to induce an opinion, that the claims of the parties may not now be as fairly and as fully examined as they could have been before the referees in 1799.

Upon a full view of the whole cause, this court is of opinion, that the circuit court erred in dismissing the bill of the plaintiffs; and that the decree ought to be reversed and annulled, with directions to set aside the award, and the judgment rendered in October 1799, and to direct an account between the plaintiff, Holker, and the defendant.

DECREE.—This cause came on to be heard on the transcript of the record, and was argued by counsel: on consideration whereof, this court is of opinion, that the award made in October 1799, in a suit brought by the plaintiff, John Holker, against the defendant, Daniel Parker, in the circuit court of the United States for the district of Massachusetts, and referred by a rule of that court to referees therein named, and the judgment of the said court rendered thereon, ought not to bar the claim of the plaintiffs in this cause to an account of all the transactions of the parties, Holker and Parker, with each other, as members of the firm of Daniel Parker & Co.; and that there is error in the decree of the circuit court dismissing the bill of the plaintiffs: This court doth therefore decree and order, that the decree of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court to be further proceeded in, according to law.

*456] *After the opinion was delivered, *P. B. Key* mentioned, that in the opinion, the court had said, that an account ought to be taken, but the decree only directs that the proceedings below should be according to law. We wish for leave to answer fully, before an account be taken, and wish it may be understood, that this court does not mean to prevent a further answer.

MARSHALL, Ch. J.—That is the meaning of the court.

Decree reversed.

BARNITZ'S LESSEE *v.* ROBERT CASEY. (*a*)

Descent.—Executory devise.—Merger.—Ejectment between tenants in common.

The statute of descents, in Maryland, has not declared how an intestate estate shall descend, which was derived to the intestate from his half-brother, or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law.

A devise to A. in fee, and if he shall die under the age of twenty-one years, and without issue, then to B. in fee, is a good executory devise; and if B. die before the contingency happen, it devolves upon his heir, and so, from heir to heir, until the contingency happens, when it vests absolutely in him only who can then make himself heir to B., the executory devisee.

And although A. be the heir-at-law of B., yet the executory devise, thus devolving on him, is not merged in the precedent estate, but on the death of A., devolves to the next heir of B.

One tenant in common cannot maintain ejectment against his co-tenant, without actual ouster.

ERROR to the Circuit Court for the district of Maryland, in an ejectment, brought by the lessee of Barnitz against Casey, to try the title of Barnitz to

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(*a*) March 10th, 1813. Present, all the judges.

certain real estate in Baltimore. The facts of the case were stated by STORY, J., in delivering the opinion of the court, as follows:

On or about the 6th of February 1780, Daniel Barnitz died seised of the premises in the declaration mentioned, having, by his will, devised the same to his wife, Catharine Barnitz, in fee, and leaving issue, by his said wife, an only child and heir, Elizabeth Barnitz, who intermarried with one Charles McConnell, by whom she had an only child, John McConnell; after whose birth, and some time in 1781, Charles McConnell died. Afterwards, his widow, Elizabeth, intermarried with one John Hammond, by whom she had one child only, John Barnitz Hammond, and died on the 22d of April 1788. After her death, John Hammond intermarried with Elizabeth Anderson, and died on the 7th of April 1805, leaving issue by the last marriage, Jane B. Hammond and Henry Hammond, his heirs-at-law, still now alive, under whom the defendant in ejectment claimed.

