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shall take only in case there should be no issue of any of the other children then living. He provides for two events, that of there being more than one child, and that of there being only one, and no issue of the others. But he has not provided for a third case, that of there being only one child, and issue of the others then living. The third event, however, is that which has happened; and in that event there is no disposition. I agree therefore that the judgment is wrong, and must be reversed, the lessee of Mrs. Mathews having no title to maintain the ejectment.

Judgment REVERSED accordingly.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

CORMICK—*Appellant.*
TRAPAUD and another—*Respondents.*

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M. CORMICK, first tenant in tail under the will of his father, R. C. deceased (by which will estates in tail male in remainder were given to the devisor's other sons, F. C. and T. C.) before suffering a recovery, executes a settlement on his marriage, by which he limits an estate for life to himself, with remainder to the first and other sons of the marriage, in tail male, remainders to his brothers, F. C. and T. C. for life, with remainders to their first and other sons in tail male:—and afterwards suffered a recovery, mortgaged the settled estate to R. Plaistow, and died without issue male. C. Cormick, son of T. C.

(F. C. having died without issue) enters upon the estate, suffers a recovery, and dies, leaving M. C. the Appellant, his eldest son. Feb. 6, March 16, June 5, 1818.

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Bill of foreclosure by Plaistow resisted by M. C. the Appellant—the question being, whether C. Cormick, the Appellant's father, was entitled under the will of R. C. or only as a volunteer under the settlement, by M. C. the first tenant in tail. Foreclosure decreed below. Argued in Dom. Proc. that as the settlor had not the fee, but was only tenant in tail at the time of the settlement executed, the provisions of the statutes of Elizabeth, enacted for Ireland by 10 Car. 1. sess. 2. cap. 3. did not apply to this case. Answered that there was no substantial distinction between tenant in fee and tenant in tail, who had it in his power at any time to acquire the fee; that the brothers and their sons took new estates under the settlement, which were voluntary, and void as against the subsequent mortgagee for val. con. So held, and decree AFFIRMED.

MICHAEL CORMICK, who was tenant in tail of certain estates in Ireland under the will of his father Richard Cormick, by which estates tail in remainder were given to his two younger brothers, before suffering a recovery, made a settlement after his marriage, pursuant to previous articles, by which, after limiting an estate for life to himself, remainder in tail to the first and other sons of the marriage, he gave estates for life to his brothers, remainder to their first and other sons in tail; and then mortgaged the settled estates to Richard Plaistow, who filed his bill to foreclose. Fraud in obtaining the mortgage was alleged but not proved; and the substantial question was, whether the mortgage was valid as against the real representative of one of the brothers, and entitled to the protection of the sta-

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tute 10 Car. 1. sess. 2. cap. 3. taken from the English acts, 13 Eliz. cap. 5. and 27 Eliz. cap. 4. made in favour of purchasers for valuable consideration; and whether such representative was not a volunteer under the settlement as against the mortgagee, although the settlor was only tenant in tail at the time it was executed: and the cases of *Doe v. Manning*, 9 East. 59; *Doe v. Routledge*, Cowp. 705; *Brown v. Carter*, 5 Ves. 862; and *Hill v. Bishop of Exeter*, 2 Taunt. 69. were cited for the mortgagee.

The cause was heard in the Court of Chancery, in June, 1811, and re-heard in December, 1811, when the Lord Chancellor ordered a case to be made for the opinion of the Court of Common Pleas, stating the circumstances as follows:—

The case.

"Richard Cormick being seized in fee of divers lands in the county of Mayo, and particularly the lands as hereinafter stated in mortgage in this cause to said Richard Plaistow, on or about the 6th day of November, 1737, made his will, duly executed for passing real estates, and by the said will devised, amongst other things, as follows: 'My will is, that, after my debts and legacies be paid, that all my real and personal estate shall go and descend to my eldest son, Michael Cormick, and the issue male of his body for ever; and, for want of such issue, my will is, that all said estate shall go to my second son, Francis Cormick, and his issue male for ever; and, for want of such issue in him, my will is, that the whole estate shall go and descend to my third son, Thomas Cormick, and his issue male for ever: the eldest son of such of my sons

Will of Richard Cormick, 1737.

issue male that should inherit said estate, and his issue male, to be always preferred before the second, or any other son, so as to make it an estate tail in all the sons of any of my sons that should inherit; and, for want of such issue, that all the said estates shall go to the right heirs of the said Michael Cormick; with full power to any of the said sons that shall inherit said estate, to charge it with reasonable provisions for any younger children he shall have, and with a reasonable jointure for such wife as he or they shall marry.'

