July 7, 1817.

PRIVILEGE OF PARLIAMENT.—CONTEMPT.—LIBEL.

Judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and, have only to add, that I fully concur in the opinion delivered by the judges.

The Counsel were called in, and informed that the House did not think it necessary to hear Counsel for the Defendants. And then, without further proceeding, the judgments of the Court below were AFFIRMED.

ENGLAND.

IN ERROR FROM KING'S BENCH.

RANDOLL and others—*Plaintiffs in error.*

DOE, on the several demises, and on the joint demise, of Roake and others..... } *Defendant in error.*

May 2, 7, 16, 1817. Devise of freehold estates to J. R. nephew and heir at law of testatrix for life; and on his decease "*to and amongst* "*his children lawfully begotten, equally at the age of*

"*twenty-one, and their heirs as tenants in common: but if* "*only one child shall live to attain such age, to him or her,* "*and his or her heirs, at his or her age of twenty-one years:* "*and in case my said nephew shall die without lawful issue,* "*or such lawful issue shall die before twenty-one,*" then over. Held by the Court of King's Bench, and judgment affirmed in Dom. Proc. that the children of J. R. took a vested remainder.

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DEVISE AT 21. —A CONDITION SUBSEQUENT.

IN the month of June, 1811, the Defendants in error brought an ejectment in his Majesty's Court of King's Bench, for the recovery of certain dwelling-houses, with the appurtenances, in the parish of Christ Church, in the City of London, which, under the will of their great Aunt Sarah Trymmer they became entitled to on the decease of their late father John Roake. The demises in the ejectment are laid on 1st June, 1811; the Plaintiffs in error entered into the common rules on defending as landlords, and pleaded the general issue. The trial of this cause was suspended for some time, during the pendency of another ejectment upon the same title, for premises in the county of Surry, in which a special case had been made at the summer assizes, 1811, but was not argued till May, 1813, when judgment was given therein for the now Defendants in error. Shortly after the above-mentioned determination, the proceedings in this ejectment were renewed, and the issue therein, coming on to be tried at the adjourned sittings after Easter Term, 1813, a special verdict was found, with the usual formalities; and as no point of form occurred, the following abstract of the verdict will suffice.

Doe v. Nowell, 1 Maul. Sel. 327.

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Special verdict.

Sarah Trymmer, widow, being seized in fee of the premises in question, duly made and published her last will in writing, dated 6th June, 1783, executed and attested as the law requires for passing real estates; and thereby, after (amongst other things) giving a certain specific bequest to John Roake, her nephew, she gave and devised the tenements and hereditaments therein mentioned (whereof the premises in question are parcel) in the following words:

Devise.

" I give and devise all my freehold estates in the " City of London and County of Surry, or else- " where, to my said nephew, John Roake, for his " life, on condition, that, out of the rents thereof, " he do, from time to time, keep such estates in " proper and tenantable repair. And on the decease " of my said nephew John Roake, I devise all my " said estates (subject to and chargeable with the " payment of 30*l.* a-year to Ann, the wife of the " said John Roake, for her life, by even quarterly " payments) to and among his children lawfully " begotten, equally, at the age of twenty-one, and " their heirs as tenants in common; but if only one " child shall live to attain such age, to him or her, " and his or her heirs, at his or her age of twenty- " one. And in case my said nephew John Roake " shall die without lawful issue, or such lawful issue " shall die before twenty-one, then I devise all the " said estates (chargeable with such annuity of 30*l.* " a year to the said Ann Roake for her life, in " manner aforesaid) to and among my said nephews " and nieces, Miles, Thomas, John, James, and " Sarah Pinfold, and Susannah Longman, or such

"of them as shall be then living, and their heirs "and assigns for ever."