On the 7th of April 1794, Catharine Barnitz died seised of the premises, *having first duly made her last will and testament. By that will, she devised to the said John McConnell, in fee, two certain parcels of land. She then devised another parcel of land, including her mansion-house, to the said John Barnitz Hammond, to the intent and uses following, viz: subject (as to the rents thereof) to certain trusts for the maintenance and education of the said John Barnitz Hammond, and for the payment of certain specific debts of the testatrix, "to the use of John Hammond, the father, for and during the minority of the said John B. Hammond, if he shall so long live, provided the said John Hammond shall maintain, clothe and educate the said John B. Hammond, out of the rents thereof, during his minority; and from and immediately after the said John B. Hammond shall arrive to the age of twenty-one years, or the death of the said John Hammond, his father, which shall first happen," then to the said John B. Hammond in fee. The testatrix then provided, "and if it should hereafter happen, that the said John McConnell should die, before he shall arrive to the age of twenty-one years, and without issue, then I give, devise and bequeath all the estate of the said John McConnell, which is hereby devised to him, to go immediately to the said John B. Hammond, his heirs and assigns for ever. And if it should hereafter happen, that the said John B. Hammond should die, before he shall arrive to the age of twenty-one years, and without issue, then and in such case, after the payment of my debts as above mentioned, I give, bequeath and devise," &c. (the same land and mansion-house before devised to John B. Hammond), to the said John Hammond, his heirs and assigns for ever; and also all the residue of estate herein before or after devised to the said John B. Hammond, and not hereby otherwise disposed of, I, then and in such case, give and devise the same to the said John McConnell, to hold to him, his heirs and assigns for ever, from and immediately after the death of the said John B. Hammond as aforesaid; and in case of the death of both of my grandsons, under age and without issue as aforesaid, then I give, devise and bequeath all that part of my estate which I have herein before given to the said John McConnell, to Charles Barnitz, of," &c., "to hold to him, his heirs and assigns for ever." [*457

*The testatrix then provided for the payment of her debts, by a sale, if necessary, of some of her lots of land, on or near Church-hill, in Baltimore, and then proceeded: "And I give and devise all the rest and [*458

residue of the said lots on or near Church-hill aforesaid, and all my estate therein (subject nevertheless to the devises aforesaid), to my said grandsons, John McConnell and John B. Hammond, their heirs and assigns for ever, to be equally divided between them, share and share alike, as tenants in common, and not as joint-tenants." After some immediate bequests, the testatrix devised "all the rest, residue and remainder of her estate, real and personal, to the said John McConnell and John B. Hammond, their heirs and assigns for ever, to be equally divided between them, share and share alike."

John McConnell attained his full age of twenty-one years, married, had issue, and afterwards, on the 7th of April 1802, died, without leaving any surviving issue. And John B. Hammond died on the 12th of February 1808, under the age of twenty-one years, and without issue.

The lessors of the plaintiff are the children and heirs-at-law of Charles Barnitz, who was the only brother of Daniel Barnitz, the testator. And upon the defect of lineal heirs, the said lessors claimed as next heirs in blood of John McConnell, on the part of his mother, Elizabeth Barnitz, the daughter of Daniel Barnitz. It was admitted, that the inheritable blood was extinct on the part of Charles McConnell, the father of John McConnell.

At the death of John B. Hammond, the property consisted of four descriptions; which it may be proper to enumerate. 1. The land specifically devised to John McConnell, with a limitation over to John B. Hammond. 2. The land specifically devised to John B. Hammond, with a limitation over in fee to his father. *3. The moiety of the Church-hill lots, and the residuary estate devised to John McConnell, in fee. 4. The moiety of the Church-hill lots, and the residuary estate devised to John B. Hammond in fee, with a limitation over to John McConnell.

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At the time of the death of Catharine Barnitz (as she survived her daughter), her two grandsons, McConnell and Hammond, were her heirs-at-law.

Harper, for plaintiff in error.—1. As to the devise to John McConnell, with limitation over, in case of his death under age, and without issue, to J. B. Hammond. This was a fee-simple in McConnell, with a conditional limitation, and not an estate-tail. 1 Fearne on Contingent Remainders, 9, 10 (Dublin ed. 1795); Ibid. 409; Powell on Devises 261; *Shears* v. *Jeffrey*, 7 T. R. 589; Plowd. 408; 3 Co. 10; Carth. 175; Dyer 127. Upon J. McConnell's arrival at full age, he had an absolute estate in fee, because, the condition never could happen which was to defeat his estate. As he took by purchase, and not by descent, and as at the time of his death, he left neither child, nor brother or sister of the whole blood, the estate descended, according to the statute of descents, in Maryland, to his brother of the half blood, John B. Hammond.