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"And that under the description of the said testator's real estate, the said mortgaged lands were comprehended.

"That said Richard afterwards, that is to say, in the month of ———, in the year 1738, died so seized of the said lands, without revoking or altering his said will, leaving issue, three sons; that is to say, the said Michael Cormick, his eldest son and heir at law; the said Francis Cormick, his second son; and the said Thomas Cormick, his third and youngest son; and upon the death of the said testator the said Michael entered into possession of the said lands, and under the limitations of the said will continued seized thereof until his death.

"That said Michael Cormick, on or about the 6th day of March, 1743, intermarried with Mary Blake, the only daughter of Xaverius Blake; and previous to such marriage certain articles of agreement, under the seals of the parties thereto, bearing date the 6th day of March, 1743, were entered into and executed in contemplation of such marriage, between the said Michael Cormick, by the

Marriage articles, and marriage of Michael Cormick, 1743.

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name and addition of Michael Cormick, of Mullinmore, in the county of Mayo, Esquire, of the first part: Xaverius Blake, of Doonmacreeny, in the said county, Esquire, on his own behalf, and likewise for and on behalf of his only daughter, Mary Blake, of the second part: Denis Daly, of Raford, in the county of Galway, Esquire, and Walter Blake, of Oranmore, in the said county, Esquire, of the third part; whereby the said Xaverius Blake did covenant with the said Michael Cormick, his executors and administrators, that he would pay to the said Michael, as the marriage portion of his daughter, the sum of 2,000*l.* which sum was afterwards duly paid; and the said Michael, in consideration of the said intended marriage, and of the marriage portion of the said Mary, and for the securing a maintenance to the said Mary, in case she should happen to survive the said Michael, did thereby covenant with the said Xaverius Blake that he the said Michael Cormick would, by judgment or judgments, statute merchant or of the staple, or other sufficient personal security, secure to the said Denis Daly and Walter Blake, their executors or administrators, the sum of 7,000*l.* sterling, to the uses, trusts, and purposes following; that is to say, that in case the said Mary shall survive the said Michael, having then no issue by him, or having issue, and that such issue should happen to die without issue, then and in either of the said cases, that the said Mary should, out of the yearly interest and produce of the said 7,000*l.* have and receive for her maintenance and support the sum of 400*l.* a-year during her life; or the sum of 300*l.* a-year

only, on a certain event therein mentioned. And it was further covenanted by and between the said parties that, in case the said Mary Blake would have and recover dower out of the real estate of her intended husband, the said Michael Cormick, that she should have her election to have her dower at common law, or the said provision therein before provided for her, provided she should make her election in twelve calendar months after the decease of her said intended husband. And the said Michael Cormick further covenanted with the said Xaverius Blake, his executors and administrators, for the said considerations, that he would settle all his real estate in the kingdom of Ireland, whether in fee simple, fee tail, fee farm, or lease, or leases for lives, in such manner as the counsel of the said Xaverius Blake, or his heirs, should advise, but so as not to obstruct or hinder the payment of 130*l.* a year to the said Michael's mother for life, and so as the said Michael Cormick should have an use for life only, with proper remainders to support contingencies; with remainders to the first and every other son of the said Michael Cormick and Mary Blake, successively in tail male, according to priority of birth and seniority of age: the elder to take before any younger; but subject to the powers, provisions, portions, provisoes, and authorities, hereinafter mentioned. And to enable the said Michael Cormick to execute such settlement, he did covenant and agree for him, his heirs, executors, and administrators, with the said Xaverius Blake, his executors and administrators, to levy fines and suffer common recoveries of all his said real estate.

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And the said Michael Cormich further covenanted with the said Xaverius Blake, his executors and administrators, that the said real estate of the said Michael Cormick should be charged with, and liable to, the sum of 4000*l.* sterling, as a portion and provision for the younger child or children of the said marriage, if there should be no issue male at the said Michael's death, or that having such the issue male should die without issue; *pro ut* the said articles of agreement, which were registered on the 23d of May, 1746, under a memorial signed and sealed by the said Xaverius Blake.

"That in Hilary Term 1743, the said Michael Cormick levied a fine of the said mortgaged lands and others, *sur conuzance de droit come ceo*, &c. in consideration of a sparrow hawk, to one Roger Palmer, on which proclamations were duly made pursuant to the statute; *pro ut* said fine and proclamations, &c.

Settlement. 1748.

