THE

AMERICAN LAW REGISTER.

DECEMBER, 1858.

REMARKS ON SOME RECENT PENNSYLVANIA CASES.

It is an oft repeated observation, that in respect to real estate, it is of small importance what the law is, so long as it is definitely settled and rigidly adhered to. No matter how artificial, and even irrational, a rule of property may be, it can do, in the long run, little harm, provided its existence be once absolutely fixed. Nay, even if its operation could be shown, upon considerations of abstract policy, to be positively injurious, still its very certainty provides a remedy, by suggesting the means of its evasion. In short, whether it be a beacon to guide or a rock to be shunned, when it is clearly marked upon the chart, no real danger need be feared.

For the ordinary business of life, this certainty and fixedness in the rules of law are matters of positive necessity; peculiarly so, indeed, here, where land has become so much an article of commerce. As such its value is entirely dependent on the real or supposed security of title. Any doubt on that score will throw the most desirable property out of the market. This is especially the case where there is a fluctuation of decision on a point of frequent occurrence in the derivation of title. Counsel will not advise, nor clients buy, where the soundness of the advice or the security of the purchase must depend on the determination of such a point. Pro-

perty is thus struck as it were by a legal blight. But it is not in the dealings in the market place alone that the injurious effect of this uncertainty is felt. In the division of estates and in family arrangements it operates in quite as hurtful a manner. It is in the present a sure incentive to bitter litigation among those who above all ought to be kept in harmonious relations, and in the future tends to produce the disruption of settlements made in good faith, and on the basis of which marriages are formed and offspring reared. From whatever point of view they can be regarded, decisions which unsettle the law on questions of importance must be deeply deplored, and ought to be the subject of a general and earnest protest.

These remarks may seem trite and scarcely deserving of the space which they occupy here; but, unfortunately, they do not appear always to have been kept before the minds of judges, otherwise of great learning and logical force. It cannot be denied, however much it may be regretted, that for this reason there are cases on the law of real estate to be found in recent volumes of the Pennsylvania Reports, which have by no means given general satisfaction to the bar in this State. We wish to speak with the greatest respect and deference, but it is impossible not to see that in several instances old rules have been shaken or abandoned, and established precedents neglected, in favor of newer theories of jurisprudence, and of doctrines which had not previously been considered as a part of our law. In making this assertion we believe that we do no injustice to the bench, for such seems to be the expressed intention in several of the decisions to which we refer.

It is not our purpose to enter into any criticism upon the points actually decided in any of those cases. Once determined it may be as well that they should stand, however much we may regret their decision.

> "Let what is broken so remain.
> The Gods are hard to reconcile."

Our intention at present is simply to offer a few brief remarks on some dicta contained in two late decisions, which have been the subject of considerable comment among lawyers here:—we mean *Williams* vs. *Leech*, 4 Casey, 89, and *Price* vs. *Taylor*, Id. 104.

These cases are not, indeed, very recent, but the doctrines advanced in them have not yet lost the freshness of novelty, nor have they been qualified or withdrawn in any subsequent decision.

Before the case of *Price* vs. *Taylor*, it had been the undoubted opinion of lawyers in Pennsylvania that estates tail descended to the heir at common law, there as in England. It had been so expressly decided under an early act of assembly, to be hereafter noticed. Many estates had been settled, many titles passed on the faith of the law having still remained the same. Property of really immense value in the city of Philadelphia alone, is now and has been held under entails, particularly in the Penn and other English families, which had always been treated as so descending, and many sales made by the supposed tenant in tail for the time being. No one had raised, or even hinted any doubt on the point, so far as we are aware. In *Price* vs. *Taylor*, however, while it is not expressly decided, nor indeed in any way necessary to the decision of the cause, it is for the first time suggested that estates tail descend here according to the provisions of the intestate laws; and this suggestion is made is such strong terms as to leave a decided impression on the mind that it was intended as a timely warning of what the court would decide when the question actually arose, and not as a mere speculative *discursus* on an abstract subject. Considering it in this light, we must respectfully say, that even if it were correct in principle, we would earnestly deprecate such a decision at this late day, because of the great damage to titles which would ensue, and still more, if as we expect to show, it could not really be supported in law.