J. B. Hammond took it by descent, through his mother, and therefore, the estate descended to him "on the part of his mother," within the meaning of the statute. He certainly took by descent, and not by purchase; and the *commune vinculum*, which connected him with his brother, must be traced through his mother. The statute was intended to prevent escheats *pro defectu sanguinis*, and to provide for all cases. The legislature meant to comprehend all cases, in three classes. 1. Where the estate had descended to the intestate, on the part of the father. 2. Where it had descended on

the part of the mother: and *3. Where it had vested in the intestate by purchase, and not derived from or through any of his ancestors.

The court will not suppose, that the legislature has omitted to provide for the case where the estate has descended from a brother to a brother, but will rather place the present case in the second class. The legislature did not mean to limit the second class to cases where the estate had descended from the mother, because it provides, that if there be no child or descendant of the intestate, the estate shall go to the mother: and it would be absurd to say, that an estate which had descended from the mother, should descend again to the mother. So, if the estate had descended from the mother's father, directly to the mother's son, it would be an estate which had descended to the son on the part of his mother, and yet it had not descended either from or through his mother, for the estate had never vested in her. The statute must mean every case where the blood must be traced through the mother; every case where the mother is a link of the chain which connects the intestate with the person from whom the estate descended to him.

This estate, therefore, must be understood as having descended to J. B. Hammond, on the part of his mother; and therefore, inasmuch as, at his death, he left neither child nor descendant, nor mother, nor brother or sister of the blood of the mother, nor descendant of such brother or sister, nor grandfather on the part of the mother, nor descendant of such grandfather, nor father of such grandfather, and inasmuch as the lessors of the plaintiff are the descendants of the father of such grandfather, the estate must, by the provisions of the statute, descend to them.

2. The devise to John McConnell, in fee, of the moiety of the Churchhill lots, and of the general residuum, vested in him a fee-simple estate from the beginning: he took by purchase, under the will. It descended to J. B. Hammond by the same rule of descent as in the former case, and by the same construction of the statute, has descended from him to the plaintiffs.

3. The third case under this will, is that of the specific devise to J. B. Hammond, with limitation over, in *case of his death under age and without issue, to John McConnell. J. B. Hammond died under age [*461 and without issue, so that the fee devised to him was defeated, and would have vested immediately in John McConnell, if he had been alive, but he died in the lifetime of J. B. Hammond. In whom, then, did it vest? By the rules of the common law, John McConnell had such an interest in the devise, as was descendible to his heirs. Who were his heirs? Not they who were such at the time of his death, but they who answered the description of his heirs, at the time of the death of J. B. Hammond. 2 Fearne 529; Ibid. 535; *Goodright* v. *Searle*, 2 Wils. 29. John McConnell, if he had been alive at the time of the death of J. B. Hammond, would have taken the fee by purchase, and the lessors of the plaintiff were the only persons who could at that time entitle themselves as his heirs, there being no heirs of the paternal line then living.

Martin and *Pinkney*, Attorney-General, contrà.—The executory devises were void, because the contingency is the dying "without issue" indefinitely, and not limiting it to the case of dying without leaving issue alive at the time of his death. 1 Fearne 411; 2 Ibid. 74, 144–5, 154; *Cotterson* v. *Right*, 1 Sid. 148; 4 Bac. Abr. 251 (Gwillim's Ed.); 2 Fearne 187, 358;

Nichols v. *Hooper*, 1 P. Wms. 198 ; 2 Fearne 245 ; 2 Ibid. 206, 159, 154, 160 ; 2 H. Bl. 358. The limitations over being void, each took an absolute fee-simple in the lands devised to him.

