where the person to whom the remainder is limited is not ascertained, or not in being. As in the case of a limitation to two persons for life, remainder to the survivor of them; or in the case of a lease to A for life, remainder to the right heirs of B, then living. B can not have heirs while living, and if he should not die until after A, the remainder is gone, because the particular estate failed before the remainder could vest.

16. *Is there not a distinction which operates by way of exception to the third class of contingent remainders?*—209.

There is; thus, a limitation for a long term of years, as, for instance, to A for eighty years, if B should live so long, with the remainder over, after the death of B, to C in fee, gives a *vested* remainder to C, notwithstanding it is limited to take effect on the death of A, which possibly may not happen until after the preceding estate for eighty years.

17. *Do not exceptions exist also to the generality of the rule which governs the fourth class of remainders?*—209, 210.

They do; thus, if the ancestor takes an estate of freehold,

and an immediate remainder is limited thereon, in the same instrument, to his heirs in fee, or in tail, the remainder is not contingent, or in abeyance, but is immediately executed in possession in the ancestor, and he becomes seised in fee, or in tail. So, if some intermediate estate for life, or in tail, be interposed between the estate of freehold in A and the limitation to his heirs, still the remainder to his heirs vests in the ancestor, and does not remain in contingency or abeyance. If there be created an estate for life to A, remainder to the heirs of his body, this is not a contingent remainder to the heirs of the body of A, but an immediate estate tail in A; or if there be an estate for life to A, remainder to B for life, remainder to the right heirs of A, the remainder in fee is here vested in A, and after the death of A, and the determination of the life estate in B, the heirs of A take by descent as heirs, and not by purchase. The possibility that the freehold in A may determine in his lifetime, does not keep the subsequent limitation to his heirs from attaching in him; and it is a general rule, that when the ancestor takes an estate of freehold, and there be in the same conveyance an unconditional limitation to his heirs, in fee, or in tail, either immediately, without the intervention of any estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately with the interposition of some such intervening estate; the subsequent limitation vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession, or a vested remainder.

18. *What is this rule called, and what is the present law in New York on this point?*—211, *n.* (*d.*)

The rule in Shelley's case. The New York Revised Statutes have done away with the rule in Shelley's case, and enacted that where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as *purchasers*, by virtue of the remainder so limited to them.

19. *How has Mr. Preston defined the rule in Shelley's case?*—215.

His definition of the rule is as follows: "When a person

takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

20. *Must there be a particular estate to precede a remainder?*—233.

Yes; for it necessarily implies that a part of the estate has already been carved out of it, and vested in immediate possession in some other person.

21. *Must the particular estate be valid in law, and formed at the same time, and by the same instrument, with the remainder?*—233.

Yes.

22. *If the particular estate be void in its creation, or be defeated afterward, will the remainder created by a conveyance at common law, resting upon the same title, be defeated also?*—235.

It will, as being, in such a case, a freehold commencing *in futuro*.

23. *When must the interest to be limited as a remainder, either vested or contingent, commence or pass out of the grantor?*—248.

At the time of the creation of the particular estate, and not afterward.

24. *Must the remainder be so limited as to await the natural determination of the particular estate?*—249.

It must, and can not take effect in possession upon an event which prematurely determines it.

25. *Do not the New York Revised Statutes allow a remainder to be limited on a contingency?*—250–252.

They do; on a contingency which, in case it should happen, would operate to abridge or determine the precedent estate; and every such remainder is to be construed a conditional limitation, and to have the same effect as such a limitation would have at law.

They have also made many other changes in the common law doctrine of remainders. Thus, a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the prior estate determines before the person to whom it is limited attains the age of twenty-one. No remainder can be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such a remainder be a fee; nor can a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term. Nor can a remainder be made to depend upon more than two successive lives in being; and if more lives be added, the remainder takes effect upon the death of the first two persons named. A contingent remainder can not be created on a term for years, unless the nature of the contingency on which it is limited be such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate. A freehold estate, as well as a chattel real (to which these regulations apply), may be made to commence at a future day; and an estate for life may be created in a term of years, and a remainder limited thereon; and a remainder of a freehold or chattel interest, either contingent or vested, may be created expectant on the determination of a term of years. Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it; and no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect. When a remainder on an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years. No expectant estate shall be defeated or barred by any alienation or other act of the owner of the intermediate estate, nor by any destruction thereof, except by some act or means which the party creating the estate shall, in the creation thereof, have provided for or authorized. Nor shall any remainder be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; and the remainder takes effect when the contingency happens, in the same manner and to the same extent as if the precedent estate had continued.