The first permanent provision on the subject of descents in Pennsylvania is contained in the act of 1705, entitled "An Act for the better settlement of *intestates*' estates." That act regulated only lineal descent, establishing therein equality of division, except that the eldest son got a double share. In all other cases, subject to a provision for the widow, the heir at common law took. The particular section of the act in which this provision occurs, reads as follows: "The surplusage, or remaining portion of the *intestate's* lands, &c., not sold or ordered to be sold by virtue of this act, and not otherwise limited

marriage settlement, shall be divided between the intestate's widow," &c.

That act continued in force till 1794, being modified in the meantime only by the acts of 1748 and 1764, which provided for the case of lineal descendants dying under age and without issue.

Under this act of 1705, the question arose about the year 1793, in the case of *Goodright* vs. *Morningstar*, 1 Yeates, 315, as to the descent of estates tail. It was argued upon almost exactly the same grounds as have since been urged in *Price* vs. *Taylor*, that such estates were within the act. But the court, without hearing the opposite side, decided at once that the heir at common law took, observing, "That it was *too late now* to stir the point, whatever reason there might have been for it in the first instance. The invariable opinion of lawyers, since the act of 1705, has been that lands entailed descended according to the course of the common law, and it has been understood generally that it had been so adjudged in early times. All the common recoveries which have been suffered by the heirs of donees in tail have been conformable to that principle; *to unsettle so many titles at this late day would be productive of endless confusion.*" "Our act of 1705 only regulates the descent of lands among the children where the father is seized thereof, *and might dispose of them by deed or will.* It leaves other cases as they were at common law."

In the subsequent case of *Jenk's Lessee* vs. *Backhouse*, 1 Binn. 96, it was decided, further, that trust estates were not within the act; and in the course of his opinion, Judge Yeates, who was a most accomplished lawyer, said: "In the case of an estate tail after the death of the tenant in tail, it has been determined at York Nisi Prius that his heir at common law shall take the land thus entailed. He claims it as said *per formam doni;* yet as to the purpose of taking he is considered the heir of his father. The strong ground of the decision I take to have been, that it *had been the uniform received opinion of the profession* that such a case *was not within the true spirit of the intestate laws*, that many estates had been held under it, and that it would be highly dangerous at this time to impeach the doctrine."

The act of 1794 then came to abolish the preference formerly given to the eldest son, and to establish, in certain specified cases, a scheme of descent different from the common law. That act is styled "An Act directing the descent of intestates' real estates," &c., and the prefatory language is as follows: "The remaining part of any lands, tenements, hereditaments and personal estate of any person deceased not sold *or disposed of by will*, shall be divided and enjoined (enjoyed) as follows." There were supplementary acts in 1798 and afterwards, intended to supply *casus omissi*, but nothing was enacted in them affecting this point. The general rule was frequently held under these statutes to be, that the heir at common law took in all cases not specially provided for. It does not seem to be asserted in *Price* vs. *Taylor* that any difference was made by them in regard to estates tail. Indeed, the language of the court in *Goodright* vs. *Morningstar*, is quite as applicable to these acts as to the act of 1705.

The act of 1833 was drawn by the revisers of the code of Pennsylvania, all men of great learning, and thoroughly acquainted with the law and usages of Pennsylvania. That act is entitled "An Act relating to the descent and distribution of the *estates of intestates*." Its prefatory words are: "The real and personal estate of a decedent remaining after payment of debts and legal charges, and which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoined (enjoyed) as follows." It then proceeds to make provision for all possible cases of descent, enumerated as far as convenient, and otherwise covered by the sweeping expression "next of kin." There is a clause, indeed, which, after reciting that whereas it was the true intent and meaning of the act that the heir at common law should not take in any case to the exclusion of other heirs or kindred standing in the same degree of consanguinity *to the intestate*, declares that in every case which might arise, not expressly provided for by the act, real as well as the personal estate should pass to and be enjoyed by the next of kin of *the intestate*, without regard to the ancestor or other relative, &c. But it is not pretended that this has any bearing on the question in hand, nor indeed could it. It extends, of course, only to cases within the purview of the