Upon the death of John McConnell, the estate descended, according to the provisions of the statute, to J. B. Hammond, who took, not by way of descent at common law, but by force of the statute. The preamble of the statute shows that the legislature meant to abolish the law of descents altogether. The expression "on the part of the mother," means, from or through the mother. Now, this estate never came to J. B. Hammond from
*462] or through his mother. Under *the 3d branch of the statute, every estate which comes to an intestate, "and not derived from or through either of his ancestors," is supposed to have come by purchase, and is to descend accordingly. This estate was not derived to the intestate, J. B. Hammond, from or through either of his ancestors, and therefore, is to descend as if it came to him by purchase. This construction makes the statute provide for all cases, whereas, the construction insisted upon by the plaintiffs, leaves the cases where the estate has descended or passed by force of the statute from brother to brother of the whole blood, or from son to father, or from husband to wife, or from wife to husband, wholly unprovided for ; for these are not cases of purchase, nor of descent from ancestors. If, however, the case of Hammond be *casus omissus*, then the estate may descend at common law, through the line of his father.

One argument of the plaintiff's counsel was built upon the absurdity of supposing that the statute directed an estate to descend to the mother, which had already descended from her. But the statute only directs it to descend to the mother, by way of illustration, so as to lead to the heir.

But if the limitations over were good, then John McConnell died seised of an hereditament, a descendible interest, which went to his heir. Who was his heir? This same J. B. Hammond, so that, either way, the absolute estate in fee vested in him as a purchaser, and descended to his heirs. Again, the 3d section of the statute declares, "that no right in the inheritance shall accrue to or vest in any person, unless such person is in being, and capable in law to take as heir, at the time of the intestate's death." Now, these plaintiffs were not "capable in law to take as heirs" to John McConnell "at the time of his death." So that they are prohibited by the statute from taking the benefit of this executory devise, even if they could do so by the common law. Under the statute, J. McConnell had, at his death, an inheritable interest in the land devised to J. B. Hammond, with limitation over. The statute makes no difference between vested and contingent interests ; they all descend alike.

*463] *But there is a fatal objection to the plaintiff's recovery in this case. The lessors of the plaintiff are tenants in common with the defendants ; and one tenant in common cannot maintain ejectment against another, without proof of actual ouster. Such ouster is not proved.

Harper, in reply.—The defendants have confessed lease, entry and ouster, and therefore, an actual ouster need not be proved.

The whole question is as to the meaning of the words "descend on the part of the mother." There are only two modes of acquiring property, viz., by purchase and by descent ; by the act of the party, or by act of law.

Descents are either lineal or collateral. Lineal, is from the ancestor in the direct descending line. Collateral, is where you first ascend to the common ancestor, and then descend until you find the heir.

The construction of the statute adopted by the defendants, allows only one kind of descent—lineal. The statute uses the word "descent" generally, comprehending both kinds. It says, from or through either of his ancestors: "from" applies to lineal descent; "through" to collateral. If the statute includes collateral descents, there is an end of the question. If a man takes an estate by reason of his mother, he takes through his mother. If a man takes as great grandson from I. S., the estate has not passed through the father or grandfather, yet he takes through them. So, in tracing a collateral descent, the estate does not go through the intermediate links, yet the heir claims through them.

As to the executory devises. The contingency was not too remote nor indefinite. It must be determined within twenty-one years. If the contingency had been simply, dying without issue, there would be weight in the objection; but it is dying under age, and without issue; so that if he came of age, or had issue, the estate became absolute. Here are not two conditions, but two facts making one condition.

*The plaintiffs do not take as heirs, but as purchasers, under the will, by the description of their persons; if they answer the description of heirs, at the time the contigency happens on which the executory devise takes effect, they must take. A possibility is not descendible. They take as purchasers. This is an answer also to the objection raised upon the 3d section of the statute. They do not claim as heirs, and therefore, are not within the statute. The statute refers to their natural capacity to take. It alludes to the disability of alienage, attaint, &c., and was intended to exclude posthumous children, in cases of collateral descent. [*464

March 14th, 1813. Present, Marshall, Ch. J., Washington, Duvall and Story, Justices.

The court having taken time since last term to advise, Story, J. (after stating the facts of the case), delivered the opinion of the court as follows:—

It is true, that the general rule is, that an heir shall not take by devise, when he may take the same estate in the land by descent. 1 Roll. Abr. 626, L. 30; Hob. 30; 1 Salk. 242; 1 W. Bl. 22. But it is not denied, that all the estates which each of the grandsons derived under the will were estates by purchase. Admitting the executory devises over to be good, there could be no doubt as to any part of the estates; for the estates, are of a quality different from what the parties would have taken in the course of descent.