But these provisions do not affect interests which became vested, nor instruments which took effect, before the 1st of January, 1830.

26. *By what are conveyances to uses governed?*—257.

By doctrines derived from courts of equity; and the principles, which originally controlled them, they retained when united with the legal estate.

27. *Are all contingent and executory interests assignable in equity?*—261, 262.

They are; and will be enforced, if made for a valuable consideration; and it is settled, that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and devisable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they can not be either devised, or descend, at common law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens.

LECTURE LX.

OF EXECUTORY DEVISES.

1. *What is an executory devise?*—263.

It is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law.

2. *What if the limitation by will does not depart from those rules prescribed for the government of contingent remainders?*—263.

It is in that case a contingent remainder, and not an executory devise.

3. *For what reason were executory devises instituted?*—263.

To support the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.

4. *What does the history of executory devises present?*—264.

An interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold the policy, and keep property free from the fetters of entailments, whatever modification or form they might assume.

5. *What is the English rule relative to limitations by way of executory devise?*—267, *n.* (*a.*)

That real or personal estate may be limited by way of executory devise for a life or any number of lives in being and twenty-one years afterwards, and the fraction of another year to reach the case of a posthumous child. And the House of Lords have recently decided that the term of twenty-one years may be added as a term in gross, without reference to the infancy of any person who is to take under such limitation.

6. *How many kinds of executory devises are there relative to real estates?*—268.

Two.

7. *What is the first?*—268.

The first is where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency. Thus, if there be a devise to A for life, remainder to B in fee, provided that if C should, within three months after the death of A, pay one thousand dollars to B, then to C in fee, this is an executory devise to C, and

if he dies in the lifetime of A, his heirs may perform the condition.

8. *What is the second?*—268, 269.

The second is where a testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time; as in the case of a devise to the heirs of B, after the death of B, or a devise to B in fee, to take effect six months after the testator's death, or a devise to the daughter of B, who shall marry C within fifteen years.

9. *In what three very material points does an executory devise differ from a remainder?*—269, 270.

1. An executory devise needs not any particular estate to precede and support it, as in the case of a devise in fee to A upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seisin; and until the contingency happens, the fee passes in the usual course of descent to the heirs at law.

2. A fee may be limited after a fee, as in the case of a devise of land to B in fee, and if he dies without issue, or before the age of twenty-one, then to C in fee.

3. A term for years may be limited over, after a life estate created in the same. At law, the grant of the term to a man for life would have been a total disposition of the whole term. Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever in the estate out of which, or subsequently to which, it is limited. The executory interest is wholly exempted from the power of the first devisee or taker.

10. *What restrictions have the New York Revised Statutes put on the English rule, as to limitations by way of executory devise?*—271.

They have enacted that since the 1st of January, 1830, the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except in the single instance of a contingent remainder in fee, which may be created on a prior remainder in fee, to take effect in the event, that the persons to whom the first

remainder is limited shall die under the age of twenty-one years ; or upon any other contingency, by which the estate of such persons may be determined before they attain their full age. Every future estate is declared to be void in its creation, which suspends the absolute power of alienation for longer than that period.

11. *If an executory devise be limited to take effect after a dying* without heirs, *or* without issue, *or* on failure of issue, *or* without leaving issue, *is the limitation held to be void?*—273.

It is ; because the contingency is too remote, as it is not to take place until after an indefinite failure of issue. But, if the testator meant that the limitation over was 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 is broken, and the executory devise is sustained.

12. *What is a definite failure of issue?*—274.

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.*

13. *What is an indefinite failure of issue?*—274

It is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen.