statute. The words still refer to "*the intestate*" only, *i. e.* to that class to whom the prefatory words above cited were meant to apply. The actual operation of the clause is only in respect to cases not expressly provided for by the statute, and hence not to lineal descent, which is the peculiar characteristic of estates tail. And finally, it is well known that it was introduced only to prevent the possibility of the *casus omissi* under the earlier acts which had made fresh legislation necessary from time to time, as such omissions were discovered.

Now, on the point before us it is difficult to see what difference there is between the acts of 1705, 1794, and 1833. The language is almost identical. They all equally point to property over which the decedent would otherwise have had a power of testamentary disposition, as that to which their provisions were to apply. Indeed, the very word *intestate* implies this. If any thing, the terms of the act of 1833 are the strongest to exclude estates tail. The words "remaining after the payment of debts and legal charges," are peculiarly significant, for whatever else may be asserted, it certainly cannot be contended that an estate tail is liable for the debts of the tenant in tail. If there be any virtue in precedents, the opposite was expressly decided in *Elliott* vs. *Pearsoll*, 8 W. & S. 38. Further, the act of 1833, after exhausting all conceivable cases of descent by consanguinity, ends them with the provision: "In default of *all such known heirs or kindred*, widow or surviving husband, *as aforesaid*, the real and personal estate of *such intestate* shall go to and be vested in the commonwealth by escheat." Unless we are prepared to admit that estates tail escheat upon failure of the issue in tail, irrespective of the rights of the reversioner or remainder man, we must in the first instance consider that the act was intended to apply only to estates in fee simple.

As the revisers moreover prefixed to the acts prepared by them a short explanation of their provisions, always carefully indicating therein, as was their duty, any novel sections or clauses which they had introduced, we might expect to find in their Report on the intestate law some indication of their intention to recommend such an important change as that act is supposed to have effected. Surely they never meant to introduce it into our legislation, in dis-

guise as it were. But we have read the Report carefully, and fail to discover the slightest indication of such an intention. The whole tenor of their observations is entirely removed from any such supposition. On the contrary, we know it as matter of fact to have been the intention of the revisers to leave the law in regard to estates tail and trust estates exactly as it had been, and that the introductory words of the act, which we have before quoted, were copied so closely from the earlier acts for the very reason that they had received a judicial interpretation in *Goodright* vs. *Morningstar*, and *Jenk's Lessee* vs. *Backhouse*. But let this go for what it is worth. It is sufficient that the printed explanations of the revisers maintain an expressive silence as to any designed alteration of the law. We are therefore at liberty, or rather are forced to fall back on the very safe and rational maxim that statutes *in pari materia* are to be construed together, and that analogous words therein are to receive the same interpretation.

Now let us turn to the grounds on which the dicta in *Price* vs. *Taylor* are based. These are thrown into the form of four connected propositions, and so numbered.

The first of these is thus stated:

"1. The reason why estates tail descended to the eldest son under our old laws of descent, was because the descent of such estates was not provided for under our old statutes, and therefore the common law alone furnished the rule for them."

True: but the same reasoning applies to the act of 1833.

"Our old statutes of descent provided only for the descent of lands which the decedent could *dispose of by deed or will*, and estates tail did not then fall within that category. The act of 1799 changed this, and allowed estates tail to be sold and conveyed by deed in a very simple way."