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The special verdict then finds, that Mrs. Trymmer died, seized on 4th December, 1786, without having revoked or altered her will, leaving the said John Roake, the first devisee, her heir at law; who at the time of Mrs. Trymmer's decease was a widower without issue, and who upon such decease, entered and became seized as the law requires by virtue of the devise. That on 10th May, 1787, the said John Roake being so seized, married Elizabeth Rippen, and the four lessors of the Plaintiff (two of whom were born before, and the other two subsequently to the execution of the deed or levying of the fine hereinafter stated) are the lawful issue of such marriage, and the only children of the said John Roake. It is then found, that on the 5th November, 1789, an indenture of that date was duly executed, purporting to be made between the said John Roake (whose wife was also a party to the release) of the one part, and one Richard Nowell of the other part, being a deed for leading the uses, of a *fine sur conuzance de droit*, of the premises in question; with a declaration, that such fine, when levied, should enure to the use of the said John Roake, his heirs, and assigns. That a fine was levied thereof accordingly, as of Michaelmas Term in the same year, in his Majesty's Court of Common Pleas at Westminster; and proclamations were had and made thereon in due form of law. The special verdict goes on to state indentures of lease and release, dated 22d and 23rd June, 1790, from the said John Roake and his wife to

Death of Testatrix. J. R. becomes seized,

and levies a fine,

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one John Bell, conveying the premises in question, as far as they lawfully could or might, for a valuable consideration in money, unto the said John Bell; who entered, and afterwards made his will, executed and attested as the law requires for the passing of real estates; and having thereby given and devised the same premises to the now Plaintiffs in fee-simple, departed this life without revoking or altering such will; whereupon the now Plaintiffs entered as his devisees. That the said John Roake, the first devisee in the said Sarah Trymmer's will, died on the 13th February, 1803, leaving the several lessors of the now Defendant surviving him; of whom the two first named lessors attained the age of twenty-one years, before or upon 25th August, 1810, the two others being still under age, and that after an actual entry by the now Defendants' lessors on 1st June, 1811, the present ejectment was brought on 8th June in that year. Upon this special verdict, judgment was given (without argument) in the Court of King's Bench in favour of the now Defendants' lessors. A Writ of Error having been brought in the House of Lords, the Plaintiffs assigned general errors, and the Defendants pleaded *in nullo est erratum.*

and conveys the lands to J. B. who devises to Plaintiffs.

Ejectment by Defendants, who recover.

Error in Dom. Proc.

Mr. Leach (for Plaintiffs in error). The whole question turns upon this, whether the testator meant to give any thing to any one till he or she attained the age of twenty-one. If the will had stopped with the words "to and amongst his children lawfully begotten, equally at the age of twenty-one, and their heirs, as tenants in common," I pre-

sume no lawyer would question that this would have been a devise to a person or persons at twenty-one, and that no estate vested till twenty-one. This case has been considered as coming within the principle of Boraston's case in Coke, and of *Bromfield v. Crowder*, 1 B. P., N. R. 313., decided below in 1814, and affirmed in this House in 1815. But in considering the expressions of the will, your Lordships have to determine on the whole, whether this was intended as a condition, precedent, or subsequent. The universal rule of construction with respect to wills is, that the intent is to be collected, not from particular expressions, but from the whole of the will taken together; so that it is unnecessary to refer to any particular class of cases, as that is the universal rule. Then the testatrix having in this case given an estate at twenty-one, and not till twenty-one, we have to consider whether from the whole of the will any intent can be discovered contrary to the import of that expression. The will proceeds thus: "but if only one child shall live to "attain such age, to him or her, and his or her "heirs, at his or her age of twenty-one years;" that is, if more than one, they shall take equally at twenty-one; if only one, then that one shall take the whole at twenty-one. Is not this then a still stronger expression of contingency? The second clause not controlling the first, but expressing with more precision the intent before indicated. Then follows "and in case my said nephew shall die "without *lawful issue*," then over. Is there any thing in the terms of this devise over to show an intent that any of the children should take before

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Boraston's case, 3 Rep. 19. 1 P. W. 170.