"After the said marriage, that is to say, on the 8th day of October, 1748, a certain deed of settlement was executed between the said Michael of the first part; and Roger Palmer and Walter Blake of the second part; George Browne and Francis Palmer of the third part; and the said Xaverius Blake of the fourth part, and which deed was signed and sealed by the said Xaverius Blake and Michael Cormick; whereby, after reciting the said articles of the 6th of March, 1743, in part, and (amongst other things), that then it appeared from the situation of the said Michael's affairs, that in order to raise money to pay his debts, he must sell part of his said real estate, but was possessed of some valuable leasehold interests

for years, which he intended to settle, and was also willing and had agreed, in order to make good his said original agreement or contract, in the said articles, to create a term for years of the value of 400*l.* a year and upwards, in part of his estate, in order to raise a fund of 4400*l.* sterling, to be paid into the hands of the said Xaverius Blake, to be by him laid out in the purchase of lands, in the name of the said Michael Cormick, and to be settled to the same uses; the said Michael did thereby grant, assign, and make over unto the said Roger Palmer and Walter Blake, certain lands and premises therein mentioned, to hold all and singular the said premises, with their appurtenances, to the said Roger Palmer and Walter Blake, for the term of ninety-nine years, at the yearly rent of a pepper-corn, if demanded; upon the trusts, and subject to the several provisions, conditions, limitations, and agreements therein after mentioned and expressed; and further, that the said Michael Cormick, in consideration and full execution of the said marriage articles, and covenants contained in them, did convey unto the said George Brown and Francis Palmer, and their heirs, the said mortgaged premises, with other lands, as well lands comprized in the said articles as other lands of the said Michael Cormick, but still subject to the said lease or term for years, to the said Roger Palmer and Walter Blake, to the uses and trusts following, amongst others; that is to say, in trust for, and to the use of the said Michael Cormick for and during the term of his natural life, without impeachment of waste; remainder to the use of the first, and other sons of

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the said Michael Cormick, on the body of the said Mary his wife begotten, or to be begotten, and the heirs male of the body of such first, and other sons lawfully issuing, and in the general course of family settlements. And for want of such issue, remainder to the use of the said Francis Cormick, brother to the said Michael, and son of the said Richard Cormick the said testator, for and during the life of the said Francis; with like remainders as aforesaid, to the use of the first, and other sons of said Francis, and the heirs male of their respective bodies; and for want of such issue, remainder to the use of the said Thomas Cormick, brother to the said Michael, and son of the said Richard Cormick, the said testator, for life; with like remainders to the use of the first and other sons of the said Thomas Cormick lawfully to be begotten, and the heirs male of their respective bodies; and in default of such issue, with such remainders and limitations over as the said Michael should by will or other deed, nominate or appoint. It was declared by the said settlement, that as to any lands mentioned therein, whereof the said Michael was in possession, by virtue of a lease or leases for years, it was not intended to convey or settle the same, but for such term or terms as the said Michael then had, and for any further term or time which he should thereafter acquire. And it was further agreed, that it should be lawful for the said Michael Cormick to raise a sum of 7000*l.* sterling, to be laid out at interest, as a fund to secure the said Mary Blake, his then present wife, in case she should happen to survive him, the sum of 400*l.* a-year for

her jointure, if the said Michael should die leaving issue by the said Mary, in case the said Mary should make it her election to have such provision secured for her within twelve months after the said Michael's death, in lieu of dower at law; otherwise that said Mary should have dower. And it was further covenanted between the said parties, that it might be lawful for the said Michael Cormick, by any deed by him executed, and attested by two or more witnesses, or by his last will, to charge the said lands in the said trust term, and all and every other part of his said real estate, with any sum of money for the preferment and maintenance of his daughters and younger sons by the said Mary as should not be preferred in his own lifetime, with any sum not exceeding in the whole the sum of 5000*l.* sterling; to be paid and distributed to and amongst such daughter and daughters, and younger son and sons, in such reasonable shares and proportions as the said Michael Cormick should by such deed, will, or other writing in the nature of a will, direct and appoint; and for want of such appointment to be distributed to and amongst them in equal shares and proportions. And the trust of the said term so limited unto the said Roger Palmer and Walter Blake, was by the said settlement declared to be, that said trustees, their executors, administrators, and assigns, should and might, during the life of the said Michael Cormick, receive the rents, issues, and profits of the said lands in said term mentioned, and pay the same into the hands of the said Xaverius Blake, who was to pay Mary Cormick, alias Blake, the sum of 180*l.* sterling,