These words, "dispose of by deed or will," are not found in any of the acts; they are the loosely reported language of the court in *Goodright* vs. *Morningstar*. The words of the act of 1705 are, "not sold or ordered to be sold by virtue of this act, and not otherwise limited by marriage settlement."[1] The meaning of these words

[1] This is the exact punctuation of Bradford's editions of 1714 and of 1728, of tha of Franklin in 1742, and of that of Miller in 1762.

can be better understood by referring to the immediately preceding sections, or rather section, which enacts that "If any person or persons shall die intestate, being *owners* of lands or tenements at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts, &c.," then that it should be lawful for the administrators to sell for payment of debts, &c.; with a proviso, "That no lands or tenements, contained in any marriage settlement, shall by virtue of this act be sold or disposed, contrary to the form and effect of such settlement." Then follows the clause enacting that "the surplusage or remaining part of the intestate's lands, &c., not sold or ordered to be sold, &c.," which we have before quoted. The conclusion of the court in 1 Yeates must therefore have been derived from the general tenor of the act, from the use of the word *owner*, and from the fact of the act applying in its terms only to the estates of *intestates*. They were construing general, not specific language.

Estates tail, moreover, could be sold and conveyed before the act of 1799 as well as after. The object of that act was not to render them for the first time alienable, but as its preamble declares, to avoid the "inconvenience" and "heavy expense" of common recoveries. But such estates could not then, nor can they now, be disposed of by will, and therefore are not within the purview of "intestate" laws. They are not properly *in bonis* of the decedent at the time of his death. The heir in tail takes as purchaser, not by descent; *per formam doni*, not by operation of law. How could an estate in tail *male* be divided *equally* under our act of 1833? The true distinction lies here, not in any question as to the alienability of estates tail, which has existed for centuries. The whole matter, indeed, appears in a very clear light, when we remember that the acts under consideration are not "statutes of descent," in the abstract, a phrase which involves, with great respect, a *petitio principii*, but simply as they style themselves, acts "relating to the descent and distribution of the *estates of intestates*," or the like. Thus leaving the descent of other kinds of estates at common law.

We are for these reasons unable to follow the court to the conclusion that:

"Therefore the new law of intestates of 1833 *expressly includes* such estates, because it declares the line of descent of all lands which the intestate *might have sold in his lifetime* or disposed of by will."

The words last italicised are merely an inference from the act of 1833, not its very words. The word "sold," in that act, as in the act of 1705, means sold by the administrator, &c., under order of the court, not sold by the intestate himself. It would scarcely be very rational legislation to provide that the "remaining estate" of an intestate, *except such as he did not own at the time of his death*, should be divided, &c., which would only be another mode of putting it. The revisers, in their anxiety to continue the words both of the act of 1705 and 1794, have left the sentence a little obscure, at first reading; but the preceding words, "remaining *after payment of debts and legal charges*," show that they meant their language to apply only to a period at or after the death of the intestate. And when we turn back to the provisions of the act of 1705, the difficulty is entirely cleared up.

2. The next proposition of the court in *Price* vs. *Taylor* is to this effect.

The statute of wills of 1833, *passed on the same day with the intestate law*, which provides that in case of a devise to a child, there shall be no lapse by his or her death in the testator's lifetime, goes on the principle of entailment, and yet there the descent is according to *our law of lineal descent.*

The answer to this is:

(1.) This provision is a mere repetition of an act of 1810, and therefore its present coincidence in date with the intestate act is purely accidental.

(2.) A devise to a child *in tail*, which would otherwise lapse just as a devise in fee, is equally within this clause of the wills act, which merely provides that "such devise shall be good and available in favor of such surviving issue, *with like effect as if such devisee had survived the testator*," and says nothing at all about the "law of lineal descent." So that the argument proves too much.

(3.) The act of 1705, in providing for a descent to grandchildren

and their lineal descendants, in the case of the death of a child in the lifetime of the intestate, goes quite as much on the principle of entailment, and yet under it *Goodright* vs. *Morningstar* was decided.

3. We now come to the 3d ground taken in *Price* vs. *Taylor*, which is in substance that,

The judicial adoption of the law of primogeniture has ceased to have any support in our laws and customs. Therefore we cannot any longer presume that by general words of entailment, a descent according to the English law was intended.

