J. H. Lyon & Co., Printers, Jersey City.

New Jersey Court of Errors and Appeals.

Anna V. H. Traphagen, and Anna Adams, *Plaintiffs in Error*, *v.* William B. Ross, *Defendant in Error.* } *On Writ of Error to the Supreme Court.*

RECORD.

NEW JERSEY SUPREME COURT.

William B. Ross, *Applicant*, *vs.* Alonzo W. Adams and Catharine V. B. Adams, his wife, Anna Adams and Anna V. H. Traphagen, *Defendants.* } *Application for money paid into Court by the New York and Erie Railroad Company, on, &c.*

Take notice, that application will be made on behalf of William B. Ross, to the Supreme Court of New Jersey, at Trenton, on Tuesday, the second day of June next, at ten o'clock on the forenoon, or as soon thereafter as the said Court can attend to the same, for an Order for the payment to the said William B. Ross or his attorney, so much as he may be entitled to, of the money paid into the said Court by the New York and Erie Railroad Company, as damages ascertained upon the execution of a writ in the nature of a writ of ad quod damnum, as sustained by reason of the 10 taking a parcel of land situate in the fourth ward of Jersey City, known as the westerly half of lots numbered 1, 2, 3 and 4, on block No. 159, as laid down and designated on Mangin's Map of Harsimus, for the construction of a railroad in continuation of the Paterson and Hudson River

Railroad to the Hudson river, of which lots, or part thereof, or some interest therein, you were the owner, and as such owner or part owner claim an interest in the proceeds thereof. And further that the said application will be founded upon a mortgage made by Alonzo W. Adams and Catharine V. B. Adams, his wife, upon the said property, dated October twelfth, in the year eighteen hundred and fifty-five, to secure the payment of a bond of even date, made by the said Alonzo W. Adams, in the penal sum of twelve thousand dollars, payable in one year from the date thereof, with interest at the rate of seven per cent per annum, upon which bond there is now due the whole amount of both principal and interest; the said mortgage was duly acknowledged and recorded on the nineteenth day of October, eighteen hundred and fifty-five, in the Clerk's Office of the County of Hudson, in Liber 15 of Mortgages, pages 737 and 738.

Yours, &c.,

Dated May 25th, 1857.

G. C. & A. V. SCHENCK,
Attys. of Applicant.

To J. D. MILLER, Esq., Attorney of Anna V. H. Traphagen, one of Defts.

WILLIAM B. ROSS, *Applicant*,
vs.
ALONZO W. ADAMS and CATHARINE V. B. ADAMS, his wife, ANNA ADAMS and ANNA V. TRAPHAGEN.

In matter of application to be paid certain monies in the hand of the Clerk of this Court, paid on an inquisition ad quod damnum, to assess damages for taking lands in the 4th ward of Jersey City, by the New York and Erie Railroad Co., belonging to Catharine V. B. Adams.

It is ordered by the Court that the parties interested in the above stated money, show cause on the next day of the next term of this Court at 10 o'clock A. M., or as soon thereafter

as the Court can attend to the same, to be held at Trenton on the first Tuesday of November next, why the said money should not be paid to William B. Ross, the Applicant thereof, and that all parties have leave to take affidavits to be used in the case.

On motion in behalf of
G. C. & A. V. S. SCHENCK,
Attys. of said Applicant.

Under the above rule, depositions were taken. The mortgage mentioned in the foregoing notice, dated on the 12th day of October, 1855, and acknowledged on the 19th day of the same month, was offered in evidence. Also proof that Catharine Ann V. B. Adams at the date and acknowledgment was an infant under the age of nineteen years.

The following deed was also offered in evidence, being the deed under which Catharine V. B. Adams claims title:

This Indenture made the ninth day of September, in the year one thousand eight hundred and fifty-four, 1854, between Anna V. H. Traphagen of Jersey City, in the County of Hudson, in the State of New Jersey, party of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the same place, party of the second part, witnesseth that the said party of the first part for and in consideration of the sum of natural love and affection and of one dollar lawful money of the United States to her in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, her heirs, executors and administrators for ever released and discharged from the same by these presents hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, all those four certain lots, pieces or parcels of land and premises, situate, lying and being in the Fourth Ward of Jersey City, in the County of Hudson, in the State of New Jersey, which on the map showing the