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payable half yearly, by virtue of a deed or instrument to that purpose, perfected by the said Michael Cormick; the remainder of such rents, issues, and profits to be by the said Xaverius Blake laid out to the best advantage (without any risk to his own fortune), that he could thereby raise a fund of 4400*l.* sterling, to be laid out in the purchase of lands, which should, immediately after such purchase, be settled, secured, and limited to the same uses, subject to the same powers, charges, provisoes, conditions, and agreements as already mentioned; and after raising the said 4400*l.* then, and from thenceforward, in trust to permit and suffer the said Michael Cormick and his assigns, during his natural life, to receive the rents, issues, and profits thereof, still subject to the several other contingent charges and incumbrances therein already mentioned; and from and after the death of the said Michael Cormick, in trust that the said Roger Palmer and Walter Blake, their executors, administrators, and assigns, should and might, by leasing, mortgaging, and absolute sale of the said term, with the consent of the said Xaverius Blake (if then alive), raise the portions and maintenances already mentioned, to and for the daughters and younger sons of the said Michael Cormick, in such manner, shares, and proportions as they should then respectively appear to be entitled to; *pro ut* the said deed, which was registered on the 4th day of May, 1750, under a memorial signed and sealed by the said Xaverius Blake.

Recovery, 1757.

"That afterwards, that is to say, in Michaelmas Term, in the thirtieth year of the reign of King

George the Second, and in the year 1757, a common recovery was suffered of part of the said mortgaged and other lands; *pro ut* said recovery, wherein Edward Colpoys demanded against Roger Palmer the said lands comprised in the said articles, which said Roger Palmer called to warranty said Michael Cormick, who vouched over the common vouchee; but no deed appears making a tenant to the precipe for the said recovery.*

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"That the said Michael Cormick afterwards, that is to say, by deeds of lease and release bearing date respectively on the 15th and 16th of August, 1777, after reciting that the said Richard Plaistow did as of Trinity Term, 1775, obtain two separate judgments in the Court of King's Bench against said Michael Cormick, each for the sum of 3844*l.* debt, besides costs; and that there was then due to said Richard on the said recited judgments for principal, interest, and costs, the sum 4354*l.* 7*s.* over and above all just and fair allowances; and after further reciting that the said Michael Cormick then stood further indebted unto the said Richard in the sum of 865*l.* 17*s.* 4*d.* sterling, said sums making in the whole the principal sum of 5220*l.* 6*s.* 4*d.*; and that said Michael Cormick was willing and desirous to give the best security in his power unto the said Richard for the due payment of said 5220*l.* 6*s.* 4*d.*, and for that purpose had proposed to grant his real and freehold estates in said county of Mayo in mortgage to the said Richard, for the better securing

Mortgage, 1777.

* By the Irish Act of 21 Geo. 2. c. 11. § 8. a recovery is good after twenty years, if the persons joining had a sufficient estate, though the deed making a tenant to the writ be lost.

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unto said Richard the repayment of said sum, the said deed of release witnessed that the said Michael Cormick did, for the reasons and considerations aforesaid, and in consideration that said Richard had executed warrants of attorney to said Michael Cormick to acknowledge satisfaction on the records of said two judgments; and also in consideration of five shillings to the said Michael in hand paid by said Richard, the receipt whereof was thereby acknowledged, did grant, bargain, sell, release, and confirm, unto said Richard Plaistow, *pro ut* the deed, to hold with the appurtenances unto said Richard Plaistow, his heirs and assigns for ever; subject to the provisoe or condition of redemption therein mentioned; that is to say, if said Michael, his heirs, executors, or administrators, on the 1st of May, 1778, should well and truly pay or cause to be paid to said Richard Plaistow, his executors, administrators, or assigns, said 5220*l.* 6*s.* 4*d.*, and should in the mean time, and until payment of said sum, well and truly pay, or cause to be paid to said Richard Plaistow, his heirs, executors, administrators, or assigns, interest for said 5220*l.* 6*s.* 4*d.*, at five per cent. per annum, from the date of said indenture, half yearly, then and from thenceforth it should and might be lawful to and for the said Michael Cormick, his heirs or assigns, into the said premises, or into any part or parcel thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as in his or their former estate; and also that then and from thenceforth one bond or obligation, with warrant of attorney for confessing judgment thereon, bearing equal

date with said indenture, perfected by said Michael Cormick to said Richard Plaistow of the penalty of 10440*l.* 12*s.* 8*d.*, conditioned for the payment of the said principal sum of 5220*l.* 6*s.* 4*d.*, and the interest thereof on said 1st May, 1778, should be delivered up to be cancelled (casualties excepted); or if judgment should in the mean time be obtained on said bond pursuant to said warrant of attorney, then said Richard Plaistow, his heirs, executors, administrators, or assigns, should, at the request, costs, and charges, of the said Michael Cormick, his heirs, executors, administrators, or assigns, execute a warrant of attorney to acknowledge satisfaction on the record of such judgment; which bond and warrant were intended as collateral security for payment of the said sum of 5220*l.* 6*s.* 4*d.* sterling, intended to be thereby secured, and not as a security for any other or different sum.

