[HIGH COURT OF AUSTRALIA.]

CARAHER AND ANOTHER . . . APPELLANTS;

AND

LLOYD (OFFICIAL ASSIGNEE) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *March* 28, 29, 30, 31. *April* 3, 4. *June* 13.

Griffith C.J., Barton and O'Connor JJ.

Will—Tenant for life—Contingent remainder—Assignability—Release to tenant for life—Releasee not to take beneficially but as trustee—Enlargement of estate of releasee—Forfeiture—Residuary devisee—Interest vested not contingent.

A contingent remainder may be released by deed to the tenant for life, and such a release will operate by way of enlargement of the latter's estate, and not merely by way of extinguishment of the contingent remainder.

An instrument, which is capable of operating as a release of such an interest, made in favour of a person capable of accepting it, will pass the legal estate to the releasee although by the terms of the instrument the releasee agrees to accept it, not for his own benefit, but as trustee for others.

Quære, whether, independently of statutory enactments, the doctrine that executory and contingent interests are not assignable to a stranger except by fine or by a contract for valuable consideration is good law, and whether such interests do not pass by an instrument capable of creating estoppel, *e.g.*, an indenture.

A testator devised certain lands to his wife for life, and, after her death, to his two sons M. and J. for their lives as tenants in common in equal shares, the share of either son dying to go to that son's children, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and in default of such issue, to the other children of the testator then living. Certain other lands were devised to J. for life with limitations in remainder after his death as in the former devise. The residue was devised to M., J., and another upon trust to sell, and to hold the proceeds after payment of certain legacies and expenses, in trust for M. and J. in equal shares. There was a proviso that (*inter alia*) if any of the children made tenants for life should alienate or attempt to alienate their interest or interests in the lands so devised the interest of such tenant for life should go as on his

or her death. Before the widow's death J., by voluntary post-nuptial settlement, purported to "grant bargain sell alien and release" to M. as trustee in fee all "the lands and property of whatsoever nature and kind soever absolutely and otherwise acquired" by him under the will and all his "estate right title and interest" therein to hold to such uses as his wife E., one of the appellants, should appoint, and in default of appointment for her separate use for life with remainders over. After the death of the widow of the testator, and of M., who died without issue, E. exercised her power of appointment in favour of the other appellant.

J. having become bankrupt six years after the settlement, all his interests not then legally disposed of passed to the respondent, as official assignee, but the validity of the settlement itself was not affected.

It was not disputed on the appeal, that the settlement operated to create a forfeiture of J.'s life estate under the will or that upon the forfeiture the intermediate rents and profits, until one of J.'s children attained the age of twenty-one years, fell into residue.

Held, that, as to M.'s moiety of the lands devised to the testator's wife, J., at the date of the settlement had a contingent remainder in fee as tenant in common with such of the testator's children as should survive M., and a vested remainder as residuary devisee in joint tenancy in the event of failure of any of the testator's children to survive M. :

That J.'s interest in M.'s moiety was effectually released by the settlement to M., either regarded as tenant for life in remainder expectant on his mother's decease, or as joint tenant in remainder under the residuary devise : and

That the accretion or enlargement of his original estate which M. thus acquired was bound in his hands by the trusts of the settlement.

Doe d. Calkin v. *Tomkinson*, 2 M. & S., 165, and *In re Ellenborough* ; *Towry Law* v. *Burne*, (1903) 1 Ch., 697, distinguished.

Held further that J.'s interest as residuary devisee *quoad* the property comprised in the second devise, though it depended upon certain contingencies whether he would ever take anything under it, was not a contingent, but a vested interest, and passed under the settlement.

Egerton v. *Massey*, 3 C.B.N.S., 338, followed.

Decision of *Walker* J., (1905) 5 S.R. (N.S.W.), 63 ; 21 N.S.W. W.N., 213, reversed on these points.

APPEAL from a decision of *Walker* J. sitting as Judge in Equity.

By his will dated 10th September, 1875, Owen Joseph Caraher, who died on 22nd August, 1879, made devises in the following terms :—"I give and devise all those six houses and store and office situated in Gloucester street in the City of Sydney, also the land hereditaments and premises consisting of four houses situate in Cumberland street which land was bought by me from William

H. C. OF A. 1905.

CARAHER v. LLOYD.

Austin Hogan, to my wife Catherine Caraher for her life without impeachment of waste, and from and after her decease I devise the same to my sons Michael Joseph Caraher and John Edwin Caraher for their lives and without impeachment of waste as tenants in common in equal shares, and from and after the decease of either of them the said Michael Joseph Caraher and John Edwin Caraher as to the moiety of the one so dying I devise the same to his children who being sons or a son shall have attained the age of twenty-one years or who being daughters or a daughter shall have attained that age or shall have married or shall marry and if more than one in equal shares and in default of such issue then I devise the same to the others or other of my children who shall be then living and if more than one in equal shares."

. . . . . .

"I devise my five houses in Cumberland street opposite the watch-house to my son John Edwin Caraher for life without impeachment of waste, and after his decease I devise the same to his child or children who being sons or a son shall have attained or shall attain that age or shall have married or shall marry and if more than one such child in equal shares, and in default of any such issue as aforesaid then I devise the same to the others or other of my children who shall be then living and if more than one in equal shares."

"And as to the rest residue and remainder of my real and personal estate I give and devise the same to James Mullens of Pitt Street, Sydney . . . my son the said John Edwin Caraher and Edward Flanagan of George Street Sydney . . . (hereinafter designated trustees) their heirs, executors and administrators respectively" upon trust to sell as directed in the will. Out of the proceeds the trustees were to pay the testator's funeral and testamentary expenses, and debts, and certain legacies, and to stand possessed of the residue, after payment of certain legacies, in trust for his two sons Michael Joseph Caraher and John Edwin Caraher in equal shares.

The will also contained the following proviso:

"Provided always and I hereby declare that it shall not be lawful for any of my said children hereby made tenants for life of the said premises hereinbefore devised to charge all or any of

the said premises so hereinbefore devised for life with the payment of any sum or sums of money nor in anywise to dispose of any estate or interest in the said premises so hereinbefore devised, and in the event of the interest of any tenant for life being attached alienated or disposed of by operation of law then I give and devise the interest of such tenant for life to the person or persons who would be entitled thereto if such tenant for life were actually dead."

By a codicil dated 11th August, 1879, Michael Joseph Caraher was appointed executor and trustee in place of James Mullens who had died.

The testator was survived by his wife and eight children, including John Edwin and Michael Joseph, and probate was granted to the executors named in the will in September, 1879. The widow died on 3rd March, 1893. The son Michael Joseph died on 31st December, 1894, never having married, and the trustee Flanagan in October, 1900, and no person was appointed trustee in place of them. John Edwin Caraher was married in July, 1880, to the appellant, Emily Caraher, and there was issue of the marriage one child, Ethel May Caraher, born in October, 1881.

By a voluntary post-nuptial settlement dated 20th January, 1882, John Edwin conveyed to Michael Joseph Caraher as trustee in fee all his interests of whatsoever nature and kind under the will, upon such trusts as the settlor's wife should by deed or will appoint and in default of appointment in trust for the wife for life as her separate estate, and after her death without having appointed in trust for the children of the marriage who should attain the age of twenty-one or marry. The operative words and limitations of the settlement are more fully set out in the judgment. No other children were born of the marriage. In August, 1888, the estate of John Edwin Caraher was sequestrated in bankruptcy, and the respondent was appointed official assignee of the estate, which has never been released. In 1894 the marriage of John Edwin was dissolved by decree of the Divorce Court, and he has not re-married. In 1904 the appellant Emily Caraher exercised her power of appointment under the settlement in favour of the other appellant.