division of lands at Harsimus, between Anna V. H. Traphagen, Cornelius C. Traphagen, Hanna Maria Post, and Henry M. Traphagen, are designated, known and distinguished as lots numbered five (5), six (6), seven (7), and eight (8), in block numbered one hundred and fifty-nine, P. 159 P., fronting on Grove street, each lot being twenty-five feet wide in front and rear, and one hundred feet deep on each side, and also all that other piece or parcel of land situate, lying and being in the same ward of Jersey City aforesaid, which may be described as follows, viz: Beginning at a point in the southerly side of North Third street distant fifty feet westerly from the westerly course of Grove street, thence to run 1st. southerly in a line at right angles to North Third street and parallel with Grove street one hundred feet, thence 2nd. westerly parallel with North Third street fifty feet, thence 3d. northerly parallel with Grove street one hundred feet to North Third street, thence 4th. easterly along said North Third street fifty feet to the place of beginning, being fifty feet wide in front on North Third street and in the rear, and one hundred feet deep throughout, being the westerly half part of the lots which on said map above referred to are numbered one (1), two (2), three (3), and fonr (4), together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estates, right, title, interest, property, possession, claim and demand whatever, as well in law as in equity, of the said party of the first part of in and to the same and every part and parcel thereof with the appurtenances. To have and to hold the above granted bargained and described premises with the appurtenances unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten by her present husband Alonzo Whitney Adams; and the said Anna V. H. Traphagen for herself, her heirs, executors and administrators doth covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that the said Anna V. H. Traphagen at the time of the sealing and delivery of these presents is lawfully seized in her own right of a good,

absolute, and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises with the appurtenances, and hath good right, full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid; and that the said party of the second part her heirs and assigns shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, her heirs, or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgements, taxes, assessments and encumbrances of what nature and kind soever; and also that the said party of the first part, and her heirs, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in or to the hereinbefore granted premises, by, from, under or in trust for her or them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the case of said party of the second part, her heirs and assigns, make, do and execute, or cause to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, her heirs and assigns for ever, as by the said party of the second part, her heirs or assigns, or her or their counsel learned in the law shall be reasonably advised or required; and the said Anna V. H. Traphagen, and her heirs, the above described, and hereby granted and released premises and every part and parcel thereof, with the appurtenances unto the said party of the second part, her heirs and assigns, against the said party of the first part, and her heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents for ever defend.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

ANNA V. H. TRAPHAGEN. [L. S.]

Sealed and delivered in the presence of

[The printed words "and to heirs and assigns for ever," all on the first page, and the printed words "heirs and assigns to their own proper use, benefit and behoof for ever," on the 2d page, stricken out before executing.]

J. D. MILLER.

State of New Jersey, Hudson County, ss. Be it remembered that on this ninth day of September, in the year one thousand eight hundred and fifty-four, before me, J. Dickenson Miller, a Master in Chancery in and for said State, personally appeared Anna V. H. Traphagen, who I am satisfied is the grantor in the within indenture named, and I having first made known to her the contents thereof, she did thereupon acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the use and purposes therein expressed.

Witness my hand,

J. D. MILLER.

ALONZO W. ADAMS and CATHARINE V. B. ADAMS, his wife, ANNA ADAMS and ANNA V. B. TRAPHAGEN, *Respondents.* and WILLIAM B. ROSS, *Petitioner.* — *Order to dispose of monies paid in Court.*

This matter having been argued by the Counsel of the above parties before the Court, at the Term of February last, and the Court having taken till the present term to consider the same, and being now satisfied that the estate granted to Catharine V. B. Adams, wife of Alonzo W. Adams, by the deed from Anna V. B. Traphagen, bearing date the ninth day of September, eighteen hundred and fifty-four, and recorded in Hudson County Record of Deeds, Liber 40, page 496, &c., was an estate in fee tail, special in the said Catha-

rine, and the heirs of her body, by her present husband, Alonzo W. Adams, and that the mortgage on said premises executed by the said Alonzo W. Adams, and Catharine, his wife, to William B. Ross, bearing date the twelfth day of October, eighteen hundred and fifty-five, and registered in Hudson County Records of Mortgages, is avoided as against the said Catharine, she being at the time a feme covert, and a minor under the age of twenty-one years, and that it was only valid against said Alonzo as to the right of courtesy of the said Alonzo in said premises, and that all the interest and right of the said Catharine under said deed from said Anna V. B. Traphagen, was by said deed and the statute in such case made and provided, vested in said Catharine during her natural life, for her sole and separate use, without the intervention or control of her said husband, and that the remainder of said estate, vested in fee in the said Anna Adams, daughter of the said Catharine Adams, subject to open and let in any other children she has or may have (subject to the right and estate of the said Catharine, and of the courtesy of her said husband), and the said premises granted as aforesaid, or a portion thereof having been seized and taken by the New York and Erie Railroad Company, pursuant to the statute in such case made and provided, and the damages therefor assessed and paid into this Court to the amount of three thousand and sixty-one dollars; it is therefore ordered by the Court that the said sum of money, after deducting the costs of this application and the fees of the Clerk and the Respondent's Counsel, be paid over to the said Anna V. B. Traphagen and Henry M. Traphagen, upon their executing their bond to Jonathan D. Miller, his executors and administrators, in trust for the said Alonzo W. Adams and Catharine V. B. Adams, his wife, and the children of the said Catharine V. B. Adams, in the penal sum of six thousand dollars, conditioned for the payment of the legal interest on the said sum of money so paid to the said Anna and Henry to the said Catharine V. B. Adams during her natural life, for her sole and separate use, without the intervention or control of her said husband, and in case the said Alonzo W. Adams should survive his said wife Catharine, then from and after her death to pay the interest on the same