It has been argued by the plaintiff's counsel, upon the foregoing facts, that as to the whole estate immediately devised to John McConnell, the lessors of the plaintiff are entitled to recover, in the events which have happened, as his heirs *ex parte maternâ*; and that as to the estate devised to him upon the contingency of the death of John B. Hammond under age and without issue, the lessors of the plaintiff are entitled to recover, as the heirs-at-law of John McConnell, at the time when the contingency happened, although not heirs at the time of his death.

*The decision of these points depends upon the true construction [*465

of the statute of descents of Maryland, and the application thereto of the principles of the common law.

This statute of descents (1786, ch. 45), after reciting that the law of descents which originated with the feudal system and military tenures, is contrary to justice, and ought to be abolished, enacts, "That if any person seised of an estate," &c., "shall die intestate thereof, such lands," &c., "shall descend to the kindred, male and female, of such person, in the following order, to wit: First, to the child or children, and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father; and if no father living, then to the brothers and sisters of the intestate of the blood of the father, and their descendants, equally; and if no brother or sister as aforesaid, or descendant from such brother or sister, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree, equally; and if no descendant of such grandfather, then to the father of such grandfather; and if none such living, then to the descendants of the father of such grandfather in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree, without end: And if no paternal ancestor, or descendant from such ancestor, then to the mother of the intestate; and if no mother living, to her descendants in equal degree, equally; and if no mother living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as is above directed as to the paternal ancestors and their descendants. And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother; and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother, and their descendants in equal degree, equally; and if no such brother or sister, or descendant of such brother or sister, then to the grandfather on the part of the mother; and if no such grandfather living, then to his descendants in
*466] equal degree, equally; and if no such descendant *of such grandfather, then to the father of such grandfather; and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor; and if none such living, to his descendants in equal degree; and if no such maternal ancestor, or descendant from any maternal ancestor, then to the father of the intestate; and if no father living, to his descendants in equal degree, equally; and if no father living, or descendant from the father, then to the paternal ancestors and their descendants, in the same manner as is above directed as to the maternal ancestors."

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree, equally; and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants, in equal degree, equally; and if no brother or sister of the whole or half blood, or any descendant from such brother or sister, then to the father; and if no father living,

then to the mother; and if no mother living, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather, in equal degree, equally; and if no such grandfather, or any descendant from him, then to the grandfather on the part of the mother; and if no such grandfather, then to his descendants in equal degree, equally; and so on, without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants; and giving preference to the paternal ancestor and his descendants. And if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be; and if the husband or wife be dead, then to his or her kindred, in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives, in equal degree, equally."

*Three classes of cases are here in terms provided for: 1. "Estates descended to the intestate on the part of the father." 2. "Estates descended to the intestate on the part of the mother." 3. "Estates vested in the intestate by purchase, and not derived from or through either of his ancestors." [*467

The case of a *propositus* dying seised of an estate, which descended to him from his brother, who had taken the same by purchase or by descent, not *ex parte paternâ* or *maternâ;* and the case of a *propositus* dying seised of an estate which descended to him from his own child, who had taken the same by purchase or by a like descent; are not directly within the language of the statute. For, by the common law, a descent from brother to brother is held to be an immediate descent, and not from or through the parents; and the express provision of the statute of Maryland as to estates of purchase, necessarily involves the same conclusion; and the same may be declared of a descent from a child to a parent, under the same statute.

It has been argued, that the legislature intended to form a complete scheme of descents; and that the court ought not to construe any case to be a *casus omissus*, if, by any reasonable construction, the words can be extended to embrace it. Both parties accede to this argument, but they apply it in a very different manner. The plaintiffs contend, that the descent from brother to brother was meant to be included in the first and second classes of descents, as the parents were the common link of connection from and through whom the consanguinity was to be sought; that, therefore, the descent, in such case, is *ex parte paternâ*, or *maternâ*, as the father or mother happens to be the *commune vinculum*. And the plaintiff's rely on the words "and not derived from or through either of his ancestors," in the clause embracing the third class, as distinctly showing that the legislature deemed every case of descents to be completely within the preceding classes.