By notification of resumption dated 29th December, 1900, the

H. C. OF A. 1905.

CARAHER v. LLOYD.

lands, comprised in the devises set out above, were resumed by the Crown under the provisions of the *Public Works Act* 1900, and the *Darling Harbour Wharves Resumption Act* 1900, and the compensation moneys, with interest, paid into Court by the Minister.

John Edwin Caraher was at this time still living.

The several claimants, including the appellants, petitioned the Court for payment out to them of their respective shares of the moneys paid into Court. The appellants claimed to be entitled, under the settlement of 1882, to John Edwin Caraher's interest under the will, which was at the date of the settlement contingent on Michael John dying before him, and without leaving issue who should fulfil the conditions of majority or marriage. The respondent contended that the settlement did not operate as an assignment of this interest, and that therefore it had passed on bankruptcy to the official assignee. *Walker* J. who heard the petition, sitting as the Judge in Equity, was of opinion that at law nothing passed by the settlement, and that, the settlement being voluntary, and the property purported to be settled never having come into the hands of the trustee, it was inoperative also in Equity. He held therefore that the title of the assignee must prevail. He also was of opinion that the same reasoning applied to the share of John Edwin, as one of the residuary devisees, in the rents of the property devised to himself for life in the interval between the forfeiture of his life interest and the attainment of majority by his daughter Ethel May: *Ex parte the Minister for Public Works*; *In the matter of the Will of Owen Caraher* (1).

From this decision the present appeal was brought.

Loxton for the appellants. The interest of John Edwin Caraher in Michael's share of the property held by them as tenants in common, which was expectant on Michael's death, passed under the settlement. It was one of those contingencies or possibilities which, though incapable of being conveyed to a stranger otherwise than by estoppel, fine and recovery, or assignment for value in Equity, are capable of being voluntarily released to persons who stand in a certain relationship to the releasor, *e.g.*, to a terre-

(1) (1905) 5 S.R. (N.S.W.), 63; 21 N.S.W. W.N., 213.

tenant or remainderman. Michael being terre-tenant was capable of accepting such a release. The settlement purported, amongst other things, to release to Michael all that John had acquired under or by virtue of the will. The fact that Michael was to take as trustee did not militate against the efficacy of the conveyance. The rule is one of law, subject to certain exceptions, and the Court, in applying it, can only take cognizance of legal interests. If a particular assignment comes within the exceptions, the Court must enforce the legal title, irrespective of any equities that may be created at the same time. The rule against alienation of such interests was laid down in *Lampet's Case* (1). An exception was recognized in the case of releases to persons already having an estate in the land: *Thomas* v. *Freeman* (2); *Higden* v. *Williamson* (3); *Wright* v. *Wright* (4); *In re Parsons*; *Stockley* v. *Parsons* (5); *In re Ellenborough*; *Towry Law* v. *Burne* (6); *Marks* v. *Marks* (7). The reason given in the old authorities for the exception in the case of releases was the same as the reason given for the rule itself, viz., that it tended to the quieting of disputes. A release was permitted because it resulted in the extinguishment of an adverse claim, or the enlargement of the estate of the terre-tenant or remainderman. But, though this was the foundation of the exception, it must be applied irrespectively of its origin whether the particular application will result in extinguishment or not. In the present case the release removed the possibility of legal disputes, whatever differences might arise between the claimants of equities.

A release of a possibility is good where the person to whom it purports to be made has the freehold in deed or in law, and therefore it is good when made to a life tenant: *Cruise's Digest of the Laws of England*, (1835) vol. II., pp. 78, 82; *Co. Litt.*, Bk. III., secs. 446, 447, *et seq.*; *Williams's Law of Real Property*, 9th ed., p. 22. A release may operate either by extinguishment or as an enlargement: *Watkins on Conveyancing*, 8th ed., p. 243; *Co. Litt.*, Bk. III., secs. 452, 453, 465-467. Here the release extinguished the executory devise, and enlarged the life estate of Michael.

(1) 10 Rep., 328 (48a).
(2) 2 Vern., 563.
(3) 3 P. Wms., 132.
(4) 1 Ves. Sen., 409.
(5) 45 Ch. D., 51.
(6) (1903) 1 Ch., 697.
(7) 1 Str., 129; 2 Blac. Com., 290.

H. C. OF A. 1905.

CARAHER v. LLOYD.

[GRIFFITH C.J. referred to *Co. Litt.*, Bk. III., sec. 305, and *Dean* v. *Dean*, (1).]

Another consequence of John's attempted alienation of the life estates given him by the will was forfeiture. [He referred to *Blackman* v. *Fysh* (2); *In re Porter*; *Coulson* v. *Capper* (3); *In re Tancred's Settlement*; *Somerville* v. *Tancred* (4).] His interest in the residuary estate passed to Michael. That interest was not contingent. As residuary devisee he had an ultimate vested remainder in fee, subject to a contingency. This was assignable and therefore passed by the settlement. Nor was his interest expectant upon Michael's death a mere expectancy. It was a possibility coupled with an interest. In *In re Ellenborough*; *Towry Law* v. *Burne* (5), which was relied upon in the Court below, the subject-matter of the assignment was a mere *spes successionis*. A possibility coupled with an interest has always been assignable: *Watkins on Conveyancing*, 8th ed., p. 253; *Doe d. Perry* v. *Jones* (6); *Shep. Touch.*, p. 239. The settlement therefore operated in Michael's favour by way of enlargement of his life estate, and enured to his benefit as ultimate remainderman, he being the sole residuary devisee: *Williams on Law of Real Property*, 9th ed., p. 256.

[GRIFFITH C.J. referred to *Jarman on Wills*, 5th ed., p 757.]

Whatever the operation of the release, John ceased to have any interest in the estate, and none therefore passed to the respondent, the official assignee, on the bankruptcy. The settlement was in 1882 and therefore was not affected by the *Bankruptcy Act*. Michael took the conveyance under such circumstances as would lead the Court of Equity to declare that he held the property which passed under it, subject to the trusts mentioned in the deed. The settlor having done everything possible to effectuate the settlement, the Court will enforce it, although it was voluntary: *Ellison* v. *Ellison* (7); *Wh. & T. L. C. in Equity*, 6th ed., vol. I., p. 291; *Pulvertoft* v. *Pulvertoft* (8); *Kekewich* v. *Manning* (9).