sum of money so received, to the said William B. Ross, his executors, administrators or assigns, on his said mortgage, provided that said mortgage be not then otherwise paid off or extinguished. And from and after the death of the said Catharine and the said Alonzo, her husband, then the said Anna V. B. Traphagen and Henry M. Traphagen, their heirs, executors and administrators, shall pay the principal of the said sum of money received by them as aforesaid, to the said Anna Adams, daughter of said Catharine, and the other children of said Catharine, born or to be born, according to this order, or as the Court may otherwise direct; and also upon the said Anna V. B. Traphagen and Henry M. Traphagen, executing to the said Jonathan D. Miller, his executors and administrators, in trust as aforesaid, their mortgage on unencumbered real estate, worth double the amount of the money by them received as aforesaid, to secure the faithful performance of the aforesaid bond and condition, said bond and mortgage being first approved by the Supreme Court or one of the Justices thereof.

On motion of

J. D. MILLER,
Att'y for Respondents.

Rule entered Dec. 3, 1858.

ANNA V. B. TRAPHAGEN and ANNA ADAMS by ANNA V. H. TRAPHAGEN, her next friend, *Plff's in Error.*
vs.
WILLIAM B. ROSS, *Deft. in Error.*
} *In Error to Supreme Court.*

Afterwards, to wit, on the third Tuesday in November, in the year 1859, before the Court of Errors and Appeals of the State of New Jersey, comes the said Anna V. H. Traphagen and the said Anna Adams by Anna V. H. Traphagen, her next friend, by A. O. Zabriskie their Attorney, and say that in the record and proceeding aforesaid, and also in giving the judgment aforesaid, there is error in this to wit:

That the said Supreme Court by their judgment and

order aforesaid, directed and ordered that the interest on the sum of money therein mentioned, in case Alonzo W. Adams should survive his wife Catharine, should after the death of said Catharine, be paid to William B. Ross, his executors, administrators and assigns, provided that said mortgage should not be otherwise paid off and extinguished. And also in this, that the said Court determined and adjudged that the lands and real estate granted to Catharine V. B. Adams, by deed from Anna V. H. Traphagen, dated Sept. 9th, 1854, and recorded in Liber 40 of Deeds of Hudson County, pages 496, &c., on the death of said Catharine V. B. Adams, vested in said Anna Adams, subject to the curtesy of said Alonzo W. Adams, the husband of said Catharine V. B. Adams, whereas said lands and real estate vested in said Anna Adams, subject to the life estate of said Catharine V. B. Adams, and subject to open and let in any other issue that said Catharine and Alonzo might have without being subject to the courtesy of said Alonzo W. Adams.

And the said Plaintiffs in Error pray that the judgment and order aforesaid for the errors aforesaid, and that part thereof containing said errors may be reversed, annulled and for nothing holden, and that they may be restored to all things that they have lost by occasion thereof.

A. O. ZABRISKIE,
Atty. for Plffs. in Error.

OPINION.

NEW JERSEY SUP. COURT,
NOVEMBER TERM, 1858.

In the matter of the application of WM. B. ROSS, for money paid into Court. } Present — Justices OGDEN, RYERSON and VREDENBURGH.

VREDENBURGH, J. The Erie Railroad Company, in 1856, took, under the provisions of their charter, the west half of lots No. 1, 2, 3 and 4, of block 159, on Mangin's Map of Jersey City. The jury assessed their value at $3,061, which has been brought into this Court. The charter vests the entire interest in the land in the Company. This money represents the whole fee simple.

The applicant claims to have the whole of this money paid over to him. This is resisted by Miss Traphagen, Mr. and Mrs. Adams, and in behalf of the minor children of Mr. and Mrs. Adams, who all claim to have held different interest in the land. This money represents the land, and it is manifest that we should dispose of it, as nearly as possible, as if it were the land itself.

First—As to the claim of Mr. Ross. In its support he shows that at and prior to the 9th of September, 1854, the land belonged in fee to Miss Traphagen; that she on that day made a deed of bargain and sale, or a covenant to stand seized to uses to said Mrs. Adams, as he contends in fee, and that Mrs. Adams and her husband on the 12th October, 1855, gave a mortgage on this property duly acknowledged to him for $6,000. The validity of this mortgage is contested upon the admitted ground, that at its date Mrs. Adams was a feme covert, and under age.

First, what interest was conveyed to Ross by virtue of Mrs. Adams' execution of the mortgage.

There can be no doubt but that at the common law the deed of a married woman was absolutely void, so much so, that she could plead to it non est factum. *Lawshee* v. *Rake*, 4 *Zab.*, 613; *More* v. *Rake*, 2 *Dutcher*, 577. It never was a case like mere infancy where the title passed, but could be avoided by matters subsequent. Nor is this disability removed by the Statute *Nix. Di.* 122, § 4, authorizing the acknowledgment of deeds by married women, because the power conferred by that act is by its express terms limited to femes covert over age.