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twenty-one? Lawful issue may be considered as meaning children. It would be useful to the Plaintiff in error if the words could be taken in a general sense, as the father then would have taken an estate tail. But I cannot contend for that meaning, as the subsequent expression shows that the testatrix by the word *issue* here meant children. Then read it, "in case my said nephew shall die without "children," I give it over; and then follow the words on which the question turns, for unless the subsequent expression controls the previous words, the first expression prevails, "or such lawful issue "(children) shall die before twenty-one," then over. They say that the words "or such lawful issue "should die before twenty-one," control the meaning of the previous part of the will, and that the testatrix must, by necessary implication, be presumed to mean that the children should take before twenty-one, and upon that depends the case of the Defendants in error. But if there is any principle more settled than another in the construction of wills, it is this, that no implication arises in favour of any one merely from an estate limited over to another on his death, unless it is given over on his death to the heir at law. If an estate is given over to the heir at law on the death of A. B. there is a clear intent that the heir shall not take till the death. And where is it to go in the mean time? An implication arises that A. B. shall in the mean time enjoy the estate. But if it is limited over on the death of A. B. not to the heir at law, but to a stranger C. D. the estate until the death of A. B. goes not to A. B. but to the heir at law, who takes all that is undis-

Vid. Fawlkener v. Fawlkener, 1 Vern. 22.

posed of. It may be conjectured that the testator did not intend that the heir at law should take, but the heir takes by the rules of construction. In the case* on the authority of which this was decided, it is reasoned thus: if the construction contended for by the Plaintiff in error leads to absurd consequences, it will follow that such a construction could not be according to the intent of the testator. But the answer is, that this objection applies to nine wills out of ten. An ingenious lawyer may draw absurd conclusions out of the expressions of almost all wills. But that arises from the testator's having taken only a limited view of the subject; and the rule is to go by the expressed intention. I admit that such objections may be raised here; but the answer is, that the testatrix did not look to all the circumstances and consequences either in fact or in law. Her purpose, however, was that none of the children should take till twenty-one. So that the Court below decided on conjecture in that other cause,† and made a wiser will; but Courts of Justice cannot properly make wills for the parties.

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* *Qy.* Doe v. Nowell, 1 Maul. Sel. 327.

† *Qy.* Doe v. Nowell, 1 Maul. Sel. 327.

Mr. Richardson (for Plaintiffs in error). One would think that when an estate is given at a certain age or time, the donor intended that nothing should be given unless at that age or time. That seems to have been the old law (10 Coke, Rep. p. 50.), and Grant's case is there cited. (*Lord Eldon*, C. That was a devise to one person; but what estate in the present case would the first child take at twenty-one? Was he to wait till the others attained twenty-one, or to take the whole, and then divest as the

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Grant's case, *vid.* 2 Leon. 36. Cro. El. 122.

others came of age?) He would take and divest; I mean to argue it in that way. Grant's case was that of a devise of land to John Grant when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. Grant levied a fine at his age of twenty-one, and afterwards attained the age of twenty-five. The question was, whether the issue were barred, and the Judges were of opinion that they were; but they considered the estate tail as *in futuro* and contingency at the time the fine was levied. I am aware that the decision there would have been the same whether the interest was vested or not; but the Judges proceeded on the supposition that it was contingent. These words then "to and amongst his children at "the age of twenty-one," would give a contingent remainder, and the words "but if only one child "shall live to attain such age, to him or her, and "at his or her age of twenty-one," are still stronger as words of contingency. It was supposed elsewhere that it was necessary to give a vested interest to the children of Roake to prevent the estate's going over, as it otherwise might, though there were descendants of Roake; as suppose they all died under twenty-one, leaving twenty children, it was said to be against the intent that the estate should in that case go over, and therefore to effectuate the intent the remainder must be vested. In answer to that, I say that the remedy does not cure the defect, for if no child attained twenty-one it must go over, or if not, it must be by force of the words "in case "my said nephew shall die without issue," and that will not do unless it should be held to mean an in-

definite failure of issue, and in that case Roake had an estate tail.