Dr. Cullen K.C., and *Peden* for the respondent. It is conceded

(1) (1891) 3 Ch., 150.
(2) (1892) 3 Ch., 209.
(3) (1892) 3 Ch., 481.
(4) (1903) 1 Ch., 715.
(5) (1903) 1 Ch., 697.
(6) 1 H. Bl., 30; 3 T.R., 88.
(7) 6 Ves., 656.
(8) 18 Ves., 84; 11 R.R., 151.
(9) 1 De G., M. & G., 176.

that there are exceptions to the rule against alienation, and that in some cases a possibility may be released, but in the present case the settlement did not operate to convey the interest of the settlor by way of release or otherwise. A release of a possibility can only operate by way of extinguishment, so as to benefit the person whose interest would be impaired by the realization of the possibility. Whether the interest of the settlor is regarded as an executory devise or as a contingent remainder, it could not be released to Michael. The former class of interests can only be released to the person whose estate is liable to be cut down by the arising of the interest, and the latter only to the reversioner whose estate might be prevented from coming into existence by the happening of the contingency: *Williams on Real Property*, 19th ed., p. 357. Such a release cannot enlarge the interest of the tenant for life, because his estate must be completed independently of the interest of the releasor. Nothing was conveyed to Michael by the settlement. Michael was in the same position as any stranger, and could only take a conveyance of John's interest by fine and recovery, or its modern substitute, or by assignment for value in equity. It is only in that way that such a possibility can be passed so as to become an interest in the hands of the transferee. [He referred to *Weale* v. *Lower* (1); *Fearne C.R.*, 7th ed., p. 365; *Williams, Seisin of the Freehold*, p. 124; *Story, Equity Jurisprudence*, p. 690 (sec. 1040); *Lampet's Case* (2); *Hyde* v. *Parrat* (3).] John had no vested interest to convey. The residuary devise was contingent upon the failure of all the objects limited, and therefore might never have taken effect. [He referred to *Jarman on Wills*, 5th ed., vol. I., p. 757; *Steph. Com.*, 7th ed., vol. I., pp. 326, 327.]

[GRIFFITH C.J. referred to *Egerton* v. *Massey* (4). That case seems to show that there was a vested interest in Michael and John, as to the residue.]

No estate after a contingent limitation in fee can be vested: *Luddington* v. *Kime* (5); *Vick* v. *Edwards* (6). John's interest as residuary devisee was consequent upon his own forfeiture.

(1) Pol., 57.
(2) 10 Rep., 46b.
(3) 1 P. Wms., 1.
(4) 3 C.B.N.S., 338.
(5) 1 Ld. Raym., 203.
(6) 3 P. Wms., 371.

H. C. OF A. 1905. CARAHER v. LLOYD.

That was an executory interest at the date of the settlement because it was to take effect on forfeiture, and was not to wait until the life estate was completed: *Blackman* v. *Fysh* (1); *Rocheford* v. *Hackman* (2); *Wilkinson* v. *Wilkinson* (3); *Elphinstone on Conveyancing*, 5th ed., p. 339. Michael was not tenant for life of the estate given to John for life; he was only tenant for life of his own moiety. If his capacity to take a release only arose by virtue of the settlement, he could not take under the settlement in that capacity. The owner of one possibility cannot release to the owner of another. Michael and John, as joint residuary devisees, were each possessed of an interest to the extent of a moiety, and consequently John's interest only affected Michael's interest in the whole to the extent of one-half. But a person is capable of taking a release only when his whole interest is liable to be cut down by the coming into effect of the contingency on which the estate of the releasor depends.

[GRIFFITH C.J.—A release might have a twofold effect, enlarging one estate by the extinguishment of another.]

A gift to the survivors of several persons is a mere contingency and is not coupled with an interest. None of the persons may survive the tenant for life. [He referred to *Preston on Conveyancing*, 1818 ed., p. 95; *Vick* v. *Edwards* (4); *Fearne, C.R.*, 7th ed., p. 547; *Doe d. Perry* v. *Jones* (5); *Watkins on Conveyancing*, p. 226; *Thomas* v. *Freeman* (6); *Theobald* v. *Duffay* (7); *Beckley* v. *Newland* (8); *Hobson* v. *Trevor* (9); *In re Parsons*; *Stockley* v. *Parsons* (10); *In re Ellenborough*; *Towry Law* v. *Burne* (11); *Meek* v. *Kettlewell* (12); *Kekewich* v. *Manning* (13).

[GRIFFITH C.J. referred to *Doe d. Calkin* v. *Tomkinson* (14); *Thomas* v. *Jones* (15); *Jarman on Wills*, 5th ed., p. 717.]

[BARTON J. referred to *Jarman on Wills*, 5th ed., p. 49.]

The settlement was not a release at all in the sense contended for by the appellants, but an ordinary conveyance by the statutory

(1) (1892) 3 Ch., 209.
(2) 9 Hare, 475.
(3) 3 Swan., 515.
(4) 3 P. Wms., 371.
(5) 1 H. Bl., 30; 3 T.R., 88.
(6) 2 Vern., 563.
(7) 1 P. Wms., 574 (note).
(8) 2 P. Wms., 182.
(9) 2 P. Wms., 191.
(10) 45 Ch. D., 51.
(11) (1903) 1 Ch., 697.
(12) 1 Hare, 464; 1 Ph., 342.
(13) 1 De G. M. & G., 176.
(14) 2 M. & S., 165.
(15) 1 De G., J. & S., 63.

equivalent of the old lease and release. As such a conveyance, not being by deed acknowledged, or for value, it was inoperative to pass a contingent interest. But assuming that it was a release, and that Michael was a person capable of accepting one, it was inoperative upon the interest in question, whatever effect it may have had upon John's other property. A release can only operate as an enlargement where the estate of the releasee is complete and vested. [He referred to *Lampet's Case* (1); *Mozeley and Whiteley's Law Dictionary*, p. 445, definition of *terre-tenant*; *Steph. Com.*, 7th ed., vol. I., p. 518, and *Co. Litt.*, Bk. III., secs. 305, 447, and 450, as to the ways in which a release can operate at law.]

Assuming that the release was effective, the result, whether regarded as a release to Michael as one of several joint tenants, or as the tenant for life, was that the interests released fell into the inheritance: *Co. Litt.*, Bk. III., secs. 306, 307. That was vested in John, Michael and Flanagan, and therefore ultimately fell to John by survivorship. John therefore has not rid himself of the legal estate, and the settlement, being voluntary, will not be enforced against the settlor.

A release can only operate by merging the estate of the releasor in the estate of the releasee, if large enough to take it, or in the inheritance, not by preserving the interest released as a separate entity. The fee could not sink in the life tenancy, and Michael cannot have an estate expectant on his own death, for that would make the release operate as a conveyance, not a release. John's interest in Michael's moiety under the first devise therefore sank into the inheritance, as well as his interest in the residue, and the legal estate in both remained in himself.

Loxton, in reply, referred to *Egerton* v. *Massey* (2); *Doe d. Calkin* v. *Tomkinson* (3); *Fearne, C.R.*, 9th ed., p. 370; *Thomas* v. *Jones* (4); *Preston on Conveyancing*, 3rd ed., pp. 268, 270, citing *Goodright* v. *Forrester* (5); *Co. Litt.*, Bk. III., secs. 463, 479; *Chester* v. *Willan* (6); *Cox* v. *Chamberlain* (7); *Shep. Touch.*, 239.

Cur. adv. vult.

(1) 10 Rep., 46b, at p. 48a.
(2) 3 C.B.N.S., 338.
(3) 2 M. & S., 165.
(4) 1 De G., J. & S., 63.
(5) 8 East., 552.
(6) 2 Wms. Saund., Pt. I., p. 96A.
(7) 4 Ves., 631.

H. C. OF A. 1905.

CARAHER v. LLOYD.

June 13.

The judgment of the Court was read by

GRIFFITH C.J. This is an appeal from an order of *Walker* J. sitting as Judge in Equity, upon an application for distribution of a fund paid into Court in respect of lands taken by the Government of New South Wales under the *Public Works Act* 1900. The appellants claim under a voluntary post-nuptial settlement dated 20th January, 1882, made by one John Edwin Caraher. The respondent claims as official assignee of J. E. Caraher, whose estate was sequestrated on 30th August, 1888. The questions for determination depend upon the ancient English law of real property relating to contingent remainders, which in this respect has not been altered in New South Wales. It will be convenient to consider, first, what was the nature of the estate which J. E. Caraher had in the lands now represented by the fund in Court, and, secondly, what, if any, was the effect of his attempted dealing with it by the settlement of 20th January, 1882.