But even supposing, as Mr. Ross contends, that this mortgage is not void, but only voidable, still she is represented by counsel, claiming now here to avoid this mortgage. This is the first and only time and place she has had an opportunity so to do, and if not allowed now by us, the right is gone forever. We think by her coming forward on this occasion and claiming the money at our hands, she, so far as her rights are concerned avoids the mortgage, and that consequently Mr. Ross has no rights in this land by virtue of its execution by her.

Second—The next question is, what rights did Mr. Ross

acquire, by reason of Mr. Adams' execution of the mortgage?

Without inquiring now what was Mrs. Adams' interest in the land, under the deed from Miss Traphagen, had Mr. Adams at the date of the mortgage any present right to the rents and profits, so as to entitle him to the interest of this money during the life time of his wife? The deed from Miss Traphagen is dated the 9th Sept., 1854. He would have been entitled to the rents and profits as husband during his life, if his wife's interest lasted so long, but for the operation of the act for the better securing of the property of married women, passed March 25, 1852, *Nix. Dig.* 466. This act being in force when the deed was made by Miss Traphagen to Mrs. Adams, Mr. Adams' interest is subject to its operation.

Does this act so alter the common law as to take away from the husband all interest during his wife's life in lands conveyed to her by deed of bargain and sale, or by a covenant to stand seized to uses. The 3d. section of this act, the only one applicable to the case before us, provides that "it shall be lawful for any married female to receive by gift, grant, devise or bequest, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable to his debts." Mrs. Adams married and acquired her interest in this land *after* the passage of this statute, by a deed from Miss Traphagen, in consideration of natural love and affection and of one dollar.

This act applies only to land received by the wife by gift, grant, devise or bequest.

This was certainly not a devise or bequest, the only question is was this deed a gift or grant within the meaning of the Legislature.

It is contended by Mr. Ross that the Legislature intended to use the terms gift and grant in the strict technical sense, and that the conveyance here is one of bargain and sale, or a covenant to stand seized to uses, operating by virtue of the statute of uses, and not either a gift or grant.

But did the Legislature intend to use these terms gift or grant in their narrowest technical sense. I think not, but to

embrace in the terms gift and grant, devise or bequest, all the modes of acquiring property, except perhaps by descent. This language is used by the Legislature in 1852. Gift and grant had then long ceased to be understood even by the profession, and in all ordinary instruments even such as deeds, in their ancient technical meaning. In practice for many years, females as well as others, had ceased receiving lands by the strict technical forms of gift or grant. It can not be intended that the Legislature meant to restrict the rights of married women to lands received in a mode which had fallen into disuse.

In the State of New York, the term grant, had for many years, technically as well as in common lauguage, included all modes of acquiring lands by deed or conveyance. It is true that there this was done by special statute. But still this had only the more strongly fixed this meaning in the public mind.

The Vermont statute provides, that any rights in real estate which a feme covert may acquire by gift, grant, devise or inheritance during coverture, shall not be liable for the debts of the husband.

These words gift or grant came up for construction in the case of *Peck* v. *Walter*, 26, *Vermont Rep.* 85, wherein Redfield, Chief Justice, in delivering the opinion of the Court says: "It is very apparent that the Statute was intended to embrace all rights in real estate which the wife shall acquire during coverture. It would be a very nice and as it appears to me a very unintelligible construction of this statute to limit the word grant to its narrowest technical import. It evidently was intended to apply to all conveyances by deed, which were not gifts." That case was like the present, a mortgage of the wife's property by the husband, the wife not joining.

In our Statute, by the term grant, the Legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not; that by long usage such had become not only the popular but also the technical meaning of the term.

It follows, that at the time of the execution of this mortgage by Mr. Adams, he had no present interest in this land which he could convey.

The next question is, had Mr. Adams when he executed this mortgage any future or contingent interest which would pass by the mortgage, and give Mr. Ross any future interest in this money?

This depends upon whether Mr. Adams was tenant by the curtesy inchoate; there are children born of the marriage.

This brings us to the question, what estate Miss Adams had in this land by virtue of the deed from Mrs. Traphagen?

If she had only a life estate, then Mr. Adams never could be tenant by the curtesy, and consequently Mr. Ross never any interest in this money. But if Mrs. Adams had an estate either in fee or in tail, then it is contended that notwithstanding the act for the better security of the property of married women, Mr. Adams was tenant by the curtesy in tail.

This deed is dated September 9, 1854, and purports to be made between Miss Traphagen, party of the first part, and Catharine Adams, wife of Alonzo Adams, party of the second part, in consideration of natural love and affection and of one dollar, and to grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband, the said lots, (describing them by numbers and bounds), together with all the appurtenances, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in and to the same, to have and to hold the above described premises, unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo Adams.