14. *How have both the English and American courts construed a devise in fee, with a remainder over if the devisee dies without issue, or heirs of the body?*—276–278.

As a fee cut down to an estate tail ; and the limitation over is void, by way of executory devise, as being too remote, and founded on an indefinite failure of issue. But if it appears, from the will, that the testator meant issue *living at the death* of the first taker, the limitation over is good by way of executory devise ; and our courts have shown a disposition to discover such intention in wills.

15. *What statutory provisions have been made on this subject in New York and some of the other States?*—279-280.

In Virginia, by statute, in 1819, and in Mississippi, by the Revised Code of 1824, and in North Carolina by statute in 1827, the rule of construction of devises, as well as deeds, with contingent limitations depending upon the dying of a person without heirs, or without heirs of the body, or issue, or issue of the body, or children, was declared to be that the limitation should take effect on such dying without heirs or issue living at the time of the death of the first taker, or born within ten months thereafter. The New York Revised Statutes have declared, that where a remainder in fee shall be limited upon any estate which would be adjudged a fee tail, according to the law of the State as it existed before the abolition of entails, the remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of his death. It is further declared, that when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his 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 ; and provision is made, that posthumous children shall be entitled to take in the same manner as if living at the death of their parent.

16. *What is the effect of these provisions in the Revised Statutes of New York?*—280.

They sweep away, at once, the whole mass of previous English and American adjudications on the meaning, force and effect of such limitations.

17. *Have not the New York Revised Statutes put an end to all semblance of any distinction in the contingent limitations of real and personal estates?*—283.

They have, by declaring that all the provisions relative to future estates should be construed to apply to limitations of chattels real, as well as of freehold estates ; and that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the termination, of not more

than two lives in being at the date of the instrument containing the limitation or condition, or, if it be a will, in being at the death of the testator.

18. *When there is an executory devise of the real estate, and the freehold is not, in the mean time, disposed of, to whom does the inheritance descend?*—284.

To the testator's heir, until the event happens. A similar rule applies to an executory devise of personal estate; and the intermediate profits, as well before the estate is to vest, as between the determination of the first estate and the vesting of a subsequent limitation, will fall into the residuary personal estate.

19. *Have not the New York Revised Statutes allowed the accumulation of rents and profits of real estate, for the benefit of one or more persons, by will or deed?*—286.

They have; but the accumulation must commence, either on the creation of the estate out of which the rents and profits are to arise, and it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, if directed to commence at any time subsequent to the creation of the estate, it must commence within the time authorized by the statute for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate at the expiration of such minority. If the direction for accumulation be for a longer time than during the minorities aforesaid, it shall be void for the excess of time; and all other directions for the accumulation of rents and profits of real estate are void. It is further provided, that whenever there is, by a valid limitation, a suspense of the power of alienation, and no provision made for the disposition, in the mean time, of the rents and profits, they shall belong to the persons presumptively entitled to the next eventual estate.

LECTURE LXI.

OF USES AND TRUSTS.

1. *What is a use?*—288.

A use is where the legal estate of land is in A, in trust that B shall take the profits, and that A will make and execute estates according to the direction of B.

2. *What was the trustee, to all intents and purposes?*—288.

He was the real owner of the estate at law.

3. *What title had the* cestui que use ?—288.

He had only a confidence or trust, for which he had no remedy at the common law.

4. *Did uses exist under the Roman law, and, if so, under what name?*—289.

They did, exist under the name of *fidei commissa*, or trusts.

5. *By whom were they introduced, and for what purpose?*—289.

They were introduced by testators, to evade the municipal law, which disabled certain persons, as exiles and strangers, from being heirs or legatees.

6. *Was not the contrast between uses and estates at law extremely striking?*—292.

Yes; when uses were created, before the statute of uses, there was a confidence that the feoffee would suffer the feoffor to take the profits, and that the feoffee, upon the request of the feoffor, or notice of his will, would execute the estate to the feoffor and his heirs, or according to his directions. When the direction was complied with, it was essentially a conveyance by the feoffor, through his agent the feoffee, who, though even an infant or *feme covert*, was deemed in equity competent to exe-