On the other hand, the defendants contend, that whatever might be the legislative supposition, it is impossible to support the position, that a descent from brother to brother, or from child to parent, is a descent *ex parte paternâ* or *maternâ*. *It is therefore, either a *casus omissus*, or the words "and not derived from or through either of his ancestors" are to be considered, not as qualifying and limiting the preceding words, but as either [*468

constituting a fourth class of cases, embracing all such as are not included in the three preceding classes; or as explaining estates by purchase to include all cases which are not paternal or maternal descents.

There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words, in order to supply deficiencies occasioned by that mistake. It would be still more dangerous, to admit, that because the legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed, by adopting the construction contended for by either party.

It is not a descent from or through the paternal or maternal line, in the sense of the common law. Nor is it a purchase. The words "and not derived from or through either of his ancestors," are manifestly used as explanatory of the legal import of purchase. They are the exact words which the common law selects to distinguish the estate of a purchaser from the estate of an heir. It is obvious, that the legislature use the words descent and purchase, in their technical and legal sense. They have also expressly provided for the case of a descent from brother to brother, passing by the parents; and from a child to a parent, when there are no brothers or sisters. These descents must, therefore, be direct and immediate; and the former case is so deemed also at the common law. It is, therefore, in our judgment, perfectly clear, that a descent from brother to brother is not within the statute, and of course, is a *casus omissus*, to be regulated by the common law.

To apply this to the present case. By the arrival of John McConnell at
*469] the age of twenty-one years, all the estates *devised to him immediately, became absolute estates in fee-simple. On his death, they passed to his half brother, John B. Hammond; and upon his death, they passed to the heirs-at-law of the latter. The lessors of the plaintiff have, therefore, made no sufficient title thereto.

Let us now consider the second question: whether the lessors of the plaintiff have any title to the estates which were devised over to John McConnell upon the contingency of John B. Hammond's dying under age and without issue? It has been argued by the defendant's counsel, that this executory devise is void, because the contingency is too remote. It is the acknowledged rule, that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after. In the present case, the contingency must have happened within twenty-one years, at all events. For if John B. Hammond attained his full age, the estate vested absolutely. To have defeated the estate over, it was sufficient, either that he attained his full age, or died under age, leaving issue. The authorities are conclusive on this point. 1 Wils. 140, 270; 2 Burr. 873; 1 Taunt. 174; 5 Bos. & Pul. 38; 12 East 288; 2 Str. 1175. There is no validity, therefore, in this objection.

In the next place, it will be necessary to consider, what is the nature of an executory devise as to its transmissibility to heirs, where the devisee dies before the happening of the contingency? And it seems very clear, that at common law, contingent remainders and executory devises are transmissible

to the heirs of the party to whom they are limited, if he chance to die before the contingency happens. Pollexfen 54; 1 Co. 99; Cas. temp. Talb. 117. In such case, however, it does not vest absolutely in the first heir, so as, upon his death, to carry it to his heir-at-law, who is not heir-at-law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee, at *the time when the [*470 contingency happens, and the executory devise falls into possession.

This rule is adopted, in analogy to that rule of descent which requires that a person who claims a fee-simple, by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir of such purchaser, at the time when that reversion or remainder falls into possession. Co. Lit. 11 *b*; 14 *a*; 3 Co. 42. Nor does it vary the legal result, that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though, on the death of the latter, the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the executory devisee. The case of *Goodright* v. *Searle*, 2 Wils. 29, is decisive on this point, and indeed runs on all fours with the present.

But it is contended, that the statute of descents of Maryland has changed the rule of the common law in this respect; and has made the death of the intestate the point of time from which the descent and heirship are in every case to be traced. The third section, which is relied on for this purpose, enacts as follows: "That no right in the inheritance shall accrue to or vest in any person, other than to children of the intestate and their descendants, unless such person is in being, and capable in law to take as heir, at the time of the intestate's death; but any child or descendant of the intestate, born after the death of the intestate, shall have the same right of inheritance, as if born before the death of the intestate."