Then follows 1st. a covenant by Miss Traphagen for herself and heirs, with the said party of the second part, and her heirs and assigns, of seizin and of full power to convey in manner aforesaid.

2d. That the said party of the second part, her heirs and assigns, may at all times hereafter peaceably and quietly hold the premises without any let, suit, trouble, molestation,

eviction or disturbance of the said party of first part, her heirs or assigns, or of any other person lawfully claiming.

3d. That they are free from incumbrance.

4th. That the said party of the first part, and her heirs, and all persons claiming under them, shall and will at any time or times hereafter, upon the request of the party of the second part, her heirs and assigns, make all such further conveyances for the better vesting and confirming the said premises in and to the said party of the second part, her heirs and assigns for ever, as by the said party of the second part, her heirs or assigns, shall be reasonably required.

5th. That the said Traphagen and her heirs, the said premises unto the said party of the second part, her heirs and assigns, against the said party of the first part and her heirs, and against all persons whomsoever lawfully claiming, shall and will warrant and for ever defend.

Upon the construction of this deed, Mr. Ross contends that it conveys to Mrs. Adams either an estate in fee simple or in fee tail, and that he consequently is entitled, as representing Mr. Adams, to the interest of this money after her death, during the life of Mr. Adams, if he survives her. It is contended on behalf of Mrs. Adams that the deed gives her a fee simple, and that she is entitled to all the money. It is contended on behalf of the children of Mrs. Adams that the deed gives her only a life estate, or at most a fee tail, and that they are entitled to the money after her death, and it is finally contended by Miss Traphagen that the deed only conveys a life estate to Mrs. Adams, or at most after her death only a life estate to her children, and that the money goes after her and their deaths back to Miss Traphagen.

Upon the construction of this deed, I am of opinion that the estate thereby conveyed to Mrs. Adams was a fee tail special. As if the language had been, to Mrs. Adams and the heirs of her body by her present husband to be begotten. That by the term children which may be begotten of her present husband, the grantor meant and that the law will so construe it, heirs which may be begotten of her present husband.

No one can for a moment doubt, upon reading this deed, that it was the intent of the grantor that it should belong

to Mrs. Adams during her life, and after her death absolutely to her children. Are we forced by any strict principles of law to defeat this intent? In the first place suppose the deed had used the word heirs instead of the word children, the deed would then have read to Mrs. Adams for and during her natural life and at her death to her heirs which may be begotten of her present husband. It has never been a question from the time of Shelly's case, that this would have given Mrs. Adams a fee tail special. That the words during her life did not make it a life estate, or change the estate from what it would have been if the language had been to Mrs. Adams and to her heirs of her body by her present husband. Inserting the words "during her life" gave her nothing more or less than she would have had without them.

Are we prohibited by unyielding principles of law from giving effect to what the whole document and the nature of the transaction shows to have been the intention of the grantor?

In the first place the estate conveyed to Mrs. Adams is not a fee simple. The words of conveyance are, to Mrs. Adams during her natural life and after her death to her children by her husband. This expressly limits the estate to less than a fee simple.

It is contended that by the covenants it is warranted to her and her heirs generally. But the covenants can not be used to enlarge the estate. They only defend the estate granted whatever that may be, except so far as the general warrantee may operate by way of estoppel, of which we shall speak hereafter.

Nor is the estate granted changed by calling this conveyance a covenant to stand seized of uses. The covenant in this deed would have the same effect if we call it a covenant to stand seized to uses, as if we call it a bargain and sale. These covenants if the conveyance is a covenant to stand seized to uses would only warrant and defend the uses declared, they could not enlarge the uses. If we strike out of this conveyance the pecuniary consideration, it would then be technically a covenant to stand seized to uses, if we strike out the consideration of love and affection it is then a deed of bargain and sale, and we may call it, as it is, either the one

orthe other, or both, as may best effect the intent of the parties. But the quantity of estate conveyed, in either case, must depend upon the operative words of conveyance, or the declarations of the use, and not upon the covenant defending the quantity of estate conveyed.

The only remaining question is, does this conveyance give Mrs. Adams an estate for life, or an estate in fee tail special?

If the deed instead of saying to Mrs. Adams during her natural life and after her death to her children by her present husband, had said to Mrs. Adams during her natural life and at her death to her heirs by her present husband, there can be no doubt but that her estate would have been a fee tail special. The whole difficulty arises from using in the terms of grant the word children, instead of the word heirs.

It is contended in behalf of the children that although the grantor used the word children, yet that she by that term meant heirs, and that the legal construction of the deed is to read it as if she had used that term.

1st. By the term children did she mean heirs?

In the first place under our statute of descents the term children by her present husband is identical in legal effect with the term heirs of her body by her present husband, and designates the same objects. It is not here as it would be under the law of primogeniture where the oldest male only would be heir. Her heirs by her present husband must be her children, and her children must be her heirs. This so was decided in the case of see opinion of Chancellor Williamson. In the next place the children are not parties to the deed. They had not then yet been born. In the next place although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were intended.