There is, no doubt, force in this; and the intentions of testators are likewise constantly frustrated by the construction which the courts put—too frequently, we think—upon the words "*dying without issue.*" But there seems to be no way of getting over the rule that technical words must have their technical effect, however much it may defeat the suspected intention of a testator in either case. We are satisfied that most people in this State are aware that express estates tail go to the eldest son; and in the absence of any legislative declaration to the contrary, we suppose that they are willing that such should be the law. We are on the contrary, indeed, inclined to suspect that the real difficulty lies in the ignorance of people at large as to the effect of the constructive estates tail, which have become of late years so prevalent; and that the wiser course will be found to be to have followed the English decisions in the opposite direction.

4. Finally, we are told that this construction would make the law perfectly simple and homogeneous. "And thus," say the court, "we might hope to have wills of this nature easily construed by parties and their counsel, without the necessity which now exists of always resorting to the courts for an authoritative interpretation of them before making or accepting title under them."

We do not at all doubt that if the Legislature had chosen to declare that, *for the future*, estates tail should descend according to the intestate laws, it would have been a judicious change, and that simplicity and uniformity in the laws of descent are very desirable things. Such legislation could injure no one, and would be per-

fectly constitutional. But we do most strenuously object to the introduction of such a change by judicial decision, for that must operate upon the past, and to the destruction of many titles taken in good faith and for valuable consideration. It certainly would be neither right nor constitutional to do this merely to simplify the law and to enable counsel to construe wills with ease. The latter object would be better effected by raising the standard of legal education, and the former by a general revision and codification of our statutes, which has been long needed.

Nor, we greatly fear, would the change, if effected, whether by court or legislature, materially lighten the labors of judges in the difficult task of the interpretation of wills. While language is so imperfect, and testators are so unskilled in the use of words and so ignorant of the effect of their dispositions, it would be indulging in a vain hope to expect to make that task an easy one by any short-hand process. We believe that the chief trouble in this respect arises from the fact that most men have but a vague idea of what they wish, or possess not sufficient analytic power to adapt their wishes to a complex and changing future. But be this as it may, we fail to see how the mere alteration of the course of descent of an estate tail created by will can facilitate the construction of that will. In England estates tail general descend just as fee simples do, and the desired simplicity and homogeneity have always existed. Yet courts there find the same difficulty with the construction of wills; the same questions as to the words "dying without issue," on the rule in Shelley's case, and the other Chinese puzzles of the common law, arise and perplex judges, as here. The revisers of the New York code had gotten as near absolute simplicity in their system of law as seems possible in civilized society, and yet we believe the courts in that State are as much afflicted with testamentary cases as before. In short, the whole difficulty lies with human nature, and not with the rules of law.

These are the propositions stated by the court in *Price* vs. *Taylor*, as the reasons on which the suggestion of the court is expressly based. There is another argument incidentally used, however, in respect to which a single observation may be made in conclusion. It

is said by the court that estates tail, in respect to Gavelkind and Borough English land in England, descend to the customary heir, and not the heir at common law. This is so; but the same argument was used in *Goodright* vs. *Morningstar*, and met with the conclusive answer from the court in that case, that such descent was as much a *part of the particular custom* as the peculiar descent of the fee simple lands.

For these reasons we must respectfully submit and urge that the dicta in *Price* vs. *Taylor* are based upon a misapprehension of the law, and that they ought not to be allowed to ripen into a decision.

We now pass to the consideration of the case of *Williams* vs. *Leech*, upon which, however, as we have already exceeded the space we intended to occupy, we can say but little here. Till the decision in that case, it was the unquestioned opinion of the profession, and it had been often so held, that a devise to A for life, remainder to his children and their heirs, with or without a devise over on failure of issue, was not, as regards the estate of A., within the rule in Shelley's case. It is a very common limitation; indeed, we have seen but few wills without it, and so the title to property of the value of many millions, perhaps, depends on the correctness of that opinion.

