Scott, the wife of the said John Scott, if she survives him, during her natural life," conveying the said farm by metes and bounds, to him, in fee simple, "excepting and reserving, nevertheless, the entire use and possession of said premises unto the said John Scott and his assigns, for and during the term of his natural life; and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The *habendum* was to have and to hold the premises "after the decease of said John Scott," to him, the said J. W. Scott, his heirs and assigns, &c.

After the father and son commenced their joint possession under this deed, they quarrelled, and the father turned the son out by action of ejectment, and kept the sole possession in himself till he died, his wife Patience having died before him. Before his death, to wit, 26th February 1861, he made a formal will in which he revoked all former wills, and "particularly a certain will and testament (in form as a deed), recorded in the recorder's office of said county of Erie, in Deed-Book A. p. 716 witnessed by Marion Hutchinson and George H. Cutler; and I hereby give and assign as the reason of revoking and making void said will that my son John W. Scott and his wife have failed to treat me with filial affection, and to comply with the conditions upon which I made said will." He then goes on to devise the land in question to his daughters, Nancy Holliday, Anna Sanford, Parney P. Turner, and his son Abner Scott, the plaintiffs in this action.

These devisees succeeded to the possession but lost it by an action of ejectment brought against them by John W. Scott, and this is a second ejectment brought by them to regain the possession. If the deed of 22nd Nov. 1849 vested the title in John W. Scott, the subsequent will was inoperative of course, so far as concerned this land; but if the deed vested no present interest, and was intended to operate as a testament, it was very expressly revoked and repealed by the subsequent will, and plaintiff's devisees under this will have no title.

The testato. called and treated the deed as a will, but not until after he had quarrelled with his son and turned him out of possession. When he made the instrument he called it an indenture and permitted his son to record it as a deed. His treatment of it as a will therefore, proves nothing.

But what is the effect of the reservation clause above quoted? Undoubtedly, a life estate was reserved to the grantor, with the entire use and possession of the premises, and of course the instrument could not take effect as a "conveyance until after his death, and such was the declared intention.

The learned judge construed the latter clause of the reservation as a protection of the life estate; but it needed no protection, for it remained in the grantor, being excepted out of the grant as fully as it was capable of existing. But if these pregnant words were added with some such mistaken notion of the parties, and it is quite possible they were, they are an emphatic declaration that no interest should be considered as presently conveyed to interfere with the life estate; whilst the *habendum* is equally express that the estate intended to be conveyed to John W. Scott should commence at the death of the grantor. Without straining or unduly emphasizing any of these words, it is impossible to doubt that, if any effect whatever is to be given to them they limited the fee to take effect in *futuro*. At common law this can only be done when a particular estate to take effect presently, is *granted*, not *reserved*, to support the fee. If the question was upon John W. Scott's title under the deed, without any subsequent will in the case, and we should be obliged to say that as an attempt to create a freehold in *futuro* without the grant of a particular estate to support it, the deed was void, we might perhaps support it as a covenant to stand seized to his use. I say *perhaps*, because the case has not been fully considered in that aspect, and the reason why we do not so contemplate it is, that there being a subsequent will, it becomes a mere question of interpretation whether the former instrument was testamentary in its character or not. If it was testamentary, then it ought not to be construed as a covenant to stand seized, there being a later will. Had there been no later will, the deed, though testamentary, might perhaps have been supported as such a covenant.

We come, then, to the real question, was the deed essentially a testamentary instrument?

Swineburn defines a testament to be a just sentence of our will touching that we would have done after our death. And because—"some there be who do censure this excellent definition to be defective, though unworthily," he makes a full exposition of the meaning of every word in the definition. The only distinction he makes between a testament and a will is the distinction between *justa sententia* and *legitima dispositio*. But the essence of both is that it is a disposition to take effect after death and this is adopted by Judge Redfield, the latest comentator, in his work on the law of Wills, p. 5.

In the case of *Habergham* v. *Vincent*, 2 Vesey, p. 204, the question was whether two instruments, one in form a will, and the other in form a deed, did not together constitute a will, and the case was greatly considered. It was first argued before Lord Thurlow, who took a long time to consider of it, and then directed a case to be stated for the opinion of the court of King's Bench. In consequence of too short a statement in sending this case to law, the second instrument was there considered a deed, and the other questions were ruled accordingly. Afterward, when the case came before Lord Chancellor Lowborough, he said he felt so strongly that this instrument (the deed), was to be construed as testamentary that he must have the assistance of two of the judges to sit with him at the argument; and accordingly, Mr. Justice Buller and Mr. Justice Wilson, in accordance with a custom which sometimes is practised in the high Court of Chancery, sat with the Chancellor and delivered separate though concurring opinions. Mr. Justice Buller in his opinion said:—"When this case was argued in the King's Bench no one of the cases quoted here by the Attorney General was mentioned or alluded to. I freely confess," he added, "they did not occur to me. But those cases have established that an instrument in any form whether a deed poll or indenture, if the