From these covenants it is demonstrated that by the terms children by her present husband, the grantor intended the heirs of her body by her present husband.

Then the grantor covenants that the party of the second part, and her heirs, shall at all times hereafter peaceably occupy and hold the premises. She could not intend by this covenant that heirs general should enjoy it, but only those

who would take under the operation words of conveyance, and that she used the words children by her present husband for and really meant by it the heirs of her body by her present husband. So also as to the covenant for other assurance; so also with respect to the clause of general warrantee.

The covenants are intended not to enlarge but to defend the quantity of estate conveyed. The covenants have reference consequently to the words of conveyance, and they are to be construed together. By the term children in the conveying part, she includes certain heirs, and by the term heirs in the covenants, those heirs which are children by her present husband. By the covenants she defends the estate to all the heirs in terms, but which heirs she meant is defined in the conveying clause to be children by her present husband.

The very nature of the transaction shows that it could not have been the intent that if Mrs. Adams had children by her present husband, the property should revert at the deaths of those children at some remote period to Miss Traphagen, but that under our Statute regulating estates tail, the property would vest in the children in fee immediately at their birth.

Such being the undoubted intention of the grantor, are we forced to defeat this intent and say that the term children was only intended to be a *designatio personæ*.

There can be no doubt if this had been a will, and it had appeared by the context clearly that the testator by the term children meant heirs, that the courts would have given effect to the intention.

Is it otherwise with respect to deeds?

Blackstone, vol. 2, 107, says the word "heirs" is necessary in a grant or donation in order to make a fee or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life. This very great nicety about the insertion of the word heirs is a relic of feudal strictness by which it was required that the form of the donation should be strictly preserved. The personal abilities of the donee were originally supposed to be the only inducement to the gift, and subsisted only for the life

of the donee unless the contrary were clearly expressed. But this rule is now softened by many exceptions.

The reasons of the rule have long since ceased, and with it also ought to cease the law. Conveyances have long since ceased to be looked upon as gifts.

But it is apparent from the passage that by it was not meant that there existed any magic in the word heirs or in the sound represented by that combination of letters. Otherwise no deed in a foreign language could convey a fee. But the writer merely means to say that in a grant to make a fee the grantor must use language by which it appears that he meant to include the line of inheritance, of which the word heirs was the most apt and well defined expression. But he does not intend to say that any other language by which it clearly appears that the grantor intended to embrace the line of inheritance in the grant will not pass a fee.

If the word heir is used, that prima facie carries the fee, unless the contrary expressly appears; if the term children is used it must clearly appear from the instrument that the grantor did not mean by that term certain individuals but the same thing as heirs or the entire line of descent. But the term children like the latin hæres, or any term in a foreign language, is capable of translation, and the grantor has the right in the instrument creating the grant to translate his own language.

The rule is that it must appear upon the face of the instrument that the grantor intends to pass the inheritance, which may be done best by the term heirs, but may be equally done by any sound or word or phrase which the instrument shows the grantor used as a synonym for it. Thus the word successors in a grant of land to a sole corporation carries the fee, because it shows the intention of the grantor to convey the inheritance.

Thus Mr. Hays, in his principles for expounding dispositions of real estate, 7 *Law Library*, p. 77, remarks, "That the rules of construction freely permit the use of the words heirs of the body or issue, in the limited sense of children, and the word children in the comprehensive sense of the words 'heirs of the body.' Those rules, or rather the fundamental principles of legal interpretation, require only a

clear explanation to justify a departure from the ordinary meaning, imposing on those who would translate the term the onus of producing an express warrant under the hand of the author of the gift."

So in his 8th proposition, developing the principles on which the construction of gifts to heirs special depend, the same author remarks: "It is immaterial with reference to the preceding propositions whether their heirs special are described under the technical denomination of heirs of the body, or under the informal denomination of heir of the body, issue, descendants, son, sons, children, for all these may be used as synonymous with heirs in tail, or any other term apparently designed to comprehend the whole line of succession. The rule does not speak the word heirs abstractedly, nor suppose any special virtue to reside in that word, but when by the application of the ordinary rules of interpretation the testator is found to have used a term which though properly a word of purchase, or of an ambiguous character, yet taken in connection with the context, is of as large an import as heirs of the body standing unexplained, it follows that he has indicated that course and mode of succession which the writers on the rule have so anxiously marked as attracting and requiring its application.

Preston on Estates, vol. 2, p. 1, says: "to the creation of an estate in fee by deed, it is requisite that the land should be limited to an individual and his heirs, but that many exceptions are to be noticed. Thus the word heirs need not be in the grant at all, as where one grants land to another as fully as they were granted to him; or where one enfeoffs another, and it is re-enfeoffed in the following language: you have given me these lands, as fully as you have given them to me, I assure them to you." These authorities show that the fee passes, not because the word heir is in the deed, but because it appears by reference that it was the intention of the grantor to include the whole line of descent in the grant.