Owen Joseph Caraher, who died on 22nd August, 1879, made a will dated 10th September, 1875, which contained devises in the following terms: [His Honor read from the will the devises and proviso already set out, and continued]:

By a codicil Michael was substituted for Mullens in the residuary devise.

The effect of the first devise, stated shortly, was that, after the life estate of the widow, Michael and John Edwin took estates for life, being tenants in common during their joint lives, with remainder in fee as to each moiety for such children of the tenant for life as being sons should attain twenty-one, or being daughters should attain that age or marry, with remainder in default of such issue to the other children of the testator living at the death of the tenant for life as tenants in common in fee. In the present case we are concerned only with Michael's moiety and the limitations subsequent to his life estate. At the testator's death Michael had no children. It is clear that the remainder to his children was contingent: *Festing* v. *Allen* (1); and, as it was a remainder in fee, it follows that the remainder to the testator's children who should survive Michael was also contingent. It is also clear that this last remainder was a gift to persons *in esse*, although it

(1) 12 M. & W., 279.

was uncertain whether all or any of them would take under it. It has been held by the Supreme Court of the United States, following the opinion of Chancellor *Kent*, that "when an estate is granted to one for life and to such of his children as should be living after his death the present right to future possession vests at once in such as are living, subject to open and let in afterborn children and to be divested as to those who shall die without issue:" *Croxall* v. *Sherard* (1). In this view John Edwin's interest was only contingent by reason of its following on the contingent remainder given to Michael's children. In some of the American States, however, it is held that a remainder is necessarily contingent when it is impossible, until the death of the tenant for life, to tell who are entitled under the description. In the present case it is immaterial which of these views is correct, for in either view the remainder to the children of the testator was contingent. It was, however, urged before us by the learned counsel for the respondent that the interests of the children of the testator, if they were contingent remainders at all, were not of such a kind as to be capable at common law of assignment by the assurances appropriate for dealing with contingent remainders, but were mere possibilities not coupled with an interest, and were incapable of being dealt with except by estoppel or contract for valuable consideration; and the case was likened to the interest of an heir-at-law before the death of the ancestor. We shall have occasion to deal with this argument at greater length. But, in passing, the case of *Quarm* v. *Quarm* (2) may be mentioned. In that case a testator had devised a freehold estate to seven persons "as joint tenants and not as tenants in common and to the survivor of them, his or her heirs and assigns for ever." It was held upon the construction of these words that the devisees were joint tenants for life, with a contingent remainder in fee to the survivor. The survivor had, twenty years before the contingency was determined in his favour, become bankrupt, and it was held that his estate had passed to the trustee in bankruptcy. It does not appear to have occurred to any one concerned in the case to doubt that such an interest passed on bankruptcy. It is clear, however, that the expectancy or *spes successionis* of an heir-at-

(1) 5 Wall., 288.

(2) (1892) 1 Q.B., 184.

H. C. OF A. 1905.

CARAHER v. LLOYD.

law does not pass to his trustee in bankruptcy, if the bankruptcy is closed before he inherits. It appears, then, that as to Michael's moiety of the lands in question John Edwin had a contingent remainder in fee as tenant in common with such of the testator's children as should survive Michael. This being an estate in severalty, it is immaterial that in the events that happened he and those claiming through him only became entitled to one-seventh of Michael's moiety. The principles governing the case are the same as if they had become entitled to the whole of it on the contingency of the failure of the gift to Michael's children.

Again, the contingent remainder to the children of the testator who should survive Michael might have failed altogether. In that event the land in question would have fallen into the residue, and the legal estate would have vested in the devisees named, viz., Michael, John Edwin, and Flanagan. And this estate was vested and not contingent: *Egerton* v. *Massey* (1). At the testator's death, therefore, Michael was not only tenant for life of his moiety but was also joint tenant in remainder in fee of the same moiety.

We were invited to approach the subject on the assumption that at common law real property was *primâ facie* inalienable, and that at any rate contingent remainders could not be alienated. But it is, to use the words of *Farwell* J., "the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances": *In re Oliver's Settlement, Evered* v. *Leigh* (2). The learned Judge added that the rule is one of public policy, and that it has always been considered to be the duty of all the Courts to uphold it, not to assist in evading it. The question in each case is as to the appropriate assurance. On this point positive rules were established, one of which was said to be that certain kinds of property, including contingent remainders, could not be alienated except by release, a form of conveyance which could only operate in favour of a person already having some estate in the land. We have referred to the latest statement of the law on the point. We will now refer to one of the earliest, *Lampet's Case* (3). In that case a testator possessed of land for a term of years devised the term

(1) 3 C.B.N.S., 338.

(2) (1905), 1 Ch., 191, at p. 196.

(3) 10 Rep., 46*b*.

to the use of John Morrice for life with remainder to the testator's sister Elizabeth. Elizabeth in the lifetime of John Morrice joined with her husband in a release of all her estate and interest in the land to him. Her estate was a contingent remainder, because John Morrice's estate for life was in law greater than the term of years, and her estate was contingent upon his death before the lease was determined, an event which might or might not happen. It was contended that she had nothing but a possibility, but it was otherwise adjudged, and it was held that the effect of the release was to make John Morrice's estate absolute during all the residue of the term. We shall have occasion to refer to the case at greater length for other purposes. We mention it now for the purpose of citing a passage at p. 49a:—

"Littleton saith that it is a maxim in law, that land in fee-simple, &c., may be charged by one way or other: so it was said, that it was a maxim in law, that every right or title, or interest, *in praesenti* or *futuro*, by the joining of all who may claim any such right, title, or interest, may be barred or extinguished, and therefore upon the maxim which Littleton puts, it was concluded, that if at the common law the donor and donee in tail had joined in a grant of a rent-charge, and afterwards the donee had died without issue, and the land had reverted to the donor, he should hold it charged, and yet he had but a possibility at the time of the charge made: But all those who had estate or interest *in præsenti* or *futuro*, joined in the charge: . . . So upon the second maxim, if in the case at bar John Morrice, the elder, and Elizabeth had joined in a deed of assignment to another, without question it had utterly barred the said Elizabeth, for no other had interest either *in praesenti* or *futuro*, but those who joined in the grant. So when the husband of Elizabeth releases to him in possession, both consented to it, one in releasing, the other in accepting of it: And in the case when both join in the grant, it is the grant of him who has the term, and the release or confirmation of the other." The practical effect of the release was, therefore, to enlarge the estate of the tenant for life. These authorities sufficiently establish that the beneficial interest in a contingent remainder was capable under some circumstances of being assigned. But it was supposed to be settled that the

H. C. OF A. 1905.

CARAHER v. LLOYD.

assignment could only be made by release. The rules as to the persons to whom a release of a right in land could be effectually made are stated in *Littleton (Co. Litt.*, 265b.) "Also, in releases of all the right which a man hath in certain lands, &c. it behoveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made &c. For in every case where he to whom the release is made hath the freehold in deed, or in law, at the time of the release &c., there the release is good" (sec. 447). "But a release to one entitled in remainder is also good, because he has an estate although he has no freehold in possession" (sec. 449). "And if successive estates are limited in the land to several persons a release to any of them is good" (sec. 450). It appears, then, that John Edwin's contingent remainder was *primâ facie* capable of being released to Michael, either regarded as tenant for life in remainder expectant on his mother's decease, or as joint tenant in remainder under the residuary devise.