In this case of *Williams* vs. *Leech*, in construing a will containing clauses in substance of that character, the learned judge who delivered the opinion of the court said:

"We have suggested in a late case, *Price* vs. *Taylor*, that since the act of 1833 of wills and descents, an estate tail general may descend according to our own law of lineal descents. If this be so, *a devise to children to take distributively, is a valid definition of lineal descent, and therefore of entailment.* Then the rule would apply that an estate granted to one for life, with remainder to his lineal heirs, is an estate tail; *the superadded words, 'and their heirs,' go for nothing.* They were necessary under the English law, *when children took by purchase, and not as heirs of the body*, else they would have had but a life estate. Here they *are heirs of the body when taking equally*, and we should have little difficulty in regarding this as an estate tail, were it not that the two limitations are

altogether a devise to the general heirs of the first taker. Children, being as good a word of lineal descent, is equivalent to issue, and this devise may be put into the very language most usual in creating an estate tail, thus—devise to A. for life, remainder to his issue, and in default of issue over."

These propositions were, however, admitted not to be necessary to the decision of the cause, and the case actually went on another ground.

We confess that we are unable to follow the reasoning which we have just set down. We had hitherto supposed that the rule in Shelley's case did not apply to limitations in fee or tail, after a life estate, to the "children," "the sons," or "daughters" of the first taker, or even "heirs," when clearly used as a mere *descriptio personarum*. That our intestate laws, when defining the persons who should take as heirs, to be "children," "grand-children," "brothers and sisters," "uncles and aunts," thereby intended to make them, when used in wills, words of limitation instead of words of purchase, was, we humbly submit, never before imagined, any more than that they became so in England because they were used in Blackstone's Canons of descent. The fact that the person to whom a devise in fee is made by a specific designation is also the heir of the first taker, has been constantly held not to have any effect in giving a fee to the latter. So where the limitations expressly exhaust the whole series of lineal heirs of the tenant for life, as in the case of a devise to A. for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common in tail, which is a very common form of settlement, the rule in Shelley's case does not operate in England. In the well known case of *Goodtitle* vs. *Herring*, 1 East, 264, this was held, even where the devise was in the first instance to the *heirs male of the body* of the tenant for life, those words being subsequently qualified by the use of the word *sons*. Unless, then, we are to abandon all precedent and analogy, we cannot consider "children" here, on a devise to them in fee, as taking in the *character* of heirs, and if not, then plainly they do not take in the *quality* of heirs.

There is no doubt that under the acts of 1703 and 1794, respec-

tively, on such a devise to children they took as purchasers,[1] and yet under those acts, as well as that of 1833, lineal descent to children and grand-children *nominatim* was provided for. What difference, then, is created by the latter statute? Neither in the words of the act, nor in the language of the revisers, do we find a single word to indicate an intention to alter so well established a rule of construction.

When the court say, in the words italicised above, that "a devise to children to take distributively is a valid definition of lineal descent, *and therefore of entailment*," they seem—we wish to speak with great respect—to have become entangled in a mesh of abstract phrases. If it be meant that a devise to A for life, remainder to his children in fee, is a valid definition of lineal descent, we cannot agree to it, because, 1st, children do not constitute the whole of lineal descendants, and 2d, the heirs of a man's children are not by any means always *his* lineal descendants, or even his *heirs*. And further, if it were so, we cannot admit that a "valid definition of lineal descent" is necessarily also that of entailment. The latter implies a design to prevent alienation so long as the line of lineal descent continues, whereas a devise to children in fee implies a design to give them an absolute power of disposition. On what ground the court summarily decides that "the superadded words 'and their heirs' go for nothing," we do not see. They most clearly indicate an intention to make the children a new stock of descent, and surely there is nothing illegal in that. Such superadded words are rejected, it is true, where the previous language has already established a clear estate tail, but never before were they rejected in order to make an estate tail out of that which would not be so otherwise.

It is not necessary to discuss this matter further, for we are sure that further consideration will convince the court that the novel doctrine of *Williams* vs. *Leech* cannot be supported. We would, however, in conclusion, desire to press on their attention again the fact that conveyances from children under such limitations have been constantly taken, that property to a really incalculable value is now so held, and that if the doctrine of *Williams* vs. *Leech* be cor-

[1] See *Elliott* vs. *Paxson*, 2 W. & S. 418; *Stewart* vs. *Kenower*, 7 W. & S. 295.