So in p. 7, the same author, quoting 3d *Buls*, 128, remarks: "it will be sufficient that it should appear from the context that the grantee and his heirs are to have the benefit of the grant. Thus where a grant was of rent to A, and afterwards

that he and his heirs should distrain for it. This limitation of distress enlarged the estate and made it a fee simple."

So in p. 47, speaking of estates tail, he says: "words of reference will be sufficient to create an estate tail, therefore a gift to A, and the heirs of his body, remainder to B, in eadem forma, gives B an estate tail. So where a gift is made in frank marriage." Again, the author says, an estate tail even in a deed, may, contrary to the general rule of law, arise from necessary implication. Thus a gift to a man without any limitation to his heirs, but with a provision that the land shall revert to the donor or remain to another if the donee shall die without heirs of his body, will afford ground for the construction that the donee is to have the land to him and the heirs of his body, because the land is not to revert or remain over until there shall be a failure of these heirs. And as Perkins, and after him Chief Justice Holt states the reason to be *Quod voluntas donatoris secundam formam in carta doni sui manifeste expressa de cetero observetur.* The true reason is that the intent of the donor appeared in express words in the deed, and the implication was a necessary one. Again in page 484 the author says: It is sufficient in creating an estate tail that the words of the clause of limitation, or *some part of the deed that refers to the clause or explains it*, or a reference by this clause to some other part of the same deed, or even to a distinct instrument should confine the gift to the heirs of the body of the donee. It is not by the rule of law prescribed that the qualification of the gift should in direct words or by express terms be in the immediate clause of the gift to the donee. All that is required is that by the frame and context of the deed the gift should be restrained to the heirs of the body and not extended to the heirs generally. The point depends on the rule that all the clauses included are to be taken into consideration together, and construction made on the several parts. The entire instrument must be construed by its parts, so that every clause and every word in every clause may have effect. Whenever it is to be collected in construction on the clause of immediate gift, or from a clause which introduces the limitation of another estate, or refers to another part of the same instrument, or to another instrument that the gift under

consideration is not to extend the benefit of the limitation to any heirs besides those which are of the body of the devisee the word heirs will be restrained to mean heirs of the body.

Now construing this deed upon these principles, is it not apparent and a necessary implication from the different clauses of the deed itself, first that it was the intention to grant an estate to Mrs. Adams and her heirs, and in the second place that those heirs were the heirs of her body by her present husband ?

Take for instance the second covenant, the grantor therein for herself and her heirs covenants with Mrs. Adams and her heirs that the party of the second part and her heirs shall for ever quietly hold the premises, and so of the other covenants.

As the covenant is only intended to defend the estate granted, is it not a necessary implication that the grantor intended to use in the granting clause words that would create in the grantee an estate of inheritance, and the object of the covenant was to defend that inheritance. The words in the granting clause and in the covenant have direct reference to each other, and mutually translate each other. The children by her husband were her heirs.

Using the term heirs in the covenant shows that by children in the granting clause was intended heirs, and the term children in the granting clause shows that by the term heirs in the covenant was intended heirs of her body by her present husband.

In the case of *Parkman* v. *Bowdoin*, 1 *Sumner R.* 359 the language of the will was "I give the land to my son James and his lawful begotten children in fee simple for ever, but in case he should die without children lawfully begotten, to my son A. and to his lawfully begotten children in fee simple for ever." At the time of making this will James had no children. It was held that James took an estate tail. Judge Story in giving his opinion says the devise must be construed as meaning heirs of the body.

Numerous cases are referred to by him where children in devises have been construed to mean heirs of the body. It is true that these are cases of devises, but I cite them as showing that in legal language children may be construed as meaning heirs of the body. Here the terms children are

defined and demonstrated by the covenants to mean heirs of the body, by necessary implication from the covenants and by the direct reference of the covenants to the words of grant. Even if the word heirs must be in a deed, no authority prescribes that they can be only in the granting clause. The whole deed and all its parts are to be construed together, to give to the term heirs wherever found in the instrument, their proper force.

In *Mills* v. *Carter*, 22 *Vermont Reports*, 104, the court remarks that though it may be true that the covenants in a deed may not enlarge the estate, yet when it becomes a question of construction as to what is granted, they may well be resorted to to help the construction, and this upon the principle that reference is to be had to the whole deed, and that every part is to have operation if possible.

But again, in *Terrill* v. *Taylor*, 9 *Cranch*, 57, Story in delivering the opinion of the court says, the present deed did not operate by way of grant to convey the fee, for the term heirs is not in the deed, but the covenant of general warrantee binding the grantors and their heirs, and warranting the land to the church wardens and their successors forever (who could not hold lands), may well operate by way of estoppel to confirm to the church and its grantees the beneficial estate in the land.

The case of *Shaw* v. *Gilbraith*, 7 *Barr*, 111., was one upon a deed like the present, without words of inheritance in the the granting clause, but containing the clause of general warranty to the grantee, his heirs and assigns. The court in delivering their opinion say, that without undertaking to determine whether the fee simple is transferred we are of opinion the grantor is estopped from denying the title.