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They say that the children, as they came in *esse*, took estates defeasible on their not attaining the age of twenty-one. Now the testatrix provided for one event, that if only one child should attain twenty-one, then to that one, and if all died but one before twenty-one, that one would take the whole. Then suppose there are four children, and one dies before twenty-one, leaving children, if this was a vested interest in him before his death, his interest in the quarter of the estate would descend to his children; and so if a second and a third should die before twenty-one, leaving children, their shares would descend. Then the fourth attains twenty-one, and he then takes out of the children the whole interest so vested in them. But suppose two die, leaving children, and two attain the age of twenty-one, the two take only the half, and the other half goes to the children, as the estate is not divested except the children of Roake should be reduced to one attaining the age of twenty-one. Such a construction is clearly contrary to the intent of the testatrix, as it is clear that she meant that those only should take who attained twenty-one, and that if only one attained that age, then he should take the whole. They say it is necessary it should vest in the children before twenty-one, to prevent its going to the Pinfolds. But it will not prevent it, for if none were to attain twenty-one, it must go over if not prevented by the word "in case my said nephew "shall die *without lawful issue.*" When the latter clause comes to be considered, it is difficult to con-

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tend that the word *issue* can be understood as meaning any thing more than immediate children; and if it designates immediate children, then the estate may go over so as to defeat the subsequent issue of Roake; and if that is not the intent of the testatrix, then the words *without lawful issue* must be understood to mean a general failure of issue, and Roake takes an estate tail. By giving him an estate tail, the consequences will be to prevent the estate from going over to the less favoured branches, and that is the only way in which it can be prevented, and there the issue is barred by the fine.

Boraston's case, 3 Rep. —Goodtitle d. Hayward v. Whitby, 1 Bur. 228.

In that class of cases commencing with Boraston's case and ending with *Goodtitle, d. Hayward v. Whitby*, something was done with the estate in the mean time for the benefit of the devisee or some other person, and the decision turned on that distinction. In another small class of cases commencing with that of *Edwards v. Hammond*, in Levinz and Shower, which was the authority on which the case of *Bromfield v. Crowder* was decided, the decision did not turn on that distinction. If the report of the case of *Edwards v. Hammond* were correct as it is given in Shower, it would be distinguishable on the ground of the intent to protect the estate of the issue male. But the inspection of the roll seems to exclude that interpretation, and the report must be taken as in Levinz. According to that report it was a special verdict in ejectment, and it was stated to be a surrender by a copyholder of Borough English, to the use of himself for life, and after, to the use of his eldest son if he should attain twenty-one, *provided and upon condition* that

Edwards v. Hammond, 3 Lev. 132. Et in 2 Show. 398. nom. Stocker v. Edwards.

Bromfield v. Crowder, *vid.* Fear. Con. Rem. 6 ed. 245, 7. n.

if he died before twenty-one it should remain to the surrenderer and his heirs, and the question was whether his attaining twenty-one was a condition precedent or subsequent. It was argued on the one side that it was a condition precedent, and that the estate was in abeyance till he attained twenty-one, and it was argued on the other side, and so held, that though by the prior words "to the use "of his eldest son *if he should attain twenty-one*," imported a condition precedent (from which it appears that it would have been held a condition precedent if it had stood on the prior words), yet on all the words taken together it was a condition subsequent. That was inferred from the devise over "provided and on condition that if he died before "twenty-one, &c." as if the testator meant to undo what he supposed he had before done; and the case was decided on the analogy of the case of *Spring v. Cæsar*, in 1 Roll. Abr. 415. pl. 12. and in Jones, 389. If these authorities depend upon any principle, it is this, that the Court collecting the intent from all that appears within the four corners of the will may upon the ground of the intent disregard the word *if*, or any other word importing contingency, and in another case *Doe, d. Hunt, v. Moore*, 14 East. 601. the Court, not carrying the principle further, disregarded the word *when*. But it is admitted that the word *if* or equivalent words, do import a contingency. And why disregard the words of contingency here? Contingent estates depend on certain accidents, such as that the life or particular estate being gone before its natural expiration, the contingent remainder cannot vest at