But it was said that a contingent remainder could not be assigned to a stranger, except by a fine, or, in equity, by a contract for valuable consideration. See the case mentioned in *Fulwood's Case* (1): "A man possessed of a term for divers years, devised the profits thereof to one for life, and after his decease to another for the residue of the years, and died; the first devisee entered by the assent of the executor, and afterwards he in remainder during the life of the first devisee assigned it to another, and afterwards the first devisee died; it was adjudged that the assignment was void, for he in remainder had but possibility during the life of the first devisee." This case only differed from *Lampet's Case* in that the attempted alienation was by way of assignment to a stranger instead of by release to the tenant for life. In *Lampet's Case* (2), after pointing out the reason of the rule which forbade the alienation of contingent interests to strangers—namely, that it would give rise to litigation and disturbance of peaceable possession, which was *primâ facie* evidence of title in fee, Lord *Coke* goes on to say: "But all rights, titles and actions may by the wisdom and policy of the law be released to the terre-tenant, for the same reason of his

(1) 4 Rep., 64*b*, at p. 66*b*.

(2) 10 Rep., 46*a*, at p. 48*a*.

repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty. And therefore a right or title to freehold or inheritance (for here it is not spoken of collateral powers) be it *in præsenti* or *futuro*, may be released in five manners. (1) To the tenant of the freehold in fact, or in law, without any privity. (2) To him in remainder. (3) To him seised of the reversion without any privity; but an estate cannot be enlarged without privity. (4) To him who has right only in respect of privity, as if the tenant be disseised, the lord may release his services in respect of the privity and right, without any estate. (5) In respect of privity only, without right; as if tenant in tail makes a feoffment in fee, the donee after the feoffment has no right; and yet in respect of the privity only, the donee may release to him the rent and the services, saving fealty: so the demandant may release to the vouchee in respect of privity only, but no estate can pass by release, but to him who hath an estate in privity, and not in respect of the right or privity only."

In *Thomas* v. *Freeman* (1) the Lord Keeper (Lord *Cowper*) said: "It is a notion that has obtained at law, that a possibility is not assignable; but no reason for it, if *res integra*; but the law is not so unreasonable, but to allow, that it may be released." In *Higden* v. *Williamson* (2), land was devised to the testator's daughter for life, then to trustees to be sold, and the money arising from the sale to be divided amongst such of her children as should be living at her death. One of her sons became bankrupt during her life, and survived her, and it was held by *Jekyll*, M.R., that his interest passed under the assignment to the Commissioners in Bankruptcy. He said that the son might, in his mother's lifetime, have released his contingent interest, and that under the Statute 13 Eliz. c. 7, the Commissioners were "empowered to assign over all that the bankrupt might depart withal." Lord Chancellor *King* affirmed the judgment, partly on this ground, and partly on the language of later Statutes relating to bankrupts. It will be noticed that the contingency in this case was identical with that now under consideration. Lord *Hardwicke* was evidently of the same opinion: *Wright* v. *Wright* (3). In

(1) 2 Vern., 563.

(2) 3 P. Wms., 132.

(3) 1 Ves. Sen., 409.

H. C. OF A. 1905.

CARAHER v. LLOYD.

Doe d. Perry v. *Jones* (1) a testator had devised lands to his brother Thomas until one of his younger sons should attain twenty-one, or if he had only one son who should attain that age, till that son should attain it, and then to that son in fee. Thomas had a younger son who died under twenty-one. T., his eldest son and only son then living, having attained twenty-one, made a will in the lifetime of his father (who might have married again and had other sons), and devised all his real estate to his wife. The question was whether the interest given by the original testator passed by the will. It was held by both Courts that the interest was devisable. Lord *Kenyon* said (2): "There are two kinds of possibilities; the one, a bare possibility; that which the heir has from the courtesy of his ancestor, and which is nothing more than a bare hope of succession. Such a possibility undoubtedly is not the object of disposition; for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved on him from his ancestor, such disposition would be void. The other, a possibility, or contingency, like the present, and which is widely different from the former." He concluded his judgment with the words "I sincerely hope that the point will be now understood to be perfectly at rest." It is important to remember that at this time a will as to realty spoke from its date, and only operated to pass land which the testator "had" at the time of executing it. This, Lord *Kenyon* said, meant "having an interest in the land."

Against these authorities reliance was placed on the case of *Doe d. Calkin* v. *Tomkinson* (3). In that case a testator devised land "equally to my sisters Mary and Elizabeth or to the survivor of them and to be disposed of by her the survivor as she may by will devise." Mary afterwards in the lifetime of Elizabeth made a will devising the lands, and it was held that the devise was ineffectual. The question again turned on the Statutes of Wills of Hy. VIII. The Court, without determining what was the precise estate given by the will of the original testator, held that supposing it to be a contingent remainder it could not be considered as devisable, because the person who was to take it was not in any degree ascertainable before the contingency happened.

(1) 1 H. Bl., 30; 3 T.R., 88. (2) 3 T.R., 88, at p. 95.
(3) 2 M. & S., 165.

Lord *Ellenborough*, referring to the Statutes of Wills, asked: "How can a person be said to have a contingent interest when it is uncertain whether he is the person who will be entitled to have it or not?" He took a distinction between a power to a designated person to be executed upon a contingency and a power given to a contingent person. *Dampier* J. distinguished the case of *Selwyn* v. *Selwyn* (1), which had been relied on, on the ground that the person who was to take in that case was apparent and was therefore *persona designata*. Commenting upon this case, Mr. Jarman, in a learned note to *Powell on Devises* (3rd ed., vol. I., p. 30), remarks as follows:—"That under a limitation to several persons for life, with remainder to the survivor in fee, no effectual will can be made by any of them, before the happening of the contingency, is, it is conceived, a necessary consequence of the nature of the contingency for at latest, the very event, which was necessary to give effect to the will, namely, the death of the devisor, must determine his interest. As the will, therefore, at the time of the execution could not, from the nature of the contingency, ever operate upon the *contingent* interest, it could not be made effectual by subsequent circumstances, and consequently could not pass the *estate* subsequently *vested* in the devisor by survivorship. For these reasons, it is conceived, the case of *Doe d. Calkin* v. *Tomkinson* (2) rests upon unquestionable grounds; but the observation of Lord *Ellenborough*, that, as a contingent remainder, it was not devisable, *because the person to take is not in any degree ascertainable before the contingency happens*, does not, I apprehend, refer the case to its true principle, though it has been sanctioned by the most eminent text writers, *vide* 2 *Prest. Abst.*, 96, who have given precisely the same definition of contingent interests not devisable, referring, as an example, to the case of a limitation to the survivor of several persons. In opposition to these respectable authorities, the editor submits, *first*, that the person to take is not, in the instance in question, less ascertainable than in many other cases, where the interest is confessedly devisable; and that, therefore, this definition furnishes no distinction whatever. *Secondly*, that the only circumstance which characterizes the cases under consideration is that of the contingency involving the event which alone can

(1) 2 Burr., 1131. (2) 2 M. & S., 165.

H. C. OF A. 1905.

CARAHER v. LLOYD.

call the devise into operation, viz., the death of the testator, and, therefore, rendering it impossible for the contingent interest to be co-existent with the devise; and for that, and that reason alone, it is that such contingent interests are not devisable—a reason which also applies to prevent their being descendible.