It is well settled that a general warranty operating by estoppel passes the estate. If this be so, the general warranty in this deed passed the estate by virtue of the term heirs in a covenant to Mrs. Adams and her heirs. But what heirs? Not her heirs general, for that would be against the express language of the clause and grant, but by every rule of construction the term bears in the covenant, would be limited to those heirs named in the granting clause, to wit, her children by her present husband. The heirs named in the covenant

must mean and be restricted to the heirs of her body by her present husband, and this would give a fee tail special to Mrs. Adams.

I confess myself at a loss to put any other construction upon this deed. If we call the estate of Mrs. Adams a fee simple, we must reject the words during her life, and after her death, to her children, in fact the whole clause of conveyance; if we call it a life estate, we must strike out the words heirs in all the covenants. But if we decide that the covenants and the clause of conveyance refer to, explain and construe each other, and that the estate is a fee tail, all its parts harmonize, and the intention of the instrument manifestly carried out, the wife gets her life estate, the husband his inchoate curtesy, and the children the inheritance.

It was urged upon the argument in behalf of Mr. Ross that Mrs. Adams, under this deed, had the fee simple; but in the view we have taken of the case, this inquiry is immaterial as regards him, as he takes precisely the same interest whether Mrs. Adams has an estate in fee or in tail, he being in either case tenant by the curtsey initiate.

But the question becomes material as between Mrs. Adams, her children, and Miss Traphagen.

It was contended on behalf of Mrs. Adams that the deed gave her a fee simple because this was void as to the children on account of its being a deed of bargain and sale, and thus not being in existence at the date of the deed, and so no pecuniary consideration could move from them, and the clause of conveyance gave it to her duriug her natural life, and also all the remainders and reversions, and that she takes all after her life as a remainder. But these terms are no broader than to say to her forever. It would still be but a life estate for want of words of inheritance.

It is contended in behalf of Miss Traphagen that considering this deed as one of bargain and sale, Mrs. Adams has only a life estate, and the children of Mrs. Adams take as purchasers, and that as none of them were born at the date of the deed, it is void as to them for want of consideration moving from them. But if we are right in the conclusion that under this deed the estate of Mrs. Adams is a fee tail special, then this question cannot arise, because then the children would hold by descent and not as purchasers.

Again: it is said by Miss Traphagen that considering this deed as a covenant to stand seized to uses, it in the first place is void entirely, because Mrs. Adams was too remotely connected to raise the consideration of blood or marriage. However this may be, this deed is undoubtedly good as a deed of bargain and sale, and if by it a fee tail is vested in Mrs. Adams, it makes no difference whether it will operate as a covenant to stand seized.

Upon the whole case then we conclude that this deed is a conveyance whereby the grantee, Mrs. Adams, became seized in law of such an estate in the lands thereby conveyed, as under the Statute of 13th Edward, the first called the Statute of Entail, is an estate in fee tail, and that consequently upon her death under our Statute, *Nix. Di.* 196, §11, the lands go to and will be vested in the children of Mr. Adams in fee.

One more question is raised by Miss Traphagen. She contends that all the issue of Mrs. Adams may die before their mother, and that in that event the reversion is in her. But it appears by the case that Mrs. Adams had children before this land was condemned for the Railroad Company. This section of the act provides that upon the death of the tenant in tail, the lands shall go to and be vested in the children of such grantee, and if any child be dead the part which would come to him or her shall go to his or her issue in like manner. This language is identical with that of the tenth section of the same act, providing in case any lands shall hereafter be devised to any person for life, and at his death to go to his heirs, then upon the death of this deviser the lands shall go to and be vested in the children of such devisee in fee, and if any child be dead the part which would come to him to go to his issue.

The question is whether under the language of these sections the estate of the children vest at their birth or at the death of the parent. The language of the tenth section has received the judicial construction by the Court of Appeals of this State in the case of *Den* v. *Hopper*, 2 *Zab.*, 599, wherein that court decided that within the 10th section the children took vested estates at their birth, subject to be defeated only so far as to let in subsequently born children

I can see no difference in this respect between the two sections, and think the decision in *Den* v. *Hopper*, controls this question.

This follows from what we have said, that by the deed in question Mrs. Adams is entitled to the use of land during her natural life without the interference of her husband. That after her death her husband, if he survives her, will be tenant by the curtesy, and that the balance of the interest on the lands belong absolutely in fee to Mrs. Adams' children.

The money is in court, and it is our duty to pay it out as nearly as may be as if it were the land itself. I know of no better way than to let the value of Mrs. Adams' interest be calculated by the clerk, and said amount paid over to her. The same as respects Mr. Adams' interest, and the amount paid over to Mr. Ross. That the balance be invested under the supervision of the clerk, and the interest paid annually to the guardian of the children of Mr. Adams until the further order of this court.