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"And that at and before the time of the execution of the last-mentioned deed, the said Richard Plaistow had actual notice of the said marriage articles of 1743, and of the said settlement of 1748; *pro ut* the letters. Notice.

"That in the month of August, 1779, the said Michael died without issue male; and the said Francis Cormick died in the life-time of the said Michael without issue; and the said Thomas Cormick also died in the life-time of the said Michael, but left issue one son, Charles Cormick, who entered into all the said lands; and the said Charles Cormick having died, leaving Michael Cormick his eldest son and heir at law, the said Michael Cormick, who is in possession of the said lands, claims

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to be entitled to the said lands under the limitations of the said will of Richard Cormick, and in the said deed of settlement of the 8th of October, 1748, made in pursuance of the said articles of 1743, some or one of them; and which settlement was registered on the 4th of May, 1750, upon a memorial signed and sealed by the said Xaverius Blake.

The question.

"And the only question is, whether, under the circumstances aforesaid, the deeds of the 15th and 16th of August, 1777, are a good and valid security for the principal money and interest secured thereby, as against the persons claiming under the limitations contained in the said deed of the 8th of October, 1748, and in and by the said will of the said Richard Cormick."

June 10, 1812. Certificate of the Court of C. P.

The said case was argued before the Court of Common Pleas in Ireland, who, on the 10th of June, 1812, delivered their unanimous opinion in the affirmative of the question, and signed the following certificate:

"We have heard this cause argued by counsel, and are of opinion, that under the circumstances of this case, the mortgage deeds of the 15th and 16th of August, 1777, are a good and valid security for the principal money and interest secured thereby, as against the persons claiming, under the limitations contained in the deed of the 8th of October, 1748, and in the will of Richard Cormick, in the case mentioned. *Norbury, L. Fox, E. Mayne, W. Fletcher.*"

July 9, 1812. Decree for an account.

The said cause came on to be heard before the Lord Chancellor, on the 9th of July, 1812, on the

Judge's certificate; when his Lordship was pleased to decree, that it should be referred to the Master to take an account of what was due to the Plaintiffs for principal, interest, and costs, on the foot of the said mortgage, and of the borrowing clause therein contained; and also to take an account of the real, freehold, and personal estates of Michael Cormick in the pleadings mentioned, into whose hands the same came, and how applied and disposed of; and also to take an account of the debts, legacies, and funeral expenses of the said Michael Cormick; in which account all just allowances were to be made. And it was ordered, that all creditors of the said Michael Cormick, who had debts, charges, or incumbrances affecting his said estate, should be at liberty to come in before the Master, and prove the same.

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The Master by his report, bearing date the 13th day of June, 1813, certified, that he found that the said Michael Cormick, deceased, was at the time of his death seised, as of fee or freehold, of the several lands and hereditaments therein specified, situate in the counties of Mayo, Roscommon, and Westmeath (which included the mortgaged premises), and he certified, that there was due to the Plaintiffs for principal, interest, and costs, on the foot of the mortgage deeds of the 15th and 16th days of August, 1777, in the pleadings mentioned, the sum of 14,581*l.* 4*s.* 5*d.*, and he stated that no proof of any other debt had been laid before him.

June 24, 1813. Master's report.

It does not appear that any account was taken of the sums advanced after the date of the mort-

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gage, no part of such sums being included in the sum reported due.

This report was duly confirmed by an order bearing date the 14th day of July, 1813.

July 21, 1813. Decree on report.

On the 21st day of July, 1813, the cause came on to be heard before Lord Manners, on the report and merits; when his Lordship ordered that the register should compute interest as usual; the gross sum, with interest from the confirmation of the report, to be paid in three months, or a foreclosure and sale to take place; the sale in the first instance to be of the mortgaged premises; and if the produce thereof should be insufficient, then a sale to be had of a competent part of the residue of the lands in the report mentioned, and that the Plaintiffs and Defendants should have their costs out of the funds to arise by such sales.

From this decree Michael Cormick, the son of Charles, appealed:—the executors of Plaistow, he having died in the course of the proceedings, being the Respondents.