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all. But the testatrix knew nothing of that, and uses the words of contingency in their ordinary sense; and why disregard these words on the ground of an intention to use them in a sense which she never dreamed of?

There are circumstances in the present case which distinguish it from those on which they rely for the Defendant in error, as so much depended there on the particular words; and your Lordships will probably not be disposed to carry the principle farther than the words in these cases will bear. The contingency here rests not merely on *at* in the first clause, but also on *if* in the second, and the remainders are therefore contingent, or Roake took an estate tail; and whichever of these is the true construction, the purchase under the fine is good. This would otherwise be a very hard case for the Plaintiff in error, &c.

Sir S. Romilly (for the Defendants in error). The question depends entirely on the technical effect of the words in the will. They speak of the hardship of their situation, but our hardship is the greater. Your Lordships, however, cannot consider the situations of the parties, your business being merely to lay down the law and to fix it, as if it were fixed by the legislature.

The question lies in a very narrow compass, and depends on a point of which the testatrix knew nothing, whether a remainder is contingent or vested. That again depends on decided cases, and the point has been settled by the highest authority in this country, and it is not competent to this

House, I speak with deference, to reverse its own decision. The point was also decided in another case depending on this will, *Doe, d. Roake, v. Nowell,* 1 Maule. Sel. 327. in K. B. on the authority of *Bromfield v. Crowder,* and though Mr. Preston with much ingenuity endeavoured to distinguish them, the Court found no substantial distinction, and Lord Ellenborough says, "I think, "this case concluded by *Bromfield v. Crowder,* "which was very fully considered, &c." That case of *Bromfield v. Crowder* underwent great consideration. It was sent from the Rolls to the Court of Common Pleas, where it was argued twice by Serjeants Williams, Lens, Bayley, and Shepherd; and after as great consideration as any case ever underwent, and after the record had been consulted for the particulars of the case of *Edwards v. Hammond,* the Court was of opinion that the remainder was vested, though that case was stronger for the contingency than the present case, for it was "*if* the "said John D. Bromfield shall live to attain the age "of twenty-one years," and not as in the present case "to and amongst his children, &c. *at* the age "of twenty-one." The M. of the Rolls decreed according to that opinion, and the decree was on appeal affirmed by the Lord Chancellor, and then the case being appealed to this House your Lordships were of opinion that it was rightly decided. In that case the testator John Davenport, after charging his real and personal estates with payment of his debts, legacies, &c., gave an annuity of 50*l.* to his nephew and heir at law Samuel Crowder, and a legacy of 100*l.* to his godson John Davenport

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Bromfield v. Crowder, 1 Bos. Pull. N. R. 313.

Case of Bromfield v. Crowder, 1 B. P., N. R. 313. stated.