"What, we ask, is the nature of the interest of each individual of a number of persons, to the survivor of whom an estate is limited? It is clearly *as to him* a contingent interest, depending on the event of his surviving his companion. It is precisely the same as if the lands were given to him *nominatim* on that contingency.

"This being admitted, we further ask, what is the difference between a limitation to A. if he survive B. and C. (the real nature of the limitation in the last case), and a limitation to A. if B. die under twenty-one, which was precisely the interest that in *Goodtitle* v. *Wood* (see *supra*), was held to be devisable. In both cases the *object* to take was unascertainable (as they necessarily are in every contingent limitation), and the reason therefore why the former interest is not devisable, and the latter is, must be sought for in some other circumstance.

"That circumstance is, *that the contingent interest of A., if not determined in his lifetime by his surviving B. and C., must determine on his death; and therefore could not be the subject of a testamentary disposition.* By way of further illustration, suppose the limitation, instead of being to the longest liver of several persons, was to the shortest liver. It being just as uncertain in this case which will die first, as in the other which will live longest, (and in the case of two, the contingency being in fact the same), the object to take must in each case be equally unascertainable, and yet it will not be denied, that the contingent interest in the last case is devisable by him who shall first die. If otherwise, he would be entirely precluded from the power of disposing of it, since it does not become vested until his death, and it clearly would be descendible.

"The difference between the two cases exists exclusively in the circumstance before adverted to. The same observations apply to the case put by Mr. Fearne, as illustrative of the class of contingent interests not devisable; a limitation to the right heirs

of J.S., a person living. A will made by any person being heir apparent of J.S. cannot possibly take effect, because, if he die before his father, as he does not become heir, the limitation fails. It is, therefore, the impossibility of the contingent interest subsisting after the death of the devisor, that renders the interest not devisable. The point is not only of importance, with a view to a correct understanding of the true principles which have governed these cases, but is of direct practical utility; for, if the editor's proposition be correct, such an interest as that in *Doe d. Calkin* v. *Tomkinson*, though not devisable by will, *in consequence of the posthumous nature of the instrument*, is alienable in equity by a contract for a valuable consideration (see *Wright* v. *Wright* (1), whereas the commonly received objection excludes it from every species of alienation at law and in equity. The result is, that if the foregoing observations are well founded, all contingent or executory interests, or in other words all possibilities accompanied with an interest, are devisable under the Statute of Wills, unless, from the nature of the contingency, the devisor's interest be determinable by his death."

In the case of *Doe d. Calkin* v. *Tomkinson* (2), if the testatrix had died immediately after the execution of her will, her chance of survivorship would have determined by her death, and there would have been nothing upon which the devise could operate. And, as at that time a will spoke, as to real estate, from the time of execution, it is evident that a will which was inoperative when made could not acquire any validity from subsequent events. In our opinion, the case of *Doe d. Calkin* v. *Tomkinson* proceeded entirely upon the *Statutes of Wills*, and affords no assistance in determining the question whether a contingent interest dependent on survivorship was assignable by an appropriate assurance.

Reliance was also placed on the case of *In re Ellenborough*; *Towry Law* v. *Burne* (3), in which it was held by *Buckley* J. that personal estate to which a person may become entitled under the will or intestacy of a living person is not assignable. But such an expectancy is obviously of the same kind as the possibilities of the first class mentioned by Lord *Kenyon* in *Doe d. Perry* v. *Jones* (4).

(1) 1 Ves. Sen., 409.
(2) 2 M. & S., 165.
(3) 1903 1 Ch., 697.
(4) 1 H. Bl., 30; 3 T.R., 88.

H. C. OF A. 1905.

CARAHER v. LLOYD.

The distinction was very clearly pointed out by *Kay* J. in *In re Parsons*; *Stockley* v. *Parsons* (1), when the question was whether the *spes successionis* which a person has as one of a class of possible next-of-kin is a contingent title within the *Married Women's Property Act* 1882. The learned Judge said (2):—"There is no such character in law as the heir of a living person or as his statutory next-of-kin. There is a wide difference, for this reason, between a gift to such of the 'children' or 'nephews' or even 'kindred' of A. who shall be living at his death, and a gift to those who shall then be his statutory next-of-kin. During A.'s life there may be children, nephews, or kindred. Each of them has probably sufficient interest, though contingent, to take proceedings to protect the fund: see *per* Lord *Hatherley* in *Joel* v. *Mills* (3). Some or all of them might be made defendants in an action to administer the trusts. Neither of these things can be done where the gift is to statutory next-of-kin. They have no existence whatever in law while the *propositus* is living. No one can as possible next-of-kin even bring an action to perpetuate testimony as to his kinship during that period. I am unable to agree with the judgments which consider these cases as parallel."

The only authorities cited to us to the contrary were some passages in *Preston*, which are apparently based upon a misconception of the effect of *Doe d. Calkin* v. *Tomkinson* (4).

For these reasons, we are unable to entertain any doubt that John Edwin's contingent remainder was capable of being released to a proper person, or that Michael was a person capable of being releasee of it. As Lord *Cowper* said, "The law is not so unreasonable."

By the post-nuptial settlement of 20th January, 1882, which was expressed to be made "between John Edwin Caraher of the first part, Emily Caraher, his wife of the second part, Michael Joseph Caraher, gentleman, a trustee for the purposes hereinafter mentioned, and hereinafter designated trustee, of the third part," it was witnessed that John Edwin, in consideration of natural love and affection, and of 10s., did "grant bargain sell alien and release unto the said trustee and his heirs All that the

(1) 45 Ch. D., 51.
(2) 45 Ch. D., 51, at p. 63.
(3) 3 K. & J., 474.
(4) 2 M. & S., 165.

lands estate and property of whatsoever nature and kind soever absolutely and otherwise acquired by the said John Edwin Caraher under and by virtue of the will of his late father Owen Joseph Caraher together with the rights easements and appurtenances thereto belonging and all the estate right title and interest of him the said John Edwin Caraher in and to the said hereditaments and premises respectively " to hold to the trustee and his heirs to such uses as Emily Caraher should by deed or will appoint, and in default of appointment upon trust to permit her to receive the rents and profits for her separate use for life and after her death without making any appointment upon trust for the children of John Edwin and Emily Caraher who should attain twenty-one or if daughters marry, with powers of advancement for the benefit of infant children, and with an ultimate trust for John Edwin if he survived Emily. It appears, therefore, that Michael was not a mere releasee to uses, but took the legal estate: *Harton* v. *Harton* (1), and in certain events had active duties to perform. Until an appointment should be made the legal estate remained in him, and when it was made it would not operate as a conveyance but as a limitation of a use, which would thereupon be executed by the *Statute of Uses* into a legal estate: *Watkins*, 8th ed., 337. It was suggested that the operative words of this deed are not sufficient to pass the contingent remainder in question. As to the intention of the parties, there can be no doubt that it was intended to include in the settlement all John Edwin's interests under his father's will, of whatever kind. The word " release " which is used in it is the apt word for dealing with a contingent remainder. The Courts, so far from being astute to defeat the intention of the parties, will endeavour so to construe the words used that that intention clearly expressed may prevail. Thus, in an assurance from one joint tenant to another the word " grant " has been construed as " release," because the only effectual mode of conveyance between such parties was by release, and it was the evident intention of the parties that the deed should have the effect of a conveyance. In our judgment, therefore, John Edwin's contingent remainder now in question was effectually released to Michael by the settlement.

(1) 7 T.R., 652.