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Mr. Wetherell and *Mr. Shadwell* (for Appellant). The substantive question is whether the limitations to the brothers under the settlement of 1748 were voluntary, and, consequently, fraudulent and void as against the mortgagee by the statutes 13 Eliz. cap. 5. and 27 Eliz. cap. 4.—the provisions of which were subsequently enacted for Ireland by 10 Car. 1. sess. 2. cap. 3. so that the law is perfectly the same in both countries. It has been doubted whether the mortgagee gave a proper consideration for the mort-

gage, but no great reliance is placed upon that point. The question is very important, but it would be a waste of time to travel through all the learning of what is called the range of the marriage consideration, a subject as to which there is no very precise general result even at this moment. The old cases say that collaterals are within the range. But I will suppose the law to be this: a person, having an estate in fee, on his marriage, makes a settlement, with limitations to the issue, and, in failure of issue, to his brothers; and afterwards mortgages or sells the estate. I assume that there the marriage consideration will not embrace the limitation to the brothers. But if that be so, where the settlor has an estate in fee, it does not follow that it is so, where the settlor has not an estate in fee. In all those cases where a limitation to brothers was held to be voluntary as against a subsequent purchaser, for val. con. the settlor had an estate in fee; and the absolute disposal of the whole property. The interest of the brother in that case is the mere voluntary gift of the settlor. But in this case the settlor had but an estate tail, which, if he did not marry or suffer a recovery, would go to his brothers Francis and Thomas under the limitations in the will of Richard Cormick: and it is contrary to the fact to say that Michael gives this interest to his brother, for the brother takes not by the gift of the settlor but by the will of the donor. The whole history of the cases does not present a single case where when tenant in tail, on his marriage, introduces merely repetitions of a former settlement declaratory of the antecedent provisions—not a single in-

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stance where, upon such a state of facts, the gift has been held voluntary under the statutes of Eliz. How can it be said that the settlor gives it when he allows it to go on as before? No ingenuity can raise a colourable argument that it was voluntary within the spirit of the acts; and one cannot help thinking that this was viewed below as if the settlor had the fee. The statutes never contemplated that there was fraud in not suffering a recovery,—in not acquiring the fee when you might acquire it. And yet that is what they must contend. From the earliest case on the subject to *Doe v. Manning*, there

9 East. 59.

is no such thing. The language of the statutes applies only to cases where the settlor has the fee. But here he had only an estate tail, and the settlement is only affirmative of the intention that the estates given by the will of Richard Cormick should continue. The gift was not *ex mero motu*, as if the settlor had the fee; and in justice to the landed proprietors of the country it cannot be held that every tenant in tail commits a fraud unless he suffers a common recovery. It is remarkable here that Blake has waived taking estates tail to the issue female of the marriage. He probably said to the settlor—"I "waive that claim, provided you allow the old limi- "tations to continue." Suppose the settlor had the fee, if the father-in-law waives the giving estates to the issue female upon condition that the settlor suffers the property to go to his collateral male relations,—that is not a voluntary gift under the statutes. It may be very common to waive the claim to give estates to the females in order that the property may go to the collateral male relations of the son-

in-law; and where the father-in-law waives the claim with that view, no case can be shown where the limitation under such circumstances has been considered as voluntary. It is a case of bargain or contract, and not that of a voluntary gift: and with reference to this point the reasoning of Wilmot in *Roe v. Hamilton*, 2 Wils. 356. deserves your Lordships' attention. The consideration to Cormick is a waiver by the father-in-law of settling the estate on his daughter's issue female, provided Cormick would allow the former settlement to remain unrevoked as to the brothers. The case of *Roe v. Hamilton* then coincides with this; and a recital in direct terms is not necessary, but the intention may be inferred from the whole scope of the instrument. This is the first case where it has been held that a person who has the power to acquire the fee is in the same situation as if he actually had the fee; and that if, instead of suffering a recovery, he leaves the property to go to his collateral relations, he commits a fraud. Another view of the case is, that it is a case of contract; which distinguishes this from a voluntary gift, though it should not be considered as within the range of the marriage consideration. All the cases cited on the other side below moved on the *cantilena* of the marriage consideration. But even if the decree could be sustained, it cannot be supported in as far as it lets in the other creditors and legatees. The Court seems to have considered itself bound by the opinion of the Court of C. P. But a case may be recollected in which one of your Lordships, after sending it for