In our judgment, the conclusion drawn from this clause is not correct. The object of the section is to limit the natural capacity to take, as heirs, to persons in being at the time of the death of the intestate, where the estate is then capable of vesting in possession; and not to make persons heirs, who, if in being at the time, would not, by the common law, answer the description of absolute heirs, or to give a vested absolute interest, where the common law had given only a possible contingent interest. The legislature had in view cases of *posthumous children, and cases where a descent to an [*471 heir had been defeated by the subsequent birth of a nearer heir. The argument of the defendants, on this point, ought not, therefore, to prevail.

No question has been made as to the land specifically devised to John B. Hammond in fee, with a limitation over to his father in fee. As that limitation over was a good executory devise, and, in the events which happened, took effect, it is very clear, that the lessors of the plaintiff cannot claim title thereto. This is, indeed, conceded on all sides.

The result of this opinion accordingly is, that the lessors of the plaintiff are entitled, as heirs of John McConnell, at the happening of the contingency, on the death of John B. Hammond, under age and without issue, to one moiety of the Church-hill lands, and the residuary estates, as tenants in common with the heirs of John B. Hammond; but they are not entitled to

any portion of the lands of which John McConnell had an absolute vested fee, at the time of his decease.

As, however, a tenant in common cannot in general maintain an action of ejectment against his co-tenant, and there are no facts found in this case to prove an actual ouster, and to take it out of the general rule, the consequence is, that the judgment, in the opinion of a majority of the court, must be affirmed, with costs.

Judgment affirmed.

Blackwell *v.* Patton and Erwin's Lessee. (*a*)

Probate of deed.—Amendment in ejectment.—Land law of Tennessee.

By the laws of North Carolina and Tennessee, a deed of land in Tennessee, executed in North Carolina, by grantors residing there in the year 1794, proved in 1797, by one of the subscribing witnesses, before a judge in North Carolina, and recorded in 1808, in the proper county of Tennessee, is valid, and may be given in evidence in ejectment.[1]

In ejectment, the date of the demise in the declaration may be amended, during the trial, so as to conform to the title.[2]

The first grant from the state of North Carolina, upon an entry, is valid, although issued upon a duplicate warrant, the original being in the hands of the surveyor-general; although a subsequent grant issued upon the original warrant for other lands.

Error to the Circuit Court for the district of Tennessee, in an action of ejectment, brought by the lessee of Patton and Erwin, against Blackwell, for 5000 acres of land, in Bedford county, in the state of Tennessee. At the trial, the defendant took three bills of exception. The first stated, that the plaintiff produced in evidence, at the trial, a deed of bargain and sale from John G. and Thomas Blount, to whom, it was alleged, *the land *472] had been granted by the state of North Carolina, while it was a part of that state. The deed from John G. and Thomas Blount, was executed on the 9th of October 1794, to David Allison. On the 29th of September 1797, it was proved by one of the subscribing witnesses, before John Heywood, a judge of the supreme court of law and equity, for the state of North Carolina, and registered in Stoke's county. On the 9th of December 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the supreme court of law and equity of the state of Tennessee, who ordered it to be registered. At November term 1808, in the supreme court of Tennessee, for Mero district (in which the land lies), the handwriting of the grantors, and of the subscribing witnesses, was again proved, and on the 28th of December 1808, the deed was recorded in the proper county. On the trial (which was in June term 1810) the plaintiff offered parol evidence to prove the handwriting of the subscribing witnesses and their death, before the month of December 1807, and also to prove the handwriting of the grantors. To the admission of this evidence the defendant below objected, but the court overruled the objection, and admitted the deed in evidence.

(*a*) March 6th, 1813. Absent, Washington and Todd, Justices.

[1] See Patton *v.* Reilly, Cooke 119; Patton *v.* Brown, Id. 126; Patton *v.* Cooper, Id. 133.

[2] S. P. Walden *v.* Craig, 9 Wheat. 576; McDaniel *v.* Wailes, 4 Cr. C. C. 201; Wilkes *v.* Elliot, 5 Id. 611.