H. C. OF A. 1905. CARAHER v. LLOYD.

It remains to consider the effect of the release. On this point two arguments were addressed to us on behalf of the respondent: (1) That the effect of a release of a contingent remainder is to extinguish it; and (2) That the object of the law which forbids the alienation of a contingent remainder to a stranger would be defeated if a releasee otherwise eligible were allowed to hold it on trust for a stranger. The latter argument prevailed with *Walker* J.

The first argument, if successful, would be fatal to the claim of both the appellants and the respondent, in which view we suppose the respondent would be entitled to retain the judgment in his favour. The argument was based mainly upon the statement (which is an exposition of logical consequences and not a statement of law) contained in Mr. Butler's note to p. 266b of *Co. Litt.*, in which he points out that releases may enure in four ways: (1) *Per mitter le droit*, where a disseisee releases to the disseisor: (2) *Per mitter l'estate*, as in the case of a release by one joint tenant to another: (3) *Per l'enlarger*, as when the possession and inheritance are separated for a particular time, and he who has the inheritance releases to the tenant in possession: (4) *Per extinguishment*, where the releasee cannot have the thing *per mitter le droit*, as when the lord grants the seigniory to his tenant. Another illustration of such a release is given in the text at p. 467b, viz., a rent charge. It is clear, from the instances given, that the word "extinguishment" is used of cases in which the right released is of such a character that by the release the right to receive, and the duty to render, are united in the same person. Such a case is exactly analogous to the case of a debt or of an easement released to the owner of the servient tenement. But it obviously has no application to the case of a release, the effect of which is that the releasee acquires a larger estate in the land, either in quantity or quality, than he had before. That such is the effect of a release of a contingent remainder to the tenant for life, is apparent from the passages which have been read from *Lampet's Case*. No doubt, from one point of view, it may be said that such a release operates by way of extinguishment, inasmuch as the liability of the heir of the releasee, if tenant for life, to be disturbed in his possession (which, as already pointed

out, is *primâ facie* evidence of an estate in fee) upon the happening of the contingency, or of the releasee, if entitled in remainder, to have his enjoyment postponed, is ended or extinguished. But this is not the sense in which the word is used. A simple illustration will make the point quite clear. Suppose a devise to A. for life, with remainder to B. in fee if he is living at A.'s death, and if he be then dead, to C. in fee. In this case, the estates of B. and C. are contingent remainders. If B. and C. release their estates to A., can it be suggested that A. would not have the fee? The question is answered by the passage which has been quoted from *Lampet's Case*. Such a release in substance operates to enlarge the estate of the tenant for life, although, like every other release, it in one sense extinguishes the right of the releasor.

The learned Judge from whom this appeal is brought did not express any opinion on the points to which we have hitherto referred, and we have no reason to suppose that we are saying anything as to them inconsistent with his opinion.

We pass to the second point, which is singularly free from authority. On this point the learned Judge said: "Of course Mr. Loxton does not stop at this point, otherwise the argument would not avail him. He maintains further that the possibility was released conditionally, that is to say on condition that Michael should hold it on the trusts declared by the settlement. This is where the argument in my opinion breaks down." He then quoted from *Lampet's Case* the reasons given for the rule against allowing the assignment of possibilities to strangers, and the following passage from *Williams's Real Property* 18th ed., p. 342: "With reference to a limitation to A. for his life, and if C. be living at his decease, then to B. and his heirs: B., though he has no estate during A.'s life, has yet plainly a chance of obtaining one in case C. should survive. This chance in law is called a *possibility*, and a possibility of this kind was long looked upon in much the same light as a condition of re-entry was regarded, having been inalienable at law, and not to be conveyed to another by deed of grant. It might, however, have been released; that is to say, B. might, by deed of release, have given up his interest for the benefit of the reversioner in the same manner as if the contingent remainder to him and his heirs had never been limited;

H. C. OF A. 1905. CARAHER v. LLOYD.

for the law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen to be subsisting." His Honor proceeded: "It seems plain that a release of a possibility was only permitted with a view to its extinction, and it is in my opinion a perversion of the rule of law to apply it to a case where the releasee is intended to accept the release, not for his own benefit and to secure the merger or destruction of the interest released, but to keep it alive for the benefit of other persons. So to hold would not be to follow the rule of law but to evade and defeat it. I am of opinion that at law nothing passed by the the settlement, and that, the settlement being voluntary, and the property purported to be settled never having come into the hands of the trustee, it is inoperative also in Equity. Therefore, the title of the Official Assignee must prevail."

The only judicial utterance quoted to the Court on this point was the question put by Lord *Hardwicke* in *Wright* v. *Wright* (1): "It is now established in this Court, that a *chose in action* may be assigned for valuable consideration, and this" (*i.e.*, the contingent interest then in question) "may be released as a *chose in action* may; and then why may not it be put into such a shape as to be disposed of to a stranger, or to make him trustee for a stranger?" An analogous point is raised by *Fearne* C.R., p. 34, with respect to the rule in *Shelley's Case*: "Here it is to be observed, that cases may arise, where the estate of freehold limited to the ancestor may be so limited to him, in trust for some other person, or as a security for some charge, or to answer some other particular purpose, and no usufructuary benefit be intended to the ancestor by such limitation. As a limitation to the use of A. during the life of B. in trust for B. or to pay her the rents and profits during her life, remainder to the use of the heirs of the body of A.; and some other cases which might be put, and which, though I do not recollect to have met with in our books, have occasionally occurred to me in the course of practice. Now these are cases which, I do not see, how we are to consider as falling within the extent or application of the rule I have been treating of; because

(1) 1 Ves. Sen., 409, at p. 411.

it seems absurd and inconsistent with any possible rule of law or common sense, to create or raise an estate tail to a man upon the ground of a limitation (viz. the freehold limited in trust) by which no beneficial interest at all was intended to him." On this, Mr. Butler remarks in a note: "With deference to Mr. Fearne,—as Courts of law cannot take notice of any trusts charged on legal estates, the trusts or purposes for which the ancestor's estate of freehold, in the cases proposed by him, is charged, cannot be a subject of their consideration. Courts of law, therefore, must treat the case merely as a limitation of a legal freehold to the ancestor, and a limitation of the legal fee to the heirs of his body, and of course hold it to be a legal estate tail under the rule in *Shelley's Case*."

With deference to the learned Judge from whom we are differing, it seems to us that the question of ownership of the legal estate is one thing and the obligations attaching to that ownership are another. We are concerned here, first, to ascertain the legal ownership, as a matter of ancient conveyancing law, of John Edwin's undivided one-seventh share in Michael's moiety in remainder. And we adopt Mr. Butler's words: "As Courts of law cannot take notice of any trusts charged on legal estates, the trusts or purposes for which the . . . estate . . . is charged cannot be a subject of their consideration." The doctrine was a purely legal one, and we do not know of any equitable doctrine that forbids a person who is capable of acquiring a legal estate in land from undertaking to hold it on any trusts he thinks fit, or that requires a Court of Equity to refrain from enforcing such trusts against him. We do not think it is accurate to say that the release to Michael was conditional upon his holding the land on the trusts of the settlement. The release is in terms absolute, and a trust cannot properly be described as a condition. If the deed of 1882 had been a bare release to Michael and his heirs, and he had thereupon executed a covenant to stand seised on the trusts contained in it, there could have been no doubt of the validity of the trusts, and the fact that they are contained in the same instrument cannot make any difference.