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the opinion of the Court of K. B., decided against that opinion. In *Doe v. Manning* and other cases, nothing else appeared but the mere purposes of the settlement: and a voluntary gift is then void as against a purchaser for valuable consideration. But here Blake articles that Cormick should not himself take the fee, but suffer the estate to go to his brothers, with such remainders over as M. Cormick should by deed or will appoint: and there was no case to show that a subsequent recovery could operate so as to enable him to give to some, and not to others. How then can that be assimilated to a fee? The cases cited by them do not apply to the present case. The limitations here were not good even to the children, unless they were good to the collaterals. There is no case in terms like this case. The settlor was not seized in fee simple, and that affords a reasonable ground of distinction. But there is a legal difficulty as to the effect of the subsequent recovery. The recovery must have its effect at the time it is suffered, and it must be good as to the whole, or it is nothing. It cannot have a limited effect: and unless it is good as to the brothers of Michael, it is good for nothing at all. Where is the case where a recovery has been held to have only a partial operation? Yet that must be the way in which it has been construed. (*Lord Eldon* (C.) Why might not the effect of the recovery be to make the estates good to the collaterals also until displaced?)—Yes; but then the settlor must have had the fee at the time of making the settlement: but here he had not; and that is the real difficulty: and this is a case where it is

held that a settler, not seized in fee simple, might partially disappoint the former settlement.

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As to the other point the bill is filed by the mortgagor simply on his own case, and not on behalf of himself and the other creditors; and there was nothing to warrant the decree as to the other creditors and legatees.

Sir S. Romilly and *Mr. Hart* (for the Respondents). The Court of Chancery was not bound by the opinion of the Court of Common Pleas. But it cannot be conceded that the opinion was of no weight, and that the Judges overlooked the only question in the cause. Cases are as fully and ingeniously argued in Ireland as they are here; and the Courts below were of opinion that in this case there was no solid distinction between the case of a settlor seized in fee and one who might by a recovery acquire the fee when he thought proper. And it is now completely settled by the case of *Johnston v. L——*, lately decided, that when, in a marriage settlement, there are further limitations to collaterals, the ulterior limitations are voluntary, and are defeated by a subsequent sale or mortgage for val. con. The only question here is, whether the circumstance that the settlor was tenant in tail, and not seized in fee, affords any solid or substantial ground of distinction. He had the absolute dominion over the estate; and the collateral relations are as much volunteers as if the settlor had the fee. It was impossible that this could be considered a solid distinction. There would indeed be a distinction if

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Mr. W. could persuade your Lordships that those limitations to the brothers were only the old uses under the will of Richard Cormick; for then this would not be the bounty of the brother. But how is it possible to make that out? They took estates tail under the will. But under this settlement they took estates for life only; their sons taking estates tail. Then they say that this is a case of contract; and if that be so, it must be admitted that the settlement is not voluntary. But what motive could Blake have for so strange a contract? There is no pretence for that argument. As to the point respecting the other creditors and legatees, the reason of the decree is there perhaps not very intelligible, and it may be proper to alter it. (*Lord Eldon*, (C.) I doubt whether it was necessary that the settlor should have the fee. But suppose a recovery had been suffered and made to enure to confirm the uses under the old will, I doubt whether you could get rid of that. They must contend that these were the same uses as in the will, and that if there were occasion to bring a formedon, they could do so under the will.) (*Mr. W.* I admit that the old uses are gone, but the statutes apply not to the form, but to the substance. A formedon could not be brought certainly. But the uses are not void under the statutes.) The dominion which the settlor had over the estate was commensurate with a fee. The articles must have contemplated an estate in fee, and no intention can be inferred to leave unaffected the old estates tail, as the fee could be got only by destroying them entirely. This was clearly a gift by their brother; but

they are displaced only in favour of a purchaser for val. con.; and the gift stands as to whatever part of it remains after the claim of the purchaser shall be satisfied.

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Mr. Wetherell (in reply). Their doctrine is, *nolens volens* you shall have a fee. But the law did not always compel persons to perform their moral duty. There were analogous cases in the bankruptcy law; and, in cases of powers, the distinction between power and property was established. This case goes further than *Doe v. Manning*. These were technically in law new gifts, but morally and substantially they were not new gifts, so as to bring them within the statutes of Elizabeth.

Holmes v. Cogill, 7 Ves. 499.

Lord Eldon, (C). This question is perfectly new. It is a question also of English law; and that question is, whether a limitation made by a tenant in tail, in his marriage settlement, to his brothers, is a voluntary limitation within the meaning of the decisions which apply to a tenant in fee, who, although he has so voluntarily settled the property, may, notwithstanding, dispose of it to a purchaser for val. con.: and the claim of the purchaser is good against the volunteer. There is no case where it has been determined that the same rule applies in the case of such a limitation by a tenant in tail as in that of a voluntary limitation by one who has the fee. The consequences of the decision may possibly very deeply affect property which may have passed under a great many family settlements. I have however formed an opinion upon the case, and

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with some confidence that the opinion is right. But it can do no good to decide the case before the recess; and afterwards it will be to be considered whether, considering the property at stake and the importance of the point, the case ought not to be argued before the Judges.