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Bromfield, provided he lived to attain the age of twenty-one years, otherwise such legacy was not to be paid or payable. And then he devised to his wife Elizabeth Davenport, all his real estate for her life, and after her decease to his cousin Joshua Rose, his heirs and assigns for ever. Afterwards he made a codicil to his will in these words: "With "regard to that part of my will where I gave my "estate to Joshua Rose, and his heirs for ever, in "case he survives my present wife, now I entirely "revoke the above part of my will, and only give "Joshua Rose my estate during the term of his "natural life, in case he survives Mrs. E. Daven-"port; and at the decease of Mrs. E. Davenport, "and Mr. Joshua Rose, or the longest liver of them, "I give all my real estate of what nature and kind "soever to my godson John Davenport Bromfield, "son of Charles Bromfield, of St. Ann's, Liverpool, "*if* the said John Davenport Bromfield shall live "to attain the age of twenty-one years; but in case "he die before he attains that age, and his brother "Charles shall survive him; in that case I give my "real estate to Charles Bromfield, his brother, if he "lives to attain the age of twenty-one years, but "not otherwise; but in case both the above-men-"tioned boys die before either of them attain the "age of twenty-one years, then I give my real "estate to John Vale, &c. and his heirs for ever." The testator died, leaving Samuel Crowder his heir at law, &c.; then Elizabeth Davenport died, and Rose entered into possession and died, John Davenport Bromfield being then an infant under twenty-one years of age. John D. Bromfield by his next

friend filed his bill in Chancery against Crowder, Charles Bromfield and Vale claiming the estates, and praying amongst other things, that his right to them, on the death of Rose, might be declared, and the cause was heard and reheard before M. R., Crowder contending that the remainders to the Plaintiff, Charles Bromfield and John Vale, were contingent, and limited on the life estates of Elizabeth Davenport and Joshua Rose, which determined before the events happened on which the remainders were to become vested, and that the estates therefore belonged to him as heir at law. The question was, whether the words, "I give all "my real estate, &c. to my godson John D. Brom- "field, &c. if the said J. D. Bromfield shall live "to attain the age of twenty-one years," gave an immediate vested estate. The Judges often certify without saying any thing; but this being a case of such consequence, Ch. J. Mansfield gave their opinion in open Court; and says "The fairest "construction that can be put on this will, inde- "pendent of authority, is that the Plaintiff took an "immediate vested estate on the death of the pre- "ceding devisees, with a condition subsequent. "With respect to the cases, that of *Edwards v.* "*Hammond* is on all fours with the present. The "circumstance of the devise over being to a "stranger makes no difference, for it is clear that "the testator meant no one to take his estate unless "in the event of the Plaintiff dying under twenty- "one. *Edwards v. Hammond* is neither opposed "nor weakened by any case. No doubt the general "meaning of the word *if* implies a condition pre-

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" cedent, unless it be controlled by other words. " But in this case there is a variance between the " expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect " to the latter. On these grounds we are of opinion " that the estate vested in the Plaintiff on the death " of the preceding devisees; and the expression " 'all my estate' is so general as to pass an estate " in fee. Besides, it would be an absurdity on the " face of the will to construe it only an estate for " life." Mr. Leach rested on general reasoning without discussing that case; but though he could convince your Lordships that the decision was wrong, it is now too late; the point is settled, and can be altered only by the legislature. Mr. Richardson attempted to show some distinction between that and the present case. But there is no difference that ought to affect the ground of decision; otherwise there can be no rule unless a will is exactly in the same words as others. They say *at* may be construed as *if*; I do not admit that, for *at* is more favourable for us. But at any rate *if* is the word in *Bromfield v. Crowder*. Another case, stronger for the contingency than the present, has been decided on the authority of *Bromfield v. Crowder*, *Doe, d. Hunt, v. Moore*, 14 East. 601. When that was first argued in K. B., *Bromfield v. Crowder* had been decided in C. P. and in Chancery, and the Court of K. B. postponed the decision till the House of Lords had decided the case of *Bromfield v. Crowder*, and then that Court decided on the same ground. The expressions in that case of *Doe v. Moore* were, " I give and de- " vise to J. Moore, &c. *when* he attains the age of

" twenty-one years, &c." and so to James, Robert, and Charles Moore. The testator died, and, the devisees being all under twenty-one, the heirs at law brought an ejectment, and the question was, whether they took any and what estate or interest in the devised estates. Lord Ellenborough says, " On behalf of the Plaintiff it was contended that " the devisee's attaining the age of twenty-one " years was a condition precedent to any estate " vesting in them, and that in the mean time the " same descended to the lessors of the Plaintiff who " were the heirs at law of the testator. And the " cases of a bequest of personal estate were relied " on where it has been held that a legacy given to " one if, or when he shall attain twenty-one, lapses " in the event of the legatee dying under twenty- " one. And *Stapleton v. Cheales*, Pre. Chan. 317. " *Goss v. Nelson*, 1 Bur. 226. as to what is there " said by Lord Mansfield respecting legacies, and " *Hanson v. Graham*, 6 Ves. jun. 239. were cited; " and it was argued that there was no distinction " between devises of real and bequests of personal " estate in this respect. But that is not so, for the " rules by which legacies are governed are borrowed " all, or the greater part, from the civil law; whereas " the decisions on devises of real estate have es- " tablished a different rule; and according to them " a devise to *A.* when he attains twenty-one, to hold " to him and his heirs, and if he die under twenty- " one, then over, does not make the devisee's attain- " ing twenty-one a condition precedent to the " vesting of the interest in him; but the dying " under twenty-one is a condition subsequent on

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" which the estate is to be divested, as in *Mansfield* " *v. Dugard*, 1 Eq. Ca. Ab. 195.—*Edwards v.* " *Hammond*, 3 Lev. 132. and *Bromfield v. Crowder*, " 1 B. Pul. N. R. 313. which latter case was af- " firmed in the House of Lords. These we con- " sider as authorities precisely in point, especially " the last case, the pendency of which in the House " of Lords was the occasion of our Judgment in " this case being deferred. To which may be added " *Goodtitle v. Whitby*, 1 Bur. 228. &c." *Doe v. Moore* cannot be substantially distinguished from this. The words were equivalent to those here used, but expressed the contingency more strongly. The word in *Doe v. Moore*, is *when*, and in *Bromfield and Crowder*, it is *if*, both stronger for the contingency than *at*, which, they contend, is equivalent to *when* and *if*; and supposing it to be so, these cases are against them. No distinction has been stated applicable to the point in question, whether the remainder is vested or contingent. If your Lordships were to decide against us, you would reverse not only your own decision in *Bromfield v. Crowder*, but all the decisions that have proceeded on that authority. True, it is a question of intention, but it is also a question as to the technical effect of certain words. Mr. Richardson tries to embarrass the case by the supposition that some die before twenty-one; some not. I think the testatrix has not provided in all events for the issue of those dying before twenty-one, and the point was not in her contemplation. I think the first who attained twenty-one would take the whole and divest as the others attained that age; and if only one attained that age,

that he would retain the whole estate in fee to the disappointment of the children of those dying before twenty-one, leaving issue. "In case my "said nephew shall die without lawful issue;" it is clear from the context that the word *issue* there means *children*. Mr. L. concedes that; Mr. R. not quite; then if it means issue generally, what becomes of the devise to those attaining twenty-one? But if it means children, all is consistent. It was not intended that the estate should go over to the Pinfolds, except in the event of the nephew Roake dying without issue, or leaving issue and the survivor of the children dying before twenty-one, the Pinfolds being then living, the children having the estate in the mean time.

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Mr. Marryatt. Both on principle and authority the point is clearly in our favour. It is argued to-day that Roake took an estate tail. Under what words? The devise is to him for life, remainder to his children as tenants in common in fee without preference given to the eldest. The ground is a general failure of issue under the words "in case "my said nephew shall die without lawful issue." It is clear that issue there means children; and I could, if it were necessary, refer to a case where issue was held to mean sons, and not issue generally, *Foster v. Lord Romney*, 11 E. R. 594. The general result of the authorities is uniform for two centuries that when an estate of inheritance is given to a devisee when twenty-one, or at twenty-one, or if he should attain the age of twenty-one, it is a vested remainder defeasible on dying before twenty-one. The cases are collected in Fearne, Con. Rem. *Vid.* Con.

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Rem. 6 ed. 242.

Grant's case, *Vid.* Cro. El. 122. Leon. 36. Judgment, that estate tail was barred.

They cite only one case, Grant's case, 10 Coke, R. 50. f. as authority in their favour; the others being cited only to distinguish them from the present. Whether that case was decided does not there appear; but it is in fact an additional authority that the estate vested immediately; for unless he had then an estate of freehold, the fine could not operate at all. This much will be sufficient with respect to the authorities, after what has been already stated. As to the intent, they say that the testatrix intended to give no interest to Roake's children till they attained the age of twenty-one, though at the time of making the will he was not married, and she contemplated the occurrences of twenty-two years after at least. The intent is to be primarily regarded; and the general intent in preference to the particular. It is said that a devise at twenty-one imports no devise till twenty-one. There is a distinction in equity as to bequests out of personal property founded on the civil law; but there is no instance in which freehold estate devised at twenty-one does not vest immediately where the testator does not intend that the heir should take. The inconvenience of a contrary construction appears from the present case. First, the primary intent of the testatrix would be defeated, as she gave the heir merely an estate for life, and their construction would enable him to procure the dominion over the whole fee, which she never intended. Secondly, the children could not be of age for many years, and unless the remainder vested immediately, what was to become of the estate in the mean time? It was clear she did not intend that it

Vid. also as to legacies charged on real estate. Pawlett v. Pawlett, 2 Vent. 336. 1 Vern. 204. 321. Fearne, 6 ed. 555 n.

should go to the heir at law. Roake at the date of the will had no children, and in case of his dying leaving children then all under twenty-one, did she intend that they should be all excluded? Or that those who should then be twenty-one should take the whole, to the exclusion of the rest? she having said that they should all take equally. This is distinctly in opposition to the primary object of the testatrix. How is it consistent with the intent of providing for all, that only one being of age at the father's death should take to the exclusion of all the rest not then twenty-one, though they might attain it the next day or week? So that upon their construction Roake and his children would take in a way which she never intended. If it was a rule that no words should make a condition precedent against the intent of the testatrix, it was plain that she intended that the estate should not go over if Roake had any children, and that the remainder should vest immediately in the children liable to be defeated on their not attaining twenty-one.

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Mr. Leach (in reply). The hardship of the case can have no influence on your Lordships' Judgment, though the party purchased under the advice of the ablest lawyers in this country. But this is a case of the first consequence in the construction of wills. The particular expression must yield to the general intent as collected from the whole of the will, and it would be a novel construction that a testator did not mean what he said, because a particular inconvenience would arise. It is said that the case has been decided by this House, and that the decision must stand till controlled by the legislature.

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But I am not satisfied that it has been decided. The case is not the same in expression as that of *Bromfield v. Crowder*, and then the question is whether the principle applies. And how do they apply it? They weigh the particular expressions in both cases, and say they are of equal force. But the true mode is not to weigh one expression against another, but to try whether the expressions measured by the common standard lead to the same conclusion. And then they say that there is no authority to show, that if an estate is given at twenty-one, it does not mean that it is given before. Where is the ground of that argument? If they will look at all the authorities, they will find that a gift at twenty-one, standing *simplicitor*, is no gift till twenty-one; and such is the construction in Grant's case. The plain import of the expression here is, that the children should not take till twenty-one; and there is no other expression on the face of the will which controls that.

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Lord Eldon (C.) In either view of this case it is a case of hardship. If the fine should be destroyed, some of the parties' purchasers may be damnified; and if not, then the devisees will be deprived of the estates. But in the view of hardship, we have nothing to do with it: and after a careful consideration of the special verdict, and all that appears within the four corners of the instrument, the nature of the case, the authorities, and effect of the whole of the will, it is my humble opinion that this judgment ought to be affirmed.

Judgment AFFIRMED.