We are therefore of opinion that the settlement was effectual to pass the interest in question to Michael, and that the accretion or

H. C. OF A. 1905.

CARAHER v. LYOYD.

enlargement of his original estate which he thus acquired was bound in his hands by the trusts of the settlement.

The first tenant for life, the widow, died in 1893. Michael died in 1894, having never been married. John Edwin and six other children of the testator survived him, and became entitled to his moiety as tenants in common in fee. In 1904 Emily Caraher appointed the property comprised in the settlement to her co-appellant. In our judgment John Edwin's undivided seventh of Michael's moiety which became vested on Michael's death thereupon passed to the appointee. The appeal must therefore be allowed on this point.

We have dealt with the question on the assumption that the old doctrine, that a contingent remainder could not be assigned to a stranger except by a fine or by a contract for valuable consideration, is good law. On this point the learned author already quoted, Mr. Jarman, remarks in a note to *Bythewood's Conveyancing*, vol. IV., 2nd ed., p. 225 :—"Since the period at which this doctrine was established, it has been settled also, that contingent and executory interests are devisable: *Jones* v. *Roe* (1); and consequently, that, at the happening of the contingency, or, if it happen in the testator's lifetime, then at the death of the testator [*Jackson* v. *Hurlock* (2)], the lands vest absolutely in the devisee. But though such interests are releasable, and may be bound by a fine *sur concessit*, or by an indenture of demise by estoppel, and will even pass by a devise, yet it is still strenuously maintained by an eminent writer, 2 *Prest. Abst.*, 118; *Prest. Shepp. Touchst.*, 238, and the opinion is commonly entertained by the profession, that they are not transferable by deed. Recent decisions, however, leave us little room to doubt, that, even if such interests are not transferable by deed simply, they will pass by *indenture, i.e.*, by an instrument capable of operating by estoppel. In *Doe* v. *Oliver* (3), it was held that a fine *come ceo* &c., levied by a contingent remainderman in fee, operated by estoppel only, until the contingency happened, and then operated to vest the estate absolutely in the *cestui que use* of the fine. The same point, we have seen, has been decided as to demises by indenture; and the

(1) 1 H. Bl., 30; 3 T.R., 88.
(2) 2 Ed., 263.
(3) 10 B. & C., 181.

only remaining question is, whether an indenture, *not having the operation of a demise*, would pass the estate in such a case. The affirmative conclusion seems to be inevitable upon the general reasoning of the cases, which has applied the doctrine of estoppel to indentures generally, and not to leases only: see *Bensley* v. *Burdon* (1); and the consequence therefore is, that an indenture by grant, executed by a contingent remainderman or owner of an executory interest, would transfer such contingent or executory interest to the grantee, so that when the contingency happened the estate would vest in the grantee."

In the same note the learned author, referring to the question of the release of contingent remainders, says (p. 226):—"If the contingent interest in such a case be sold to the person in whom the vested fee resides, it may be released; unless, indeed, according to the doctrine of some writers, such interests can only be devised or released where 'the owner is ascertained': see *Prest. Abstr.*, 283; but the fallacy of such a doctrine has been attempted to be shown in a recent publication by the editor: see 1 *Jar. Pow. Dev.*, 30, *n.* If the objection be applicable at all, it would apply to the present case (which indeed is admitted by Mr. Preston in another place: 3 *Prest. Abstr.*, 255), for it is uncertain, during the life of A., whether any, or, if any, which of the children will become an object of the gift. Such an interest is clearly not *devisable*, for the same reason that it is not descendible, namely, because it cannot subsist *as such* after the death of the owner; for if a child survived A., the parent, the interest would vest, and if he died in A.'s lifetime, it would fail; so that the devise could never operate upon the property as a contingent interest. This principle, however, does not apply to conveyances *inter vivos*; and therefore, if there be no *other* reason why such an interest is not devisable, it follows that it may be released; and such, it is apprehended, is the sound conclusion upon the subject."

An attentive consideration of the leading case of *Doe* v. *Oliver* (2) referred to by Mr. Jarman in the first part of the note just quoted, will show that there is a great deal to be said in favour of the view which he takes. But, as we have arrived at the conclusion (which is fortified by the second extract) that the settlement

(1) 2 Sim. & St., 519.

(2) 10 B. & C., 181.

H. C. OF A. 1905.

CARAHER v. LLOYD.

of 26th January, 1882, was effectual even on the contrary assumption, it is unnecessary to express an opinion on the point, or to consider whether the settlement was such an indenture as to operate by way of estoppel. If it should ever become necessary to consider this point, the case of *Tailby* v. *Official Receiver* (1) may probably afford some assistance.

With regard to the second devise, *Walker* J. held that the settlement of 20th January, 1882, operated as a forfeiture of John Edwin's life estate, and that the intermediate rents and profits, until one of his children attained twenty-one, fell into residue. On this point the decision is not appealed from. But the learned Judge held that the interest of John Edwin as residuary devisee *quoad* this property was merely the chance of his life estate being forfeited before any of his children had attained a vested interest, (which is no doubt true), and that the interest was consequently contingent and not vested, and did not pass by the settlement. The case of *Egerton* v. *Massey* (2), which decided that the interest of a residuary devisee is vested and not contingent, although it may depend upon the happening of contingencies whether the residuary devisee will ever take anything under the devise, was not cited to the learned Judge. If it had been, his decision on this point would doubtless have been the other way. There can be no doubt of the sufficiency of the settlement to assign all the vested interests of the settlor. The appeal must therefore be allowed on this point also.

The order appealed from must be varied by substituting for the declaration, that the fund firstly in question belongs to the respondent, a declaration that it belongs to the appellants, with a consequent direction for the payment out to them, but without prejudice to the rights of third parties preserved by the order, and by substituting for the declaration that the funds representing a portion of the residuary estate of the testator are, subject to the payments mentioned in the order, divisible between the representatives of Michael Caraher and the respondent, a declaration that they are, subject as aforesaid, divisible between Michael's representatives and the appellants.

The order must be further varied by omitting the award of

(1) 13 App. Cas., 523. (2) 3 C.B.N.S., 338.

costs to the respondent out of the fund now in question, and directing him to pay to the appellants their costs of the adverse litigation between them.

The respondent must pay the costs of the appeal.

H. C. OF A. 1905. CARAHER v. LLOYD.

Order of Judge in Equity varied accordingly.

Solicitors, for appellants: *McDonell & Moffitt.*

Solicitors, for respondent: *Allen, Allen & Hemsley.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE TROLLY, DRAYMEN AND CARTERS UNION OF SYDNEY AND SUBURBS } APPELLANTS;

AND

THE MASTER CARRIERS ASSOCIATION OF NEW SOUTH WALES } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Industrial Arbitration Act (N.S.W.) (No. 59 of 1901), sec. 36 (b)—Preference to unionists—Persons offering their labour at the same time—Notice to union of labour required—Jurisdiction of Court of Arbitration to compel—Prohibition—Construction of Statutes.

H. C. OF A. 1905. SYDNEY, *June* 13, 14, 19. Griffith C.J. Barton and O'Connor JJ.

Sec. 36 sub-sec. (*b*) of the *Industrial Arbitration Act* (N.S.W.) 1901, provides, *inter alia*, that the Court of Arbitration, in its award or by order made on the application of any party to the proceedings before it, may "direct that as between members of an industrial union of employés and other persons offering their labour at the same time, such members shall be employed in preference to such other persons, other things being equal."

The Court of Arbitration, in an industrial dispute between the appellant and respondent unions, made an award by which preference was ordered to be given to members of the appellant union on compliance with certain conditions as