Judgment. June 5, 1818.

Lord Eldon, (C.) (after stating the case). The decree was not, as the practice is here, for a foreclosure only, but for a sale also, as the practice is in Ireland—" the sale, in the first instance to be of the " mortgaged premises: and if the produce thereof " should be insufficient, then a sale to be had of a " competent part of the residue of the lands in the " report mentioned."

When this case came to be heard the argument was confined to so much of the case as depended upon these two questions: 1st, whether under the settlement of the 7th and 8th of October, 1748, certain persons to whom estates were given by that settlement were volunteers: 2d, whether the mortgage was a good and valid security, on the principle that the mortgagee for valuable consideration, even with notice, had a better claim than mere volunteers.

I could not at first understand, and I do not yet very well understand, why an account is directed in the same cause, of debts, legacies, and funeral expenses. In the one case it is stated that all creditors may come in and prove; in the other case, that all creditors and legatees may come in before the Master in the usual way. This is of some consequence: for it may be a very different question as

between the volunteers and this particular mortgagee and creditor, and as between the volunteers and subsequent creditors and legatees. This is the case of a mortgagee and creditor, claiming specifically against the mortgaged estate. If the estate is not sufficient to pay the whole of the debt, he, by his specialty, is entitled to resort to the other real estates chargeable as assets, and to the personal estate as assets. So that the decree is rightly applied to his case as a mortgagee and specialty creditor. But if the estate should be more than sufficient to pay his debt, a question may arise with the other creditors who do not claim specifically against the estate; and the question as between the volunteers and them, and between the volunteers and legatees, may be very different.

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The principal question is whether the Appellant is to be considered as a volunteer; and whether he can support his claim as against a mortgagee for valuable consideration, even with notice. And on the best consideration which I have been able to give to this case, it appears to me that the brothers of Michael Cormick, who were tenants in tail in remainder under the old settlement, by the effect of the new settlement, recoveries, and other transactions, became purchasers of a quite new and different estate; and instead of tenants in tail in remainder, became tenants for life, with remainder to their first and other sons in tail male: the life estate being the gift of the settlor, and also the estates of the sons, who had no estate before and took originally. I cannot find that, according to

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the authorities, those who took these new estates can be held to be purchasers for consideration, or can be regarded in any other light than as volunteers.

Limitations to collaterals in a marriage settlement made by tenant in tail, voluntary as against a subsequent purchaser for val. con. in the same manner as if the settlor had had the fee.

Then the doctrine whether new estates could be given to them as volunteers by one who was himself only tenant in tail was considered, and the point very ingeniously argued. There could be no doubt that if he had previously suffered a recovery, or if the estates had been given to him in fee, the brothers and their sons would be volunteers; and they say, on the other side, that there is no substantial distinction in this respect between tenant in fee and tenant in tail: and so the Court below determined, in concurrence with the unanimous opinion of the Judges of the Court of Common Pleas. I cannot advise your Lordships to reverse that decision; and then the question returns to the decree with reference to the other creditors and legatees.

There can be no doubt as to the point considered as a question between the volunteer and the executors of Plaistow, a mortgagee and creditor. If the mortgaged estate should not be sufficient to make good the debt, he has his remedy against the general assets not included in the settlement. But if the estate should pay more, then a question may arise, what is to be done as to the residue between the volunteer and the other creditors; and what is to be done with reference to the legatees. I believe the real meaning of the decree is to decide the question only as between the volunteer and the mortgagee, claiming against this specific estate, con-

firming the other creditors to the general assets. And then there may still be a difficulty with respect to the legatees. June 5, 1818. MORTGAGE.—VOLUNTEER.

What I propose to your Lordships then is to affirm this decree, with a declaration that the affirmance is without prejudice to any question with other creditors besides the Respondents who represent the mortgagee, or between the Appellant and the legatees. This declaration can do no harm; and if the real meaning of the decree should be that to which in construction it is liable, it may be important to declare that our affirmance is without prejudice.

Decree AFFIRMED, with declaration as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GORDON—*Appellant.*

MARJORIBANKS and others—*Respondents.*

THE erection of a kitchen, billiard room, and a covered passage on the back area of a house in St. Andrew's Square, Edinburgh, opposed on the ground that it would be contrary to the original plan of the new town, and a nuisance. The feu charter contained several restrictions, but none as to building on the back area. Held by the Court of Session that the buildings might legally be erected, on the ground, as it was understood, that the erection would be no material deviation from the original plan. The judgment affirmed in Dom. Proc. Feb. 9, 16, 1818. PLAN.—CHARTER.—